Something for Nothing: Just Compensation after United States v. 50 Acres of Land

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INTRODUCTION

The fifth amendment to the United States Constitution prohibits the federal government from taking private property for a public use without paying the landowner "just compensation." While a sovereign government’s right to take private property under its power of eminent domain has been accepted at least since the time of feudal England, the principle of just compensation is a relatively recent development. In colonial and revolutionary America, there was no right of “just compensation”; instead, the prevalent belief was that property rights had to be compromised to advance the common good. The eventual rejection of this belief, a growing skepticism in the faith of the legislature’s ability to protect individual rights, and a rising concern for property rights in general, however, led the framers of the Constitution in 1791 to adopt the “takings clause” of the fifth amendment, which placed the substantive check of “just compensation” on the federal government’s power of eminent domain.

While the Constitution requires that compensation be paid to the

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1. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.
2. In 1946, the Supreme Court in United States v. Carmack explained the need for the sovereign to possess eminent domain powers:

   The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and lighthouses, for custom-houses, post-offices, and courthouses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be.
3. Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 YALE L.J. 694, 695 (1985) (containing a thorough treatment of the origins of the notion of "just compensation").
4. Id.
5. Id. at 701. In addition to requiring “just compensation,” the fifth amendment also requires that the government exercise its eminent domain power only for a “public purpose.”
owner of land condemned by the government, the only guidance it pro-
vides concerning the amount of compensation is that it be "just." The
courts usually have awarded condemnees the fair market value of the
parcel taken by the government, although that valuation is used more
because it seems to be an objective and workable standard than because it
necessarily equals "just" compensation. 6

The Supreme Court has, however, recognized two specific excep-
tions to the fair market value rule: when fair market value is too difficult
to ascertain, and when application of the fair market value rule would
result in "manifest injustice" to the owner of condemned land. 7 Under
either of these circumstances, the Court sanctions the use of alternative
methods of valuation. Additionally, the lower federal courts have, in the
past, refused to apply the fair market value rule in cases in which a con-
demnee is a public entity that must, as a matter of law or as a matter of
practical necessity, replace the lost land or facility. Under these circum-
stances, the proper measure of "just" compensation was determined by
these courts to be the amount reasonably necessary to construct a func-
tionally equivalent substitute. 8 In 1979, the Supreme Court expressly

This Note does not discuss the "public purpose" requirement because the "just compensation"
limitation is the only aspect of the fifth amendment relevant to 50 Acres of Land.

6. See, e.g., Orgel, Just Compensation, in SYMPOSIUM: THE PRACTICAL PROBLEMS OF
CONDEMNATION 10 (The Association of the Bar of the City of New York, Committee on Real
Property Law 1965) [hereinafter cited as CONDEMNATION SYMPOSIUM].

cases were found invoking the "manifest injustice" exception to the use of the fair market value
rule. The obvious problem with arguing under this exception is its vagueness. First, it is
unclear what level of compensation would be "manifestly unjust" to the owner. In her concur-
ring opinion in United States v. 50 Acres of Land, Justice O'Connor suggested that "manifest
injustice" results when fair market value for public condemnees "deviates significantly from
the make-whole remedy intended by the Just Compensation clause." 105 S. Ct. 451, 459
(1984). The test invoked by Justice O'Connor is circular and fails to provide any real guidance
to potential litigants or the district courts.

Second, the definition of the "indemnity principle" or "make-whole" remedy said to be
inherent in the fifth amendment is less than clear. See, e.g., id.; United States v. 564.54 Acres
of Land (Lutheran Synod), 441 U.S. 506, 510-11, 513 (1979); United States v. 50 Acres of
Land, 706 F.2d 1359, 1360 (5th Cir. 1983). The level of compensation that constitutes "in-
demnity" appears to be at least partially derived on a case-by-case basis rather than existing as
a rigid rule (see infra note 77 and accompanying text), but it has also often been equated with
the fair market value of the condemned property. See, e.g., United States v. Miller, 317 U.S.
369, 373 (1942). Justice O'Connor's concurrence in 50 Acres of Land suggests, however, that
fair market value does not necessarily define the indemnity principle. According to her, "man-
ifest injustice" results when fair market value deviates significantly from the indemnity prin-
ciple inherent in the fifth amendment. 50 Acres of Land, 105 S. Ct. at 459.

Until it is clear what is meant by "manifest injustice" and the "indemnity principle," the
manifest injustice exception will be of little practical help to condemnees.

8. Every circuit except the Seventh and the Eleventh supported the substitute facilities
doctrine. See Annot., 40 A.L.R.3d 143, 148-49 (1971) for the cases cited therein. See also
Comment, Just Compensation and the Public Condemnee, 75 YALE L.J. 1053 (1966):

Even when the public property has a market value, [the market value] standard
is often inadequate. Community needs or desires may require a local government to
reserved the question of whether the substitute facilities measure was compelled for public condemnees in United States v. 564.54 Acres of Land (Lutheran Synod). In the recent case of United States v. 50 Acres of Land, however, the Court definitively rejected the theory that the substitute facilities doctrine should automatically apply to public condemnees.

This Note examines both the case history of 50 Acres of Land and the Supreme Court's analysis leading to the holding that public condemnees can expect no more compensation than private condemnees for takings pursuant to the federal government's eminent domain power. It concludes with a critique of the Supreme Court's reasoning in reaching this decision, specifically focusing on the Court's avoidance of important economic issues and other policy ramifications relevant to eminent domain cases.

I

HISTORY OF THE CASE

A. Facts and Arguments Presented

The dispute in 50 Acres of Land arose out of an eminent domain proceeding instituted by the United States on October 3, 1978 in the District Court for the Northern District of Texas. The proceeding resulted in the condemnation of a fifty-acre parcel of land that the United States Army Corps of Engineers required for a flood control project. Prior to the condemnation, the site was owned and operated by the City of Duncanville, Texas as a sanitary landfill. At the time of the taking, the landfill had a remaining capacity of 650,000 cubic yards and an expected lifetime of 12.8 years.

replace the lost facility at a cost far higher than market value compensation provides.

Courts have developed the substitute facility doctrine to meet the unique needs of public condemnees; damages will be awarded sufficient to finance a replacement.

Id. at 1053 (citations omitted, emphasis in original).

As the Fourth Circuit Court of Appeals noted in United States v. Board of Education, 253 F.2d 760 (4th Cir. 1958): "Any reasonable man would say that where the government takes [public property already devoted to a public purpose], the government should make it possible for the [public entity] to acquire other property to use in substitution for the property taken." Id. at 763. See especially P. NICHOLS, LAW OF EMINENT DOMAIN § 15.1[1] (3d ed. 1983).

11. When the government decides to condemn a parcel of land, it must institute proceedings in the federal district court and simultaneously deposit with the court what it considers to be the proper amount of compensation. 40 U.S.C. § 258a (1982). Upon judicial determination of the actual amount of compensation, the court turns the money over to the condemnee, and any deficiency must be paid by the government to the condemnee with interest. Id.
12. United States v. 50 Acres of Land, 706 F.2d 1356, 1358 (5th Cir. 1983).
13. Petition for Writ of Certiorari at 2, 50 Acres of Land.
14. Id. at 3.
After the United States condemned the land, Duncanville began temporarily dumping its daily garbage in a private landfill located twenty-two miles from the City.\(^{15}\) Duncanville eventually acquired its own 113.7 acre site, which began operation on January 1, 1981.\(^{16}\)

At the district court condemnation proceeding, a dispute arose between the United States and the City of Duncanville over the amount of compensation due to the City as a result of the taking.\(^{17}\) Duncanville contended that its loss should be measured by the cost of acquiring a substitute facility.\(^{18}\) Duncanville relied on case law arising out of the federal circuit courts granting substitute facilities valuation for public condemnees with a legal or practical duty to replace the condemned facility.\(^{19}\) Duncanville argued that fair market value fails to "justly" compensate a public entity because that valuation forces local taxpayers to bear a disproportionate cost of a federal project made possible only by the federal government's use of its eminent domain power.\(^{20}\)

The government's primary argument in response to the City was based on principles of judicial economy and practicality. The government argued that fair market value was an objective working rule that could be practically administered within the limited capabilities of the courts.\(^{21}\) It contended that the courts had consistently adhered to the fair market value measure because of the practical difficulties inherent in assessing the idiosyncratic value of land.\(^{22}\) Fair market value is preferable even when it fails to achieve perfect indemnification because it is an objective and workable standard.\(^{23}\)

The government noted the Supreme Court's previously recognized exceptions to the use of the fair market value rule and argued that neither exception applied in this case.\(^{24}\) Fair market value was clearly ascertainable by reference to sales data for comparable parcels,\(^{25}\) and no showing was ever made that an award of fair market value would deviate from the

\(^{15}\) 50 Acres of Land, 706 F.2d at 1358.

\(^{16}\) Id. When Duncanville acquired this site, it had a remaining capacity of 2.1 million cubic yards and an expected lifetime of 41.6 years. Petition for Writ of Certiorari at 3.

\(^{17}\) 50 Acres of Land, 706 F.2d at 1358.

\(^{18}\) Brief for the City of Duncanville, Texas at 13.

\(^{19}\) See supra note 8. The substitute facilities doctrine could have applied to Duncanville's case. Under Texas law, each local municipality has a legal duty to provide landfill facilities for its residents. City of Forth Worth v. George, 108 S.W.2d 929, 931 (1937); Tex. Rev. Civ. Stat. Ann. art. 4477 (Vernon Supp. 1982). The Supreme Court in its decision in 50 Acres of Land also assumed that Duncanville had a duty to replace the condemned landfill. 105 S. Ct. at 457 n.19.

\(^{20}\) Brief for the City of Duncanville, Texas at 7-8.

\(^{21}\) Petition for Writ of Certiorari at 15-17; see also Lutheran Synod, 441 U.S. at 510-11.

\(^{22}\) Petition for Writ of Certiorari at 11.

\(^{23}\) Id. at 17; Lutheran Synod, 441 U.S. at 511.

\(^{24}\) Petition for Writ of Certiorari at 3.

\(^{25}\) The government ignored the fact that expert testimony on "fair market value" based on sales data for comparable parcels ranged from $160,010 to $370,000, a difference of over
indemnity principle inherent in the fifth amendment.26

The government further noted that replacement needs of the condemnee had never before been considered relevant to the proper level of compensation in private condemnee cases and that there was no reason to treat public condemnees more favorably on this issue.27 The courts cannot defer to an owner's "unique need for property or idiosyncratic attachment to it."28

Finally, the government argued that any other method of calculating just compensation would confer a windfall on the condemnee in one of two ways, thereby subjecting the United States to excessive payments in eminent domain cases.29 First, if the courts required the federal government to pay substitute facilities value, and the public condemnee did not replace the facility in the least expensive or most reasonable manner, the federal government would bear an excessive cost for the taking.30 Second, the government argued that the substitute facilities doctrine could be used by public condemnees to acquire replacement facilities more valuable than the condemned property.31

B. The District Court Opinion

The United States District Court for the Northern District of Texas held that fair market value, determined by the jury to be $225,000, was the proper measure of compensation for the United States' taking of Duncanville's land.32 The court instructed the jury to determine both

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26. Petition for Writ of Certiorari at 4-5 n.2. The government's brief does not suggest how the trier of fact should resolve such differences of expert opinion.
27. Brief for the United States at 24-25.
28. Id. at 25 (quoting Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949)).
30. Id. One suggested means of guaranteeing the most "reasonable" replacement of facilities was for the public condemnee to use its own power of eminent domain to replace condemned land, guaranteeing a payment of only "fair market value" for the replacement. Brief for the United States at 28-29.
31. The government's argument that substitute facilities valuation will result in a windfall to the condemnee is based on several unsubstantiated assumptions. First, it assumes that public condemnees will purposefully manipulate eminent domain awards to gain windfalls. Second, the argument ignores the possibility that courts can maintain control over the conduct of public condemnees, e.g., ordering deductions for net benefits acquired in replacing facilities or preventing them from engaging in manipulative conduct. Third, although a public condemnee does often possess its own eminent domain power, it is not required to exercise that power. The government failed to consider the possibility that there may be political or prudential reasons for a local municipality to refrain from exercising its eminent domain power.
32. United States v. 50 Acres of Land, 529 F. Supp. 220, 221 (N.D. Tex. 1981). As discussed previously, the estimates of fair market value introduced at the trial ranged from a low of $160,010 determined by an expert witness for the government to a high of $370,000 determined by an expert for the City of Duncanville. See supra note 25. It is unclear how the jury arrived at the $225,000 figure, except that it represents an almost equal compromise between the two estimates.
fair market value and substitute facilities value, yet chose to award the former. The court did so, in part, because it determined that the City of Duncanville had not met its burden of establishing the reasonable cost of a substitute facility. The court was also troubled by the City’s purchase of a significantly larger tract of land than the condemned site without evidence of either attempts to acquire other sites or arms-length negotiations in the price paid for the substitute tract.

Even assuming that the jury’s determination of substitute facilities value could be supported, the district court saw no reason to deviate from the normal, though not absolute, fair market value standard in eminent domain cases. The court held that fair market value should be awarded to public condemnees, even when they are under a duty to replace the condemned facility, at least in cases where fair market value is readily ascertainable. Under a substitute facilities measure, the condemnee would receive new facilities to replace depleted facilities, thus granting the condemnee a windfall. The district court also held that an award of fair market value did not deviate from the indemnity principle embodied in the fifth amendment.

33. 529 F. Supp. at 221. The court instructed the jury on both questions to develop a “complete factual record” in the event of an appeal. Petition for Writ of Certiorari at 4. The jury determined that fair market value was $225,000 and that substitute facilities value was $723,624.01. Id. The court was, however, free to choose between the two levels of compensation. Id.

34. 529 F. Supp. at 221. This is a curious argument because the district court was able to give jury instructions on determining substitute facilities value, and the jury was able to assign a value (down to the penny) of $723,624.01 based on the instructions and the evidence. Id. The instructions were as follows:

By cost of substitute facilities is meant that compensation due the City of Duncanville for the taking of its public facilities measured by the reasonable cost of supplying substitute facilities reasonably necessary to enable it to serve its constituents in approximately the same way as it would had the condemnation not occurred. It is a method of compensation by substitution. You are to determine the reasonable cost of construction of a functionally equivalent substitute sanitary landfill.

Simply stated, the cost of substitute facilities represents that amount of just compensation in money to be awarded which will sufficiently allow the City of Duncanville to provide for the replacement of the property and their public facility taken by the Government.

Petition for Writ of Certiorari at 5 n.2.

35. 529 F. Supp. at 221. City officials testified that they had been unable to find any other suitable site and that the City had not condemned a portion of the tract for fear of a costly severance suit. Brief for the Council of State Governments, the National Governors’ Association, the National League of Cities, the United States Conference of Mayors, the National Association of Counties and the International City of Management Association as Amici Curiae at 3-4 (quoting the trial record at Vol. II 12a-13a, 117) [hereinafter cited as Brief for Council of State Governments]. Duncanville’s Director of Public Works also testified, however, that the City did not bargain with the seller over the price of the land or have the land appraised before the acquisition. 451 S. Ct. at 454 n.6.

36. 529 F. Supp. at 221.

37. Id. at 222.

38. Id.

39. Id. This reasoning begs the question, though, because the precise problem in this case
C. The Court of Appeals Decision

The Fifth Circuit Court of Appeals reversed the decision of the district court and held that a public condemnee with "a legal or factual duty to replace a condemned facility is entitled [under the takings clause of the fifth amendment] to the reasonable cost of a functionally equivalent substitute facility." The court viewed its task to be that of determining the "just" level of compensation in the special case of a public condemnee under a duty to replace a condemned facility. The court noted the reasoning of the numerous circuits that had applied the substitute facilities doctrine under these special circumstances, as well as the 1923 Supreme Court opinion in Brown v. United States where the doctrine is said to have originated.

In upholding the substitute facilities doctrine in 50 Acres of Land, the appellate court relied in large part on what it perceived to be clear and relevant distinctions between public and private condemnees in eminent domain cases. Unlike private condemnees, public condemnees are often under a legal or factual duty to replace condemned facilities that are already being put to a public use. Under those circumstances, the "loss" occasioned by the taking is the money spent in replacing the facility, not the market value of the lost facility; it is not the facility itself, but the function served by the facility that should be measured when awarding just compensation.

The court conceded that Duncanville gained a more valuable site as is to determine what level of compensation is in keeping with the "indemnity principle" of the fifth amendment.

40. United States v. 50 Acres of Land, 706 F.2d 1356, 1357 (5th Cir. 1983). Duncanville also appealed the district court's award of six percent interest on the difference between the estimated compensation paid by the United States to the court on the date of the taking and the actual compensation due as determined by the court. Id. at 1358. The Fifth Circuit Court of Appeals remanded the question of the proper interest rate to the district court, but the issue was not addressed by the Supreme Court.

41. Id. at 1358.

42. See supra note 8.

43. 706 F.2d at 1359; Brown v. United States, 263 U.S. 78 (1923). In Brown, the federal government condemned three-fourths of the town of American Falls, Idaho, to build a reservoir. Id. at 81. The federal government further exercised its eminent domain power to condemn a nearby tract of land, turning it over to the displaced residents as a replacement for their lost homes and businesses. Id. at 80. The Supreme Court upheld the federal government's further exercise of its eminent domain power as proper under these circumstances. Id. at 83. The Court in Brown reasoned:

A town is a business center. It is a unit. If three-quarters of it is to be destroyed by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the State . . . are injured. A method of compensation by substitution would seem to be the best means of making the parties whole.

Id. at 82-83.

44. 706 F.2d at 1360.

45. Id.

46. Id.
a result of the condemnation, but also noted that any "benefit" received could be deducted from the total award. The court remanded the case because it found that the district court's instructions to the jury on substitute facilities valuation were not sufficiently detailed to enable the jury to fairly determine the actual net loss to Duncanville.

II
SUPREME COURT DECISION

In a unanimous opinion written by Justice Stevens, the United States Supreme Court reversed the decision of the Fifth Circuit Court of Appeals and held that public condemnees are entitled only to the fair market value measure of compensation. In reaching its decision, the Court first looked to the previously recognized exceptions to fair market value compensation and concluded that this case did not fall under either of the established exceptions. Evidence of fair market value was presented and adequately supported by expert testimony at trial in the district court, and the Court summarily disposed of the "manifest injustice" exception by noting that a departure from fair market value for private condemnees had never been granted simply because the cost of substitute facilities exceeded fair market value.

The Court next considered whether the use of substitute facilities compensation for public condemnees is compelled by the Constitution. The Court noted that no language in the fifth amendment distinguishes between public and private owners of the "private property" subject to federal eminent domain power. The loss to the owner of condemned property is no more acute when the owner is a public entity. Indeed, the Court reasoned that injury to the public condemnee may be less acute than for the private condemnee because the former can invoke its own

47. Id. at 1362. The court suggested that one method of discounting the value of the new facility might be to compare the respective life expectancies of the two sites. Id. at 1363 n.9 (citing United States v. Certain Property in the Borough of Manhattan, 403 F.2d 800, 804 n.11 (2d Cir. 1968)).

48. 706 F.2d at 1362. The jury instructions on substitute facilities valuation are quoted in note 34, supra. The court did not provide alternate instructions, though it did hold that Duncanville should be entitled to the reasonable cost, as determined by the jury, of an alternative site, the reasonable costs associated with preparing the site, and the costs associated with the need to temporarily dispose of the city's garbage before the new site was acquired. Id. at 1363-64.

50. 105 S. Ct. at 455.
51. Id.
52. Id. The notion of "private property" has been specifically held to extend to property owned by public entities; the same guarantees apply to public as well as private owners of land condemned by the United States government. United States v. Carmack, 329 U.S. 230, 242 (1946).
53. 50 Acres of Land, 105 S. Ct. at 456.
eminent domain power to replace the lost facility.\textsuperscript{54}

The Court also rejected any reliance on \textit{Brown v. United States} as a justification for the substitute facilities measure of compensation for public condemnees.\textsuperscript{55} According to the Court, the facts of \textit{Brown} were "peculiar,"\textsuperscript{56} and the case merely stands for the proposition that the federal government has the power to provide for a substitute site, but it does not have a duty to do so.\textsuperscript{57} All that is \textit{required} is the payment of the fair market value of the condemned property.\textsuperscript{58}

The Court also summarily rejected several other rationales presented to justify a distinction between public and private condemnees. First, the public condemnee's duty to replace the garbage dump was perceived to be no more compelling than, for example, a private condemnee's de facto need to replace his or her home.\textsuperscript{59} Second, the Court noted the risk of a "windfall" inherent in the substitute facilities measure of compensation. Private condemnees receive a windfall if they accept compensation yet fail to replace the facility. Public condemnees receive a windfall when the newer, often more costly replacement facility is more "valuable" than the condemned facility.\textsuperscript{60} The Court rejected the appellate court's method of windfall discounting as too uncertain and complex to be a workable compromise.\textsuperscript{61}

The final concern addressed by the Supreme Court was that the substitute facilities measure of compensation was too subjective, causing the formula to depart from the principle that just compensation should be measured only by objective standards.\textsuperscript{62} In the Court's view, the substitute facilities measure takes into account "nontransferable values deriving from [the property owner's] unique need for property or idiosyncratic attachment to it," an improper consideration under the takings clause.\textsuperscript{63}

In sum, the purpose of "just compensation" is to achieve a fair balance between the government's need for land and the landowner's loss.\textsuperscript{64} The Court concluded that the use of fair market value for public condemnees well serves this articulated purpose.\textsuperscript{65}

\textsuperscript{54} Id. at 455.
\textsuperscript{55} Id. at 457; \textit{Brown v. United States}, 263 U.S. 78 (1923).
\textsuperscript{56} 105 S. Ct. at 456.
\textsuperscript{57} Id. at 456-57.
\textsuperscript{58} Id. at 457.
\textsuperscript{59} Id. at 457.
\textsuperscript{60} Id. at 457.
\textsuperscript{61} Id. at 457-58.
\textsuperscript{62} Id. at 458.
\textsuperscript{63} Id. (quoting \textit{Kimball Laundry Co. v. United States}, 338 U.S. 1, 5 (1949)).
\textsuperscript{64} 105 S. Ct. at 458.
\textsuperscript{65} Id. In the concurring opinion, Justice O'Connor wrote that the majority's opinion would not preclude a public condemnee from establishing that the use of the fair market value measure of compensation resulted in "manifest injustice," thus compelling some other measure of compensation. \textit{Id.} at 459. Justice O'Connor proposed a rather circular test for determining
III
DISCUSSION

In 50 Acres of Land, the Supreme Court determined that there is no reason to deviate from the fair market value rule when a public condemnee loses a public facility through the federal government's exercise of its eminent domain power. The Court's reasoning, however, fails to satisfactorily address several key arguments supporting an exception to the fair market value rule for public condemnees, one which has been recognized by almost all federal circuits.

One such argument is based on the language and reasoning of Lutheran Synod, the 1979 case in which the Court specifically reserved the issue of substitute facilities valuation for public condemnees. The reasoning in Lutheran Synod, which denied substitute facilities compensation for private nonprofit condemnees, seems to justify the substitute facilities doctrine for public condemnees. This language, however, was ignored by the Court in 50 Acres of Land.

In Lutheran Synod, the condemnee was a private, nonprofit group that operated a summer camp in Pennsylvania. The federal government instituted eminent domain proceedings in order to build a public recreation area on the site. Although the fair market value of the property was determined by the jury to be $740,000, the replacement value was claimed by the condemnee to be $5.8 million, largely because the condemnee would have to acquire new and expensive permits to operate the camp at a new site. The Court held that fair market value was the proper measure of compensation under these circumstances. The reasoning invoked by the Court appears to be based on distinctions between public and private condemnees.

First, the Court in Lutheran Synod was concerned that if a distinction between public and private benefits were to be invoked in determining the proper measure of just compensation, the jury would have to make a "subjective estimation" as to whether the condemned property was being used for a public benefit. If the Court were to decide that public condemnees are entitled to substitute facilities valuation, however, there would be no need for the jury to make such a determination because by definition the property would have been used by the condemnee.

cases involving “manifest injustice.” According to her, “manifest injustice” results if market value “deviates significantly” from the indemnity principle inherent in the fifth amendment. Id. See also supra note 7 and accompanying text.
67. Id. at 508.
68. Id.
69. Id. at 508, 509, 514.
70. Id. at 517.
71. Id. at 516.
for the public benefit.\textsuperscript{72}

Second, the Court refused to allow the private condemnee in \textit{Lutheran Synod} to argue that its facility conferred a "community benefit" because "this loss is [not] relevant to assessing the compensation due a private entity."\textsuperscript{73} This situation is different, however, from cases involving public condemnees—when the public is the owner, compensating the owner is compensating the public.

Finally, the Court noted that "[r]espondent did not hold its property as the public's trustee and thus is not entitled to be indemnified for the public's loss."\textsuperscript{74} In \textit{50 Acres of Land}, however, the owner clearly did hold the land as the public's trustee. Thus, the language in \textit{Lutheran Synod} implies that the public condemnee in \textit{50 Acres of Land}, as the public's trustee, is entitled to be indemnified for the public's loss.

The language and reasoning of \textit{Lutheran Synod} seem to support the proposition that public entities are entitled to a substitute facilities measure of compensation when necessary facilities are condemned by the federal government.\textsuperscript{75} The Supreme Court in \textit{50 Acres of Land}, however, chose to ignore these implications of its decision five years earlier in \textit{Lutheran Synod}.

A second criticism of \textit{50 Acres of Land} is its mechanical application of the fair market value rule. The fifth amendment requires "just compensation" by the federal government when it exercises its eminent domain power, the term "just" being the only constitutional qualification on the proper level of compensation. The market value measure is not a constitutional imperative, but was adopted merely out of the need for a practical, workable rule. As one commentator noted:

[The value of the property taken is the value to the owner, but courts for reasons of practical administration have adopted market value as the standard of compensation. \textit{Nevertheless, this is a justifiable standard only in so far as it attains the true objective of just compensation, that is, to make the owner whole and to distribute the burden and cost of public improvements so that they do not fall too heavily on the shoulders of individual owners.} The concern of the courts, as well as of the lawyers, is ultimately to achieve this objective.\textsuperscript{76}]

\begin{footnotesize}
\textsuperscript{72.} See Brief for the Council of State Governments at 12-13.
\textsuperscript{73.} 441 U.S. at 516.
\textsuperscript{74.} \textit{Id}.
\textsuperscript{75.} Justice White's concurring opinion in \textit{Lutheran Synod} did, however, express doubt that the substitute facilities doctrine would be extended to cover public entities. 441 U.S. at 519 n.6.

When the interests of society are balanced against those of the condemnee, it seems clear that there is no compelling justification for not \textit{completely} indemnifying the landowner for his loss. The object of the fifth amendment's just compensation
\end{footnotesize}
Generally, the Court has been flexible when determining the proper measure of compensation, looking to the facts of each case. Departure from the fair market value measure of compensation is justified in cases where, in the Court's opinion, such an award would either fail to indemnify or would over-indemnify the condemnee. Indemnification is the principle embodied in the fifth amendment, and true indemnification has only yielded to the fair market value rule out of practical necessity. The indemnity principle, however, does not have to, and should not, yield where it is inappropriate to do so.

As the Court noted in *Lutheran Synod*: "the dominant consideration always remains the same: what compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?" The Court ignored this principle in favor of a mechanical application of the fair market value rule.

The Court also placed great reliance on the idea that the fair market value measure of compensation is a workable standard, while the substitute facilities measure is overly complex and burdensome to apply. Several commentators, however, have noted the very real and serious difficulties with applying the fair market value rule. The problems are obvious. For example, a willing seller might not sell until conditions are most favorable. The government might have to pay more if the taking occurs in the middle of an economic boom. The seller might also prefer to hold out for an "eager" buyer, and not just the "willing" buyer contemplated by the fair market value rule. Moreover, evidence regarding fair market value often becomes a battle between each party's experts.
One study found that determinations of the "fair market value" of a single piece of property generally vary about 100%. 83 Fair market value is clearly not as easy to determine as the theory suggests, 84 and therefore the Court's reliance on the "ease" of applying the fair market value measure of compensation is misguided.

Finally, one commentator has noted that strict adherence to a market value measure of compensation inherently leads to economic inefficiency. 85 When the government is not forced to account for costs associated with relocation, land replacement, improvements and other externalities, the cost-benefit analysis pertaining to the exercise of eminent domain power becomes skewed. 86 The "costs" would be artificially low, and the government would then wrongly decide that the benefits of the taking outweighed the costs. 87

The Supreme Court in 50 Acres of Land did not adequately consider the economic ramifications of its decision. In theory, the just compensation requirement deters inefficient takings, but the Supreme Court undermines the requirement's efficiency function when it mechanically applies the fair market value rule without fully considering the economic ramifications. 88

CONCLUSION

The Supreme Court's decision in 50 Acres of Land could result in serious consequences for municipalities and other public entities that are subject to the fair market value measure of compensation. Not all condemnees will likely be able to make up the difference between the fair market value measure of compensation received and the reasonable cost of replacing necessary facilities. If Duncanville found itself in this situation, would the federal government propose that Duncanville tell its citizens that there would no longer be a dump for their garbage? This seems to be a potential consequence of the Supreme Court's decision in 50 Acres of Land.

This decision may also result in inefficient land use. 89 Unless the

83. Hershman, Res or Spes—Riddle or Reform in the Concept of Just Compensation and the Procedures for its Adjudication, in CONDEMNATION SYMPOSIUM, supra note 6, at 31-32 (citing WALLSTEIN REPORT ON LAW AND PROCEDURE IN CONDEMNATION (1932)). The facts in 50 Acres of Land well illustrate this problem. The estimates of fair market value in this case ranged from a low of $160,010 to a high of $370,000. See supra note 25.

84. See, e.g., Hershman supra note 83, at 31. This is not to say that substitute facilities value does not have similar problems in application—just that the Court's assumption that the fair market value rule is easy to apply is misguided.


86. Id. at 1279, 1305-11.

87. Id.

88. Id. at 1278.

89. See generally id.
government is forced to consider all of the costs associated with eminent domain takings, the cost/benefit analyses it makes will not reflect a truly efficient result.\textsuperscript{90} Perhaps Congress should overrule \textit{50 Acres of Land} and compel the federal government by statute to pay substitute facilities value whenever it condemns land already being used by a public entity for a necessary public purpose.\textsuperscript{91}

In \textit{50 Acres of Land} the United States Supreme Court apparently deferred, without qualification, to the federal government's exercise of its eminent domain power. Deference to the government is also the trend in other areas of eminent domain law,\textsuperscript{92} and therefore the Court's opinion was not entirely unexpected. This deference, however, placed a disproportionate share of the burden of the federal flood control project on the citizens and taxpayers of Duncanville, and in the long run, will likely result in the inefficient use of public lands.\textsuperscript{93} To avoid these unjust results, it seems appropriate and desirable for the Supreme Court in the future to include full consideration of the economic and social ramifications of its decisions when developing the law of eminent domain.

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\textsuperscript{90} The political process may provide sufficient incentive for the government to pursue only efficient takings. For a persuasive criticism of this argument, however, see Durham, \textit{supra} note 85, at 1293-300.

\textsuperscript{91} Justice White suggested this alternative in his concurring opinion in \textit{Lutheran Synod}. 441 U.S. at 519 n.6.

\textsuperscript{92} See, e.g., Hawaii Housing Authority v. Midkiff, 104 S. Ct. 2321 (1984) (Supreme Court upheld, against a "public use" challenge, Hawaii's use of eminent domain power to condemn residential tracts and transfer ownership to existing lessees. By allowing the state to break up concentrated land ownership, "the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a 'public use' unless the use be palpably without reasonable foundation" (quoting United States v. Gettysburg Electric R. Co., 160 U.S. 668, 680 (1896))); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (voluntary submission of data under Federal Insecticide, Fungicide and Rodenticide Act, when company was aware that data submitted would not be kept a "trade secret," is not a fifth amendment "taking").

\textsuperscript{93} See Durham, \textit{supra} notes 85-89 and accompanying text.