

Just Compensation Standards and Eminent Domain Injustices: An Underexamined Connection and Opportunity for Reform

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I. INTRODUCTION

A recent Supreme Court decision upholding economic development as a public use¹ ushered in increased attention to and criticism of eminent domain from lawyers, academics, and most notably, the public. The criticism expressed over the *Kelo* decision had been mounting for decades, buttressed by growing mistrust of government and resulting decrease in social capital and sense of community.² Outrage felt by some about a broad understanding of public use that includes economic development has almost eclipsed the issue of just compensation from public view. This is not a fleeting occurrence. Courts and commentators have always paid significantly less attention to questions about just compensation than their public use counterparts; just compensation remains somewhat in the shadows of the takings debate. General criticisms of eminent domain law center on complaints about overuse and abuse, and fall into one of two categories: injustice and inefficiency. Yet efforts to reform eminent domain law have not met much success so far. This analysis will argue that inadequate compensation of property owners is greatly to blame for unjust or inefficient takings. Moreover, reforming just compensation would have a more positive and balanced impact on property owners and the public than would restricting public use. Perhaps, if we shift the focus of the takings debate to just compensation, we can parse out solutions that the public use debate has not provided.

Because just compensation law and reform has been relatively understudied, this analysis starts at the roots of just compensation and moves forward to its actual and potential roles in modern society. First, it examines just compensation's history in American society and courts, its original purposes, and its theoretical underpinnings. Second, it looks at the federal legal standard of fair market value as just compensation, its exceptions, and interpretation by the courts. Third, it surveys a variety of general and specific criticisms of eminent domain, and offers suggestions for reform. Finally, it explores states' understandings and reforms of just

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¹ *Kelo v. New London*, 545 U.S. 469, 483-86 (2005).

² See ROBERT D. PUTNAM, *BOWLING ALONE* 21-28, 184, 187 (2000).

compensation law. Connecting just compensation's history, purposes, property theory, current federal law, criticism, suggested reforms, and state law and reforms builds a strong platform from which to argue that the current federal just compensation standard of fair market value is inadequate. It appears to have fallen behind the progress of eminent domain law in general, to be at odds with its purposes and broader property theories, and to sanction unjust and inefficient takings. A higher standard for what constitutes and is included in "just compensation" is both possible and desirable. Moreover, it is a more effective way to increase fairness and efficiency in eminent domain actions than public use reform.

II. BACKGROUND

A. History

Despite American political theory's emphasis on individualism and property rights, takings did not require payment of just compensation in the Colonial and Revolutionary eras.³ Even prior to the development of centralized government, early state statutes rejected the right to just compensation.⁴ The Declaration of Independence, for instance, granted rights to life, liberty, and the pursuit of happiness, but omitted the right to property.⁵ Republican government was even ambivalent about the rights it granted, and leaders believed that economic growth depended on the sovereign power and faith in the legislature.⁶ The political climate in and among the states and the federal government was less supportive of individual rights than is often thought. For most of this era, if federal or state government wanted to take privately owned property, most often to build a public road, it could do so without paying the owner compensation.⁷

While this raised a fairness issue in theory, it did not raise a fairness issue in the minds of most landowners.⁸ Takings without compensation were not originally problematic because most land remained undeveloped and of little significant value. Even so, state legislatures confronted resistance and began to incorporate just compensation clauses into state constitutions in the late 1700s.⁹ Shortly thereafter, Madison drafted the

³ William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 694 (1985).

⁴ *Id.* at 695.

⁵ *Id.* at 700 (describing rejection of the Lockean theory of life, liberty, and property).

⁶ *Id.* at 695-99.

⁷ *Id.* at 698-701.

⁸ *Id.*

⁹ *See id.* at 701 (explaining why just compensation clauses appeared in the Vermont constitution, Massachusetts constitution, and the Northwest Ordinance).

Fifth Amendment to the Constitution, championing property rights.¹⁰ It stated, in relevant part: “Nor shall private property be taken for public use without just compensation.”¹¹ According to William Treanor, the Fifth Amendment was intended not only to protect property owners, but to serve an educative function for American society about the sanctity of property.¹² Thus, it marked a shift in thinking regarding the proper relationship between individuals, their property, and the government. The Fifth Amendment won general acceptance among the states by the 1820s,¹³ and almost all state constitutions incorporated just compensation clauses.

Questions remain, however, about the original meaning of just compensation. John Fee has pointed out that there is no direct evidence about what the framers meant by the phrase “public use” in the Fifth Amendment, and that those who rely on a narrow understanding of the phrase must rely on something other than history.¹⁴ This is equally true for the just compensation clause of the Fifth Amendment. The phrase was not originally defined, and like public use, has been largely defined by the courts. The first takings case to reach the Supreme Court was *Monongahela Navigation Co. v. United States*, in which the court articulated its own definition of just compensation.¹⁵ The Court’s understanding of just compensation was, and remains, as follows:

The noun “compensation,” standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that, if the adjective “just” had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective “just.” *There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken.* And this

¹⁰ U.S. CONST. amend. V. See also THE FEDERALIST NO. 10 at 64–65 (James Madison).

¹¹ U.S. CONST. amend. V.

¹² Treanor, *supra* note 3, at 711–12.

¹³ *Id.* at 714. Only a few decades earlier, the Fifth Amendment would have proved too radical to win general acceptance. *Id.* at 715.

¹⁴ John Fee, *Reforming Eminent Domain*, in EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT 125, 128–29 (Dwight H. Merriam & Mary Massaron Ross eds., 2006).

¹⁵ *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893); Ann E. Gergen, *Why Fair Market Value Fails as Just Compensation*, 14 HAMLIN J. PUB. L. & POL’Y 181, 182 (1993).

just compensation, it will be noticed, is for the property, and not to the owner.¹⁶

The court understood “just” compensation, as compensation equivalent with the property being taken. Thirty years later, in *Olson v. United States*,¹⁷ the Supreme Court articulated the “equivalency” discussed in *Monongahela* as fair market value.¹⁸ The *Monongahela* Court’s definition of compensation, coupled with the *Olson* Court’s definition of equivalence as fair market value provided an enduring understanding of just compensation that still exists today. However, the Court’s decision to define just compensation as fair market value of the property taken ushered in controversy. Some argue that the Fifth Amendment’s insistence on compensation alone requires compensation equivalent to the property’s fair market value, and that its drafters’ inclusion of the word “just” shows their intent for courts and legislatures to compensate for more than fair market value of property taken.¹⁹

Regardless, “a right is as big as what the court will do,”²⁰ and fair market value was the Supreme Court’s answer to the just compensation question. Perhaps at the time the Court first articulated this rule, though, the costs born by property owners in takings cases were far lower than they are today. Gideon Kanner argues that notions to limits to just compensation have roots in the Eighteenth and Nineteenth Centuries, when eminent domain was uncommon and land was undeveloped.²¹ Ostensibly, industrialization, urbanization, and an increase in population density have raised both the need for eminent domain and the costs associated with it for property owners and the public.

Until the beginning of the Twentieth Century, federal takings law and just compensation seemed to progress alongside each other, molding to the needs of a developing country and the expanding rights of its citizens. The definition of public use has evolved to meet the needs of modern society. In 2005, for example, the Supreme Court confirmed that economic development qualifies as public use even when land taken will ultimately fall into the hands of a private developer.²² The policy concerns behind the Court’s decision centered on the necessity for state and local governments

¹⁶ *Monongahela Navigation Co.*, 148 U.S. at 326 (emphasis added).

¹⁷ 292 U.S. 246 (1934).

¹⁸ *Id.* at 254–55.

¹⁹ Fee, *supra* note 14, at 133; Gideon Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 NOTRE DAME L. REV. 765, 772–73 (1973).

²⁰ Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 679–80 (quoting KARL NICKERSON LLEWELLYN, *THE BRAMBLE BUSH* 84 (1960)).

²¹ Kanner, *supra* note 19, at 773.

²² *Kelo v. New London*, 545 U.S. 469, 485–86 (2005).

to be able to revitalize depressed urban areas. Urbanization and urban depression mean that not only will most eminent domain actions involve developed land, but that urban areas will often be targeted. This fact alone creates a very different landscape for just compensation than the one that existed in 1893 or 1934. While the definition of public use has been interpreted to encompass types of projects that would have been inconceivable a century ago, just compensation has not kept pace with eminent domain evolution. Thus today, we have a public use clause that is flexible enough to address the issues faced by a modern, urban society, yet a just compensation clause that is still widely understood as it was a century ago, and applied as it was to undeveloped land.

Today we also have a nation of people who do not trust each other, or their government to do what is in their interests, or in the public interest. From the New Deal through the 1960s, citizens remained more civic-minded and maintained more faith in leadership than we see today.²³ In some ways, citizens' attitudes towards government and each other have degenerated to their pre-industrialization forms. Perhaps the change in sentiment is not misplaced. The thinning of the middle class and stratification into haves and have-nots has greatly eroded the average person's sense of security. Since the Reagan administration, both Republicans and Democrats have chipped away at social programs in the name of balancing the budget, yet it remains unbalanced.²⁴ A government that is increasingly tied to big business raises suspicions for anyone who is not also tied to those businesses. And even more fundamentally, people have less time to help each other and make up for government's inadequacies. People have good reason to question whether things the government claims are in the public interest truly are, and what the definition of the cliché phrase actually is.

Mistrust, warranted or not, poses challenges for government that have had major impacts in the field of eminent domain. As explained by Putnam, "[a] society characterized by generalized reciprocity is more efficient than a distrustful society If we don't have to balance every exchange instantly, we can get a lot more accomplished."²⁵ Thus, the distrustful society that has emerged over the past few decades does not necessarily believe that eminent domain is in the public interest. Individuals whose homes are subject to takings do not necessarily believe that they will ever reap the non-monetary and monetary rewards that supposedly accompany the taking of their land. A trail of real and perceived injustices in this area, accompanied by soaring housing costs and

²³ See PUTNAM, *supra* note 2, at 17.

²⁴ For example, welfare, public school investment and the environment.

²⁵ PUTNAM, *supra* note 2, at 21.

shrinking savings accounts, makes people less willing to give up their homes for the public good, and particularly unwilling to give them up solely for someone else's good. "Trustworthiness lubricates social life,"²⁶ and it also lubricates political and legal life. If society is lacking in this department, both individuals and the government bear responsibility. However, in the area of eminent domain, the government is probably going to have to take the bulk of the responsibility for rebuilding trust in some way. As discussed earlier, the public use clause has flexed to the evolving needs of the government; thus, it is crucial to restoring trust that some aspect of eminent domain law flex to the evolving interests of individuals in a changing society. Awarding compensation that landowners consider fair and just is a more prudent way to accomplish these ends than constricting the public use clause out of distrust for the government's use of the public interest. In order to shed greater light on the reasons for increased compensation for takings, the following two sections will address the purposes of just compensation and overarching theories of property. They will build upon what is revealed by only a brief historical account of just compensation: that in this particular area of takings law, "we have not progressed."²⁷

B. Purposes of Just Compensation

An understanding of the purposes just compensation is meant to serve is requisite to evaluation of the fair market value standard of compensation. As noted by Christopher Serkin, the content of the Fifth Amendment should depend on the purpose it meant to serve.²⁸ The following section will explore the reasons the federal government developed just compensation and the role it has played. Finally, it will begin to examine how well just compensation actually serves its intended purposes.

Just compensation serves both private and public purposes, and seeks to balance both private and public interests.²⁹ Its private purpose is to protect individuals' property rights from arbitrary invasion by the government, and ensure fairness in eminent domain proceedings. The language of the Fifth Amendment is constructed to *limit* the power of the government. It does not affirmatively grant the power of eminent domain, but rather begins its message with the word *nor*, telling citizens what the government *can't* do. This language is consistent with the spirit of the Bill of Rights, which was designed to protect individuals from a potentially

²⁶ *Id.*

²⁷ Kanner, *supra* note 19, at 768.

²⁸ See Serkin, *supra* note 20, at 679.

²⁹ James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1277 (1985).

overreaching government.³⁰ Put simply, the just compensation clause forces the government to deal fairly with individuals. Glynn Lunney describes this in terms of protecting a minority landowner from the majority who has an interest in his property.³¹ John Fee describes this in terms of ensuring that individuals are not singled out to bear costs for the public good.³² The Supreme Court has also articulated the just compensation clause's burden shifting function. In *Armstrong v. United States*,³³ the court explained that the takings clause is designed to protect individuals from bearing public burdens that should be borne by the public as a whole.³⁴ Both the language of the Fifth Amendment, and the Court and commentators' interpretations reflect the just compensation clause's fairness purpose.

Limits on the power of eminent domain created by the requirement of just compensation also protect public interests. Just compensation deters eminent domain when it would be economically inefficient by forcing the government to consider whether the public benefit will outweigh the cost of paying compensation to individuals.³⁵ Just compensation encourages cost/benefit analysis that protects taxpayers who fund eminent domain projects by ensuring that their benefits from a particular project outweigh the burden of paying for it. Thus, just compensation serves to promote efficiency and deter overuse. Frank Michelman adds the somewhat Marxist perspective that just compensation assures risk-averse individuals that it is safe to invest in property, supporting a healthy economy.³⁶ Boiled down to simplest terms, just compensation aims to ensure that takings are fair to individuals and make sense for the public.

The adequacy of just compensation determines how well it can serve its purposes, and the degree to which it serves its purposes indicates its adequacy. Insufficient just compensation has the dual effect of cheating individuals out of fairness envisioned by the Bill of Rights, and failing to deter government from inefficient eminent domain projects. Excessive compensation may not injure individuals whose homes are taken in the short term, but endangers citizens by discouraging beneficial eminent domain. Just compensation is meant to strike the balance that best achieves fairness *and* efficiency.

³⁰ Kanner, *supra* note 19, at 771-72, 779.

³¹ Glynn S. Lunney, Jr., *Compensation for Takings: How Much is Just?*, 42 CATH. U. L. REV. 721, 757 (1993).

³² Fee, *supra* note 14, at 132.

³³ 364 U.S. 40 (1960).

³⁴ *Id.* at 49.

³⁵ Durham, *supra* note 29, at 1278.

³⁶ Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?*, 64 OHIO ST. L.J. 451, 490-91 (2003) (citing Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967)).

C. Theories of Property and Personhood

A variety of theories of property support the purposes of just compensation. This section examines the relationship between property theory and the development of just compensation law, as well as the potential for property theories to inform progress in this area of the law.

The philosopher John Locke is typically cited for his contributions to property theory. His theory of property takes root in individuals' natural rights to the fruits of their own labor.³⁷ According to Michelman, Locke offers a "desert" or "personality" theory of property, appealing to what one deserves for his individual merit and efforts.³⁸ "Historically, fundamental notions of natural rights, personhood, fairness and protection against risk exposure have justified the mandatory payment of compensation when the government takes land for the public use."³⁹ Thus, Locke's influence on property law contributed to a foundation for just compensation. Personality or desert theories, such as his, still have bearing on the relationship between just compensation and its fairness purpose. They do not, however, explain the relationship between just compensation and efficiency or public interests.

Social functionary and utilitarian theories of property justify just compensation from an efficiency perspective.⁴⁰ A social functionary theory of property justifies personal property through its relationship to maximum production and consumption.⁴¹ The possibility of private ownership and leisure time stimulates production and consumption in society, and division of property into private ownership curbs dissent over resource management.⁴² This theory allows for redistribution of wealth, and hence eminent domain, as long as everyone has the opportunity to participate in production and consumption.⁴³ Private property, then, serves a positive function for society as a whole. Social functionary theory sheds some light on the public benefits of private property, and its protection through just compensation. It, on its own, has limited application to just compensation's efficiency purpose.

Utilitarian property theory provides justification for takings and just compensation from an efficiency perspective.⁴⁴ The classic utilitarian property theory of David Hume posits men as originally atomistic, non-

³⁷ LOCKE, SECOND TREATISE OF GOVERNMENT CH. 5, §§ 27-30 (C.B. Macpherson ed., Hackett Publishing Co. 1980).

³⁸ Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1204 (1967).

³⁹ Calandrillo, *supra* note 36, at 489.

⁴⁰ See, e.g., Michelman, *supra* note 38, at 1206-10.

⁴¹ *Id.* at 1206-07.

⁴² *Id.*

⁴³ *Id.* at 1207-08.

⁴⁴ *Id.* at 1209-10.

social beings who realize the advantages of association, sharing, and accumulation of possessions for purely selfish reasons.⁴⁵ They do not trespass against others because association and sharing benefit their own interests.⁴⁶ Thus, there is individual advantage to be gained from *not* interfering in another's property.⁴⁷ As applied to takings, people have an incentive to protect another's private property interests in order to protect their own. This contributes to efficiency through balancing public and private interests by the golden rule.

Theories of desert or fairness, social function, and utility all have their place in the development of just compensation. The question is how to fashion just compensation so that it balances fairness and utility. While fairness and utility theories seem similar in their aims at balancing public and private interests, they can actually yield very different results when applied to takings cases.⁴⁸ Efficiency motivated collective measures have the potential to inflict disproportionate burdens on individuals for the supposed benefit of the public, or worse, other individuals, while a fairness approach can dilute utility.⁴⁹ Maximizing production relies on utility, while fairness relies on personal individual rights.⁵⁰ Yet just compensation should maximize fairness *and* efficiency, and the approaches should be treated as parallel. While it appears more difficult to achieve fairness than efficiency, the area in which these aims overlap should mark the boundaries for eminent domain. Condemnations should proceed only in takings situations in which an individual can be paid sufficient compensation for his loss, and the taking still appears efficient from the perspective of government and the public. Not only would such boundaries protect the individual, they would also force closer scrutiny in evaluation of efficiency. Through this understanding, fairness could actually buttress utility.

Commentators have criticized eminent domain and just compensation law as being out of sync with their underlying purposes and with property theory and law, calling fair market value inadequate "unjust" compensation. Margaret Radin focuses her critique on the connection between personhood, privacy, property, and liberty, and defends property rights as inherently personal.⁵¹ She claims that the relationship between personhood and property has been both ignored and taken for granted in

⁴⁵ *Id.* at 1209. See also DAVID HUME, A TREATISE OF HUMAN NATURE bk. 3, pt. 2, §§ 2–4 (L. A. Selby-Bigge ed., 2d ed. Oxford University Press 1978) (1740).

⁴⁶ Michelman, *supra* note 38, at 1210.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1225–26.

⁴⁹ *Id.* at 1225.

⁵⁰ *Id.*

⁵¹ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

legal thought.⁵² Her theory of property and personhood scrutinizes the way current takings law undermines individual rights, relying on Hegel's philosophy that a person becomes a real self only by engaging in a property relationship.⁵³ She argues, "[o]nce we admit that a person can be bound up with an external 'thing' in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control of that 'thing.'"⁵⁴ She cites heirlooms, wedding bands, and *houses* as items that people often feel become part of themselves.⁵⁵ It follows from her understanding of certain property rights that just compensation for takings might exceed the fair market value of property. According to her, a homeowner has a personhood interest at stake, while a prospective buyer or condemner only has a property interest.⁵⁶ The personhood interest should be valued highest. Thus, the person must be compensated for something more than his property interest, and fair market value as just compensation may not be consistent with fairness or individual rights theory.

Fair market value as just compensation may also be inconsistent with general principles of property law. Gideon Kanner argues that the fair market value standard assumes more uniformity among properties and markets than actually exists, while "much of our property and contract law is premised on the notion that each parcel of land is unique."⁵⁷ He emphasizes "that the Supreme Court has been careful to make it apparent that the 'market value' is essentially a rule of convenience, not a conceptual straitjacket."⁵⁸ In *United States v. Cors*, the Supreme Court admitted that fair market value may not always be appropriate, explaining:

But the Amendment does not contain any definite standards of fairness by which the measure of "just compensation" is to be determined. The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. But it has refused to make a fetish even of

⁵² *Id.* at 957.

⁵³ *Id.* at 957–68.

⁵⁴ *Id.* at 960.

⁵⁵ *Id.* at 959.

⁵⁶ *Id.* at 959–60, 1014–15.

⁵⁷ Kanner, *supra* note 19, at 774.

⁵⁸ *Id.*

market value, since it may not be the best measure of value in some cases.⁵⁹

The Court seemed to recognize in this decision that fair market value is not the complete answer to just compensation. Kanner argues that fair market value cannot ever be determined without examining the personal desires of buyers and sellers comprising the market for a particular property.⁶⁰ According to him, the fair market value standard for just compensation fails to consider many factors that influence routine property transactions.⁶¹ Thus, not only does fair market value fail to be the “best measure of value in some cases,”⁶² but also wholly fails to incorporate personal realities that bear on all property transactions into its formula.

Kanner notes that the “student of eminent domain law quickly learns that concepts and notions of what constitutes ‘property’ in other areas of the law are of little assistance when dealing with definitions of property in eminent domain law.”⁶³ It is highly problematic that eminent domain law has not run parallel to property law in general,⁶⁴ and that just compensation has not progressed with eminent domain. These inconsistencies translate to a standard of just compensation (fair market value) that may not serve its intended purposes and their underlying theories as well as it should.

III. CURRENT FEDERAL JUST COMPENSATION LAW

A. Basic Legal Rules

While the Constitution mandates just compensation,⁶⁵ courts are left to determine how much compensation is necessary and just.⁶⁶ The Supreme Court’s views on just compensation explain that compensation should

⁵⁹ United States v. Cors, 337 U.S. 325, 332 (1949) (citations omitted).

⁶⁰ Kanner, *supra* note 19, at 780.

⁶¹ *See id.* For instance, fair market value assumes a willing buyer and willing seller even though in a condemnation proceeding there is no willing seller. If you did not really want to sell your property, you might be able to negotiate a higher price for it than if you were eager to sell. So the average negotiation in which a party wants to buy more than a seller wants to sell, puts the seller in a position to get more than fair market value for his house assuming there is a price at which he would choose to sell and the buyer is willing to pay it. Thus, if condemnation actions paralleled open market transactions, sellers would routinely be paid more than fair market value for their homes simply because they were not eager to sell.

⁶² *Id.*

⁶³ *Id.* at 771. *See, e.g.,* Placer County Water Agency v. Jonas, 275 Cal. App. 2d 691, 698 (1969).

⁶⁴ *See* Kanner, *supra* note 19, at 776–81. This can be seen in instances of pre-condemnation activity, landowners’ inability to negotiate with would be seizers, and applying fair market value in situations where there is no willing seller. Property law in general emphasizes free markets, yet ties landowners’ hands to exercise normal free market negotiating rights in takings. Property law in general has embraced the individual, while eminent domain law has embraced the public interest without adequately considering individual interests. *Id.*

⁶⁵ U.S. CONST. amend. V.

⁶⁶ Bauman v. Ross, 167 U.S. 548, 569-571 (1897).

make the property owner pecuniarily whole.⁶⁷ The Court's articulated standard for this, as discussed in preceding sections of this analysis, is the fair market value of property taken.⁶⁸ Courts understand fair market value as what a willing buyer would pay a willing seller.⁶⁹ Courts may diverge from fair market value, however, in cases in which market value is either hard to determine, or would be unjust to the property owner.⁷⁰ Fair market value requires the highest and best available use of the condemned property, yet Glynn Lunney argues that property owners must be persuasive when articulating the highest and best use for their properties.⁷¹ Fair market value also includes special uses derived from businesses, interest accrued between the date of a taking and the date of compensation, productivity of land, improvements to land, and ceiling prices in effect at the time of taking.⁷² Fair market value excludes government enhanced value,⁷³ removal or relocation costs,⁷⁴ business interests,⁷⁵ or any "undue enrichment" to the property owner.⁷⁶ Fair market value is based on a "comparable sales" approach.⁷⁷ It compensates for the net-harm suffered as opposed to the government's gain.⁷⁸ One theory is that compensating for the government's gain would over-compensate property owners, and over-deter eminent domain actions; however even federal courts have not consistently applied the net harm rule.⁷⁹ The Supreme Court has a general rule against compensating for business losses.⁸⁰ The business losses rule states that when government condemns real property upon which business is operated, the owner recovers for value of real property and fixtures

⁶⁷ Gary Knapp, Annotation, *Supreme Court's Views as to What Constitutes "Just Compensation" Required, Under Federal Constitution's Fifth Amendment, for Taking of Private Personal Property for Public Use*, 155 L. Ed. 2d 1185, 1195 (2006).

⁶⁸ *Id.*

⁶⁹ David L. Callies & Shelley Ross Saxer, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in Kelo, in EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT* 137, 137 (Dwight H. Merriam & Mary Massaron Ross eds., 2006); Durham, *supra* note 29, at 1285.

⁷⁰ *United States v. Cors*, 337 U.S. 325, 332 (1949); *Commodities Trading Corp. v. United States*, 339 U.S. 121, 123 (1950).

⁷¹ See Lunney, *supra* note 31, at 726. See also Gergen, *supra* note 15, at 189.

⁷² Gergen *supra* note 15, at 189.

⁷³ *McGovern v. New York*, 229 U.S. 363, 371-72 (1913).

⁷⁴ *United States v. Petty Motor Co.*, 327 U.S. 372, 378-79 (1946). But see Terry J. Tondro, *Urban Renewal Relocation: Problems in Enforcement of Conditions on Federal Grants to Local Agencies*, 117 U. PA. L. REV. 183 (1968). In this article, Tondro points out that Congress has adopted urban renewal reforms that include relocation costs for federal renewal projects. *Id.* at 184-85, 188-91. Also, some states have similar urban renewal statutes. *Id.* at 219.

⁷⁵ *United States v. Miller*, 317 U.S. 369, 376-77 (1943). See also Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. REV. 283, 286-87 (1991).

⁷⁶ *Bauman v. Ross*, 167 U.S. 548, 567-74 (1897).

⁷⁷ Lunney, *supra* note 31, at 727.

⁷⁸ Christopher Serkin, *Valuing Interest: Net Harm and Fair Market Value in Brown v. Legal Foundation of Washington*, 37 IND. L. REV. 417, 424 (2004).

⁷⁹ *Id.* at 425-31.

⁸⁰ Oswald, *supra* note 75, at 285-89.

taken, but not other losses.⁸¹ The property owner cannot recover for relocation, loss of profits, and loss of goodwill or going concern.⁸²

Although the Court articulated many of the above rules over fifty years ago, most of them are still applied by the federal courts in their original form. In 1970, Congress passed the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act.⁸³ It provides assistance to property owners in the form of moving expenses, dislocation allowance, and help with down payments for displaced persons, as well as other incidentals.⁸⁴ The Act only applies to federally funded projects,⁸⁵ while most recent eminent domain takings are state actions.⁸⁶ To be sure, the Act was an appropriate step to compensate individuals who were subject to 1970's urban renewal initiatives. However, today, the Act does not help most owners of condemned property. Moreover, almost fifteen years after the Act's passage, the Supreme Court reiterated classic limitations on just compensation and the exclusion of incidental costs.⁸⁷ The Court rejected the Fifth Circuit's decision to award the speculated replacement value for a city dump, and held that the government need only pay fair market value for the lot.⁸⁸ The Court elaborated that just compensation requires an objective standard of valuation, and should not include any elements of the property's subjective value to its owner.⁸⁹ The Supreme Court has also been unwilling to consider compensation adjustments for alteration in properties' fair market values attributable to eminent domain actions.⁹⁰ The Court does allow two exceptions to the general rule. First, the government must pay any increase in value for lands eventually taken that were outside of the scope of the original project.⁹¹ Second, the Court generally denies property owners compensation for any decrease in value attributable to pre-condemnation activity, unless the property owner can show that the condemner intentionally drove down the property value.⁹² In practice, these standards mean that property owners suffer losses in value, but do not benefit from enhancement in value associated with precondemnation activity.

⁸¹ *Id.*

⁸² Oswald, *supra* note 75, at 286–87.

⁸³ Callies & Saxer, *supra* note 69, at 152 (citing Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act of 1970, 42 U.S.C. §§ 4601–4655 (2000)).

⁸⁴ *Id.*

⁸⁵ *Id.* When the Act passed, most eminent domain actions involved clearance for building highways.

⁸⁶ Callies & Saxer, *supra* note 69, at 19 n.150.

⁸⁷ *United States v. 50 Acres of Land*, 469 U.S. 24, 33 (1984).

⁸⁸ *Id.* at 29.

⁸⁹ *Id.* at 35.

⁹⁰ Callies & Saxer, *supra* note 69, at 139–40 (citing *United States v. Reynolds*, ???).

⁹¹ *United States v. Miller*, 317 U.S. 369, 377 (1943).

⁹² Callies & Saxer, *supra* note 69, at 139–40.

B. Just Compensation Law and Kelo v. New London

In *Kelo v. New London*⁹³ the Court paid great attention to just compensation even though it was not within the purview of the case. The Court hinted at what commentators have said explicitly: expanding our understanding of just compensation may better balance various interests involved in takings than narrowing our understanding of public use. This is not the first time the Court has hinted at this notion. The Supreme Court's views on just compensation suggest that counsel should not discount the chance to get more than traditional "just compensation."⁹⁴ In the *Duncanville* case, the Court emphasized that fair market value served as a *minimum* standard, and that Congress could authorize greater compensation.⁹⁵ Ultimately, the Court recognized the inadequacies of its own standards, but left progress to the states and legislatures.

What was unique in *Kelo*, however, was the degree to which the Justices deliberately tried to steer the petitioner and respondents' arguments to compensation issues. They seemed to want to confront the very questions that they had passed to legislatures and states in the past. For example, Justice Kennedy asked Mr. Bullock, counsel for Petitioner *Kelo*, whether compensation should be adjusted in cases where property will ultimately go to a private person.⁹⁶ Bullock answered no, agreeing with Kennedy's read of the current law.⁹⁷ Justice Breyer addressed the Court's professed goal that just compensation put property owners in as good of a position as if their property had not been taken, asking "[I]s there some way of assuring that the just compensation actually puts the person in the position he would be in if he didn't have to sell his house? Or is he inevitably worse off?"⁹⁸ The Justices seemed troubled by the question of whether just compensation truly makes the property owner whole.⁹⁹ Their questions had a rhetorical tone, perhaps really asking, "Can we ever really know whether a property owner is made whole?" While the short answer to this question may be a resounding "no!", that does not create an excuse for neglecting efforts to try to evaluate what would make different property owners whole and provide them with a rough approximation of that sum.

The *Kelo* Court's interest in just compensation was significant for a number of reasons. First, it showed that the Court at least somewhat recognized what commentators have said for years about the invisibility of

⁹³ 545 U.S. 469 (2005).

⁹⁴ Knapp, *supra* note 67, at 1189.

⁹⁵ *United States v. 50 Acres of Land*, 469 U.S. 24, 30 n.14 (1984).

⁹⁶ Callies & Saxer, *supra* note 69, at 138 (citing Transcript of Oral Argument at 22, *Kelo v. New London*, 545 U.S. 469 (2005)).

⁹⁷ *Id.*

⁹⁸ *Id.* (citing Transcript of Oral Argument at 48, *Kelo v. New London*, 545 U.S. 469 (2005)).

⁹⁹ Callies & Saxer, *supra* note 69, at 138.

just compensation in the takings debate, the relationship between public use and just compensation, and the potential for adjustment of compensation to effectively reform eminent domain. Second, it may indicate that the Court will try to revisit fair market value as the standard for just compensation when the opportunity presents itself. There is an inherent inconsistency between the Court's goal of putting a property owner in as good of a position as if his property had not been taken, and a narrow definition of just compensation coupled with a rigid formula for determining owners' individual "positions" before and after condemnation. The *Kelo* Court appeared to appreciate this issue.

IV. CRITICISMS OF CURRENT JUST COMPENSATION STANDARDS

The *Kelo* Court's willingness to address questions raised by our current method of just compensation provides hope that the judiciary may substantively deal with just compensation in the future. Despite the fact that most of the eminent domain debate has centered on public use, commentators have generated ample criticism of just compensation over time, and pointed to areas of just compensation law in need of reform. The following section will first analyze whether, or to what degree, the fair market value standard provides adequate compensation for takings. It will then examine proposed reforms to just compensation, and provide a model for "just" just compensation.

A. General Criticisms and Suggestions

General criticisms of current just compensation standards tend to fall into one of four categories. Commentators argue that just compensation is not given great enough attention, that courts deal with just compensation issues inconsistently, that current just compensation standards are inefficient, and, most strongly, that current just compensation standards are inadequate and unjust. These problems are interrelated and must be confronted as a package in order to address any one of them effectively.

1. Ignoring Just Compensation

Critics lament that the typical takings debate ignores what should be central: "when compensation is due, how much should the government have to pay?"¹⁰⁰ Furthermore, the relationship between takings and compensation has been under-theorized.¹⁰¹ The result is that courts have not, thus far, fully recognized just compensation's potential as a check on eminent domain.¹⁰² Many just compensation critics argue that the major

¹⁰⁰ Serkin, *supra* note 20, at 678.

¹⁰¹ *Id.*

¹⁰² See Durham, *supra* note 29, at 1278.

problem confronting eminent domain is not that the public use doctrine is too broad, but that compensation is inadequate.¹⁰³ In John Fee's words,

Although I agree that governments condemn land too frequently and too easily, I question whether a narrow public use doctrine is the best way to address the current problem, or, indeed, whether it would do much good. I believe that the current injustices in eminent domain are not primarily the product of an unreasonably broad concept of public use. Rather, the root of the problem lies with the current system's failure to require adequate compensation.¹⁰⁴

The relative invisibility of just compensation in the takings debate may have stalled progress in reforming eminent domain. If eminent domain reform seeks to improve the fairness and efficiency of takings, ignoring the role compensation plays in meeting these goals is an enormous mistake. Moreover, the degree to which just compensation has been ignored in the takings debate has translated to judicial inconsistency when just compensation questions reach the courts.

2. *Judicial Inconsistency*

Although the fair market value standard for just compensation is well understood by federal and state courts, the Supreme Court has not given clear directions about how and when to apply fair market value in condemnation proceedings.¹⁰⁵ There is no established canon of cases to study about how to measure fair market value.¹⁰⁶ Christopher Serkin has commented that "[l]ooking for consistency in takings cases is a little bit like finding shapes in the clouds: you can see them if you look hard enough, but they say more about the observer than the clouds themselves."¹⁰⁷ The Court has vacillated between awards intended to indemnify former owners, and less generous awards intended to limit the

¹⁰³ Fee, *supra* note 14, at 132–35.

¹⁰⁴ *Id.* at 126.

¹⁰⁵ Michael DeBow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579, 579 (1995). See generally *United States v. 564.4 Acres of Land*, 441 U.S. 506 (1979). The Supreme Court has carved out many exceptions to the general fair market value standard. Lunny, *supra* note 31 at 722–24. Additionally, it has not overruled case law that says fair market value is not sufficient. *Id.* at 729–31. It encourages states to adopt more generous compensation, and suggests that property owners argue for more compensation than fair market value provides. *Kelo v. New London*, 545 U.S. 469, 489–91 (2005). The Court is at odds with its past opinions regarding just compensation, and sends mixed messages about just compensation to the states and the public.

¹⁰⁶ Serkin, *supra* note 20, at 683.

¹⁰⁷ *Id.* at 741.

government's obligations to pay for takings.¹⁰⁸ The Fifth Amendment gave the Supreme Court little guidance on the meaning of just compensation, the Supreme Court has given the judicial system little guidance on the application of fair market value, and the result has been regularly referred to as a patchwork quilt.¹⁰⁹ As discussed in previous sections, the patchwork quilt appears inconsistent with general property law,¹¹⁰ and also with the goals of the Takings and Just Compensation Clauses of the Constitution.

Although an inconsistent understanding of fair market value presents barriers to reforming eminent domain, it also presents opportunities. Commentators and states have explored various alternatives to fair market value in an effort to make just compensation a fairer and more useful tool in eminent domain actions. The next sections explore arguments that fair market value as just compensation does not achieve optimum efficiency or fairness, and then will address specific criticisms and suggestions for change.

3. Just Compensation and Efficiency

The basic argument regarding just compensation and efficiency is that under-compensation of property owners leads to overuse of eminent domain in situations where benefits do not actually offset costs. By forcing individuals to bear the costs of eminent domain, the government shields itself from the realities of its own inefficient decisions. The *Poletown* case provides an example of this problem. In *Poletown*, a large Detroit neighborhood was condemned in order to build a GM car plant.¹¹¹ However, the supposed benefits of the project did not actually offset its costs. Detroit was not deterred from the project because it could under-compensate property owners, but it "probably never would have razed Poletown had it known that the Constitution required it to compensate every aggrieved owner for their full losses."¹¹² In sum, increasing compensation for property owners would deter eminent domain mistakes. Those that oppose this theory argue that increased compensation would over-deter eminent domain.¹¹³ However, this concern would only be valid if the government *over-compensated* property owners. Compensating owners for their "full losses" in an effort to put them in as good of a position as if their property had not been taken does not constitute over-compensation. In *Poletown* this might have included emotional damages

¹⁰⁸ Lunney, *supra* note 31, at 769.

¹⁰⁹ See Kanner, *supra* note 19, at 770-73.

¹¹⁰ *Id.* at 772.

¹¹¹ Fee, *supra* note 14, at 130 (citing *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (1981)).

¹¹² *Id.* at 135.

¹¹³ Fee, *supra* note 14, at 134.

due to loss of neighborhood, business damages from relocation, or even including replacement value instead of fair market value to better ensure that residents whose homes were taken would actually reap benefits from the GM plant. Having to award these things would encourage the government to undertake more realistic, efficient cost-benefit analyses when considering condemnations, and protect landowners from bearing a disproportionate amount of the costs involved.

4. Inadequacy of Fair Market Value as Just Compensation

The loudest and most common criticism of just compensation law is that fair market value is *not* fair to property owners and creates a system of *unjust* compensation.¹¹⁴ A property owner may not be “made whole” by current just compensation. Market value excludes consequential damages,¹¹⁵ or any subjective or emotional damages.¹¹⁶ Market value does not account for precondemnation activity,¹¹⁷ or destruction of a business’ good will,¹¹⁸ and wholly ignores the losses suffered by tenants.¹¹⁹ Unsurprisingly, fair market value has been termed inadequate, rigid, and unjust.¹²⁰ The courts defend their bar on subjective values through the “external validity” of fair market value, but fair market value has no greater external validity than the cost of a functionally equivalent substitute.¹²¹ Essentially, fair market value achieved by a comparative sales approach is no more concrete than the calculation of replacement value, nor are consequential damages such as relocation costs or business damages impossible to calculate. Accordingly, one commentator argues, “the Fifth Amendment should require governments to compensate condemned [land]owners for all of their losses associated with eminent domain, making at least a reasonable approximation of those losses that are

¹¹⁴ Many commentators included in this article routinely refer to current just compensation standards as unjust and inadequate. See Fee, *supra* note 14, at 132–33; Lunney, *supra* note 31, at 725; Radin, *supra* note 51, at 1005.

¹¹⁵ Serkin, *supra* note 20, at 679.

¹¹⁶ Fee, *supra* note 14, at 133.

¹¹⁷ Callies & Saxer, *supra* note 69, at 146.

¹¹⁸ See, e.g., Lunney, *supra* note 31, at 743–44.

¹¹⁹ See Michelman, *supra* note 38, at 1254.

¹²⁰ See Callies & Saxer, *supra* note 69, at 150 (“Without a change in these general rules, just compensation may not always be just.”); Gergen, *supra* note 15 at 198 (“[F]air market value does not encompass all values” and does not “put the owner in ‘as good a position . . . as if . . . property had not been taken.’ . . . Lost . . . is the original meaning of just compensation: fairness and indemnity.”); *Recommendation of the California Law Revision Commission: Relating to Evidence in Eminent Domain Proceedings*, in 3 CALIF. LAW REVISION COMM’N, 1960 AND 1961 REPORTS AND RECOMMENDATIONS AND STUDIES, A-5, A-26 (1961) (The fair market value standard “reconstructs a Procrustean bed; if the subject does not fit comfortably—and with comparative ease—upon the ready-made bed, then the victim’s head or feet are cut down to the convenient size.”).

¹²¹ Durham, *supra* note 29, at 1292.

difficult to quantify or verify.”¹²² Other critics agree that courts should consider more factors for fair market value,¹²³ as well as alternatives to fair market value.¹²⁴ The government should be required to indemnify owners for their losses, and fair market value often fails to do so.

B. Externalities and Considerations Warranting Compensation

The prior section identified a variety of ways in which just compensation appears inadequate. This analysis will now turn to specific externalities and considerations that deserve compensation. It will argue that “just” just compensation requires compensation for some consequential losses in order to prevent eminent domain from creating “net losers” and to indemnify property owners from as much loss as possible. The people who most often become net losers to eminent domain are renters, the poor, the elderly, business owners, and those negatively affected by precondemnation activity.¹²⁵ Valuation of compensation should identify and compensate for externalities of eminent domain that affect these property owners, business owners, and tenants. There are more externalities affecting property owners or dwellers than this analysis has space to explore, and more importantly, than the government can realistically calculate or compensate. The following considerations and externalities are by no means exhaustive, but are merely valuation considerations that deserve attention, and for which the government could realistically calculate compensation.

1. Loss v. Gain Based Valuation

Neither net loss, nor benefit gained based valuation consistently favors property owners or the government. There are situations in which the owners’ loss far exceeds the public’s supposed gains, and benefit-received compensation could ignore components of an owners’ loss. On the other hand, the value of the property taken after an eminent domain action is completed may be exponentially greater than the fair market value at the time of taking, and there is an argument that the owner should receive a piece of the pie.¹²⁶ Either way, it is clear that there are many situations in

¹²² Fee, *supra* note 14, at 134. Costs difficult to quantify could not be left to be determined solely by landowners. Rather, there would have to be an objective set of factors that would determine awards for subjective losses. These would not be able to entirely capture emotional losses, but would provide the “reasonable approximation” for which Fee argues.

¹²³ Callies & Saxer, *supra* note 69, at 150–51.

¹²⁴ Gergen, *supra* note 15, at 194–98.

¹²⁵ See Oswald, *supra* note 75, at 286–87; Patricia E. Salkin, Lora A. Lucero & Allyson Phillips, *The Friends of the Court: The Role of Amicus Curiae in Kelo v. City of New London*, in *EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT* 165, 171 (Dwight H. Merriam & Mary Massaron Ross eds., 2006).

¹²⁶ Callies & Saxer, *supra* note 69, at 153.

which fair market value does not truly compensate a property owner for his net loss or the government's gain, and this must be addressed. I would propose the following reforms. First, net-loss compensation appears to better balance public and private interests. Benefit-gained rewards have the potential to strain the public purse by requiring the government to compensate landowners based on the value of land after the completion of an eminent domain project. Gain-based compensation could overcompensate landowners, and thus deter vital eminent domain projects. Yet, gain-based compensation could also hugely under-compensate landowners. In either case, gain-based compensation seems less reasonable than a standard that reflects property owners' losses. One exception, however, should be parcel assembly situations in which properties' aggregate value divided by the number of parcels aggregated would actually yield higher values for individual properties than their individual values. In cases of parcel assembly in which this value would be lower than individual properties' individual values, property owners should be compensated according to their properties' individual values. In sum, whichever value is higher should apply in parcel assembly situations. In most cases, however, the net loss standard is more appropriate and creates less chance for injustice to any party. Yet, the net loss rule must take some consequential damages into account in order to truly compensate property owners for their losses.

2. Replacement Value

There are situations in which replacement value should be considered in lieu of a comparative sales approach. Christopher Serkin argues that replacement value should be used as an alternative to fair market value when fair market value is either not available, or when consequential losses are very high.¹²⁷ One can imagine how this consideration would have helped the city of Duncanville when the federal government condemned its dump.¹²⁸ The replacement costs for the dump equaled more than the dump's fair market value,¹²⁹ creating extremely high consequential damages for the city. Replacement value would have represented much more "just" compensation for the city, and also would have promoted efficiency from the federal government's perspective.

The *Kelo* case presents another example of a taking where replacement value may have represented more just compensation than fair market value. As New London spiraled downward towards the status of a "depressed city," property values in surrounding towns skyrocketed.

¹²⁷ Serkin, *supra* note 20, at 702–03.

¹²⁸ *United States v. 50 Acres of Land*, 469 U.S. 24, 24 (1984).

¹²⁹ *Id.* at 34.

There are not many homes like Susette Kelo's cottage in New London. The one neighborhood within the city that offers similar housing is far more expensive than the Fort Trumbull neighborhood in which she lived. Surrounding towns are more expensive still. Houses you would not want to set foot in without a general contractor start at over \$300,000. Houses similar to hers easily sell for more than that. I have serious doubts that many comparable homes to Susette Kelo's exist in New London, and even more serious doubts that the fair market value of her home could buy her a comfortable home in a neighboring community. Despite public outrage over eminent domain, I sincerely wonder whether the *Kelo* case would have ever reached the Supreme Court, or even the Connecticut Supreme Court, if residents of Fort Trumbull had been offered the replacement value of their homes.

3. Precondemnation Activity

Another injustice that pervades eminent domain actions results from precondemnation activity. Government actions that precede takings can both positively and negatively impact fair market value of property, more often the latter. The federal standard is skewed in favor of the government to property owners' detriment.¹³⁰ Unless the government purposely drives down a property value or the property was outside of the original scope of the project, its owner is not entitled to damages for loss in fair market value resulting from precondemnation activity. Interestingly, though, if the government drives up the value of a property through precondemnation activity, it need not compensate its owner for the increase in value. This standard is lopsided, and forces property owners to swallow losses, but forfeit gains, while allowing the government to affect property owners' property values without any negative consequence. Particularly, if we are going to hold fast to fair market value, we must ensure that the government does not abuse precondemnation activities for its advantage. Indemnifying property owners for any losses associated with precondemnation activity would easily accomplish this. Furthermore, indemnifying property owners from losses associated with precondemnation activity would likely speed up the process of planning eminent domain actions, and discourage delays. This would benefit the public from an efficiency perspective by reducing monetary and non-monetary costs associated with planning eminent domain projects.

4. Relocation Expenses

Payment of relocation expenses would serve the primary purpose of providing more "just" compensation to renters and business owners.

¹³⁰ Callies & Saxer, *supra* note 69, at 146.

Tenants affected by eminent domain actions are not entitled to anything under federal law.¹³¹ The urban poor are often the most vulnerable to, and most often affected by, eminent domain since most recent takings involve urban renewal.¹³² Business owners are also vulnerable because their relocation costs may be particularly high.¹³³ Unexpected relocation may be an unaffordable expense for tenants and property owners alike. Thus, just compensation should include relocation expenses. Mandating such payments would raise the question, “[h]ow far away is a person ‘entitled’ to move?”¹³⁴ While a valid question, it could be answered on a community by community basis. The government would have to limit relocation costs to some degree, but *reasonable* relocation costs are just and desirable. The government should not be able to completely avoid responsibility for displaced persons associated with eminent domain actions. The federal government has already shown some approval for including relocation costs in just compensation in the Uniform Relocation Act and Real Property Acquisition Policies.¹³⁵ However, the Act only applies to federal projects.¹³⁶ This form of compensation should be extended to state and local takings.

5. Business Damages

Business owners are not entitled to good will or going-concern losses, meaning they are not compensated for relocation costs, loss of profits, loss of standing in the community, or loss of the actual business entity.¹³⁷ Business owners are compensated only for the fair market value of real property and fixtures taken.¹³⁸ This means lease-holding business owners may be entitled to very little. It also means that the business owner loses any value he might gain if he sold his actual business (i.e. its name, its customers, its assets, etc). The general rule against business losses is surprising in a society that so highly values entrepreneurial activity and typically protects capital interests. One commentator predicted that more business losses will be compensated in the future.¹³⁹ Michael Risinger has offered that the rule against business losses is actually based on misinterpretation of case law, carefully fostered by treatise writers biased towards condemning authorities.¹⁴⁰ He argues that the supposed rule is in

¹³¹ Michelman, *supra* note 38, at 1254.

¹³² *Id.* at 1255.

¹³³ *Id.* at 1254-55.

¹³⁴ *Id.* at 1255.

¹³⁵ Callies & Saxer, *supra* note 69, at 152.

¹³⁶ *Id.*

¹³⁷ Oswald, *supra* note 75, at 286-87.

¹³⁸ *Id.* at 286.

¹³⁹ *Id.* at 319-20.

¹⁴⁰ Michael Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises are Condemned*, 15 SETON HALL L. REV. 483, 524 (1985).

conflict with Supreme Court authority, and that even under current law, a franchisee is entitled, at a minimum, to the market value of whatever salable package is taken from him.¹⁴¹ Whether or not the business losses rule is a myth, as Risinger persuasively argues, it is shockingly unfriendly to business owners. It would be entirely feasible to calculate the market value of the total “salable package” mentioned by Risinger, as well as relocation costs, for businesses. It serves just compensation’s fairness purpose to compensate business owners for these consequential damages, and it also benefits the public welfare to protect business owners and their role in communities. While Justice O’Connor’s concern that “[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory,”¹⁴² seems largely overstated and unpersuasive, it may hold some truth for business owners. To the degree that it *is* accurate, protection lies in adequate compensation for business losses.

6. Emotional Damages

Many of the proponents of other just compensation reforms oppose emotional damages or demoralization costs because they are more difficult to calculate than other damages.¹⁴³ However, John Fee presents a strong case for compensation for emotional damages. He argues that while it is difficult to place a value on emotional loss, one cannot assume the value is always zero.¹⁴⁴ He contends that if tort law can recognize and calculate emotional losses, there is no reason eminent domain law cannot.¹⁴⁵ This argument harkens back to the assumption of a willing buyer and willing seller in calculation of fair market value. There *is not* a willing seller in an eminent domain action, and while it is difficult to calculate in dollars how unwilling or unhappy a property owner may be, some compensation for the fact that the owner does not want to sell is appropriate. Understandably, a case by case basis that relies on the property owner’s perception of his own emotional losses would create challenges from an efficiency perspective. Yet some indices, perhaps based on years lived at the property and improvements made, would not be impossible to develop.

More simply, reform could set a flat five or ten percent premium to augment fair market value in takings. The fairest way to compensate for emotional losses would probably be a graduated premium, hypothetically ranging from one to twenty percent. Someone who purchased her house

¹⁴¹ *Id.* at 490.

¹⁴² Steven J. Eagle, *Kelo v. City of New London: A Tale of Pragmatism Betrayed*, in EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT 195, 210 (Dwight H. Merriam & Mary Massaron Ross eds., 2006) (quoting *Kelo v. New London*, 545 U.S. 469 (2005)).

¹⁴³ Gergen, *supra* note 15, at 200; Durham, *supra* note 29, at 1305–06.

¹⁴⁴ Fee, *supra* note 14, at 134.

¹⁴⁵ *Id.*

last year might only receive a two percent premium on fair market value, while someone who had lived in her home for fifty years, raised a family there, and would have to change communities if forced to sell might receive a twenty percent premium on fair market value. This method would not avoid a formulaic element, but would be much less arbitrary than flat fair market value. The main point is that calculating some proxy for emotional damages is not impossible, and would probably do more to serve just compensation's fairness purpose than any other proposed reform. The possibility remains that the premiums described could discourage eminent domain in some cases, but this could actually serve the positive function of limiting its overuse and abuse.

V. STATES' UNDERSTANDING OF JUST COMPENSATION

Forty-seven of the fifty states expressly prohibit taking without just compensation, and the three other states' statutes have similar language.¹⁴⁶ States usually follow federal standards for just compensation and do not stray far from fair market value. However, the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act of 1970 has influenced some states to provide relocation compensation.¹⁴⁷ States and trial courts are actually given great discretion in fashioning just compensation.¹⁴⁸ State legislatures *could* grant premiums, and state courts *could* include more factors in determining fair market value.¹⁴⁹ Some states do exceed federal standards for compensation through their legislatures, courts, or constitutions.¹⁵⁰ However, legislative reforms have been weak,¹⁵¹ and judicial reforms have been limited.¹⁵² Even so, these state reforms serve as models to other states, and hopefully send a message to Congress and the federal courts. Two states, Alaska and Louisiana, have adopted landmark reforms that give much greater protection to property owners through compensation than they would receive anywhere else in the country.¹⁵³ These states' reforms exemplify the ways that just compensation could be more fair and efficient.

¹⁴⁶ Calandrillo, *supra* note 36, at 471.

¹⁴⁷ Callies & Saxer, *supra* note 69, at 152.

¹⁴⁸ *Id.* at 150.

¹⁴⁹ *Id.*

¹⁵⁰ DeBow, *supra* note 105, at 585.

¹⁵¹ *Id.*

¹⁵² *Id.* at 148.

¹⁵³ Oswald, *supra* note 75, at 351-61.

A. Legislative Reforms

Despite the weakness of legislative reforms, existing reforms have addressed a number of issues discussed in preceding sections of this analysis. Georgia recognizes that fair market value is not the only method for calculating just compensation, and that other methods such as replacement value may be more appropriate.¹⁵⁴ A number of states have reformed the lopsided federal standard for precondemnation activity. For example, Alabama instructs the government to disregard any increase or decrease in value resulting from a project,¹⁵⁵ meaning property owners receive the fair market value of their property before precondemnation activity. Alaska also protects property owners' compensation from alteration for any increase or decrease in property value associated with eminent domain.¹⁵⁶ California and Pennsylvania's statutes have similar provisions.¹⁵⁷ Some of the precondemnation activity provisions expressly state that former standards forcing owners to bear losses for precondemnation activity were unfair.¹⁵⁸ Kansas, Iowa, and Oregon's just compensation statutes include provisions requiring relocation assistance.¹⁵⁹ Florida was the first state to pass a statute allowing recovery for business losses.¹⁶⁰ Vermont followed suit shortly thereafter, awarding compensation for business losses associated with highway construction.¹⁶¹ Today, California and Wyoming's statutes also compensate for business losses for loss of goodwill such as benefits of location and customers.¹⁶² Kansas is the only state to overtly supplement fair market value.¹⁶³ It adds a twenty-five percent premium to market value when property is condemned for redevelopment.¹⁶⁴ These reforms show that states have identified some of the injustices of traditional just compensation law and

¹⁵⁴ GA. CODE ANN. § 22-1-5 (1999).

¹⁵⁵ ALA. CODE §§ 18-1A-171, 18-4-14 (LexisNexis 2006).

¹⁵⁶ ALASKA STAT. § 09.55.440 (2006).

¹⁵⁷ CAL. CIV. PROC. CODE § 1263.330 (West 1982); 26 PA. STAT. ANN. § 1-604 (West 1997).

¹⁵⁸ CAL. CIV. PROC. CODE § 1263.330 (West 1982); 26 PA. STAT. ANN. § 1-604 (West 1997).

¹⁵⁹ Callies & Saxer, *supra* note 69, at 152–53 n.157 (citing *Tomasic v. Unified Gov't. of Wyandotte County*, 962 P.2d 543, 559–60 (Kan. 1998) (noting allowance for the legislature to award compensation beyond “just compensation”). See also IOWA CODE ANN. § 6B.42 (West 2001); IOWA CODE ANN. § 6B.54 (West 2001); OR. REV. STAT. § 35.510 (2005).

¹⁶⁰ Oswald, *supra* note 75, at 322 (citing 1933 Fla. Laws. Ch. 15927 (No. 70), amending § 5089 of the Compiled General Laws of Florida, *previously* § 3281 of the Revised General Statutes of Florida).

¹⁶¹ *Id.* at 326 (citing Act of June 21, 1957, 1957 Vt. Laws 242 (currently codified, as amended, at VT. STAT. ANN. tit. 19 § 501 (1987))).

¹⁶² *Id.* at 329–34. California and Wyoming adopted § 1016 of the Uniform Eminent Domain Code which provides for recovery of loss of goodwill. *Id.* at 329. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM EMINENT DOMAIN CODE § 1016 (1974).

¹⁶³ Callies & Saxer, *supra* note 69, at 218.

¹⁶⁴ *Id.*

are attempting to rectify them. Criticism that these reforms are weak do not undermine states' efforts, but rather, recognize that only a handful of states' statutes reflect reforms and that statutory reform may have more limited influence than judicial reform.

B. Judicial and Constitutional Reform

What is troubling about state judicial reform is that, so far, it has only substantively addressed business losses. In *Bowers v. Fulton*, Georgia became the first state court to require business losses compensation as a matter of state constitutional law in 1966.¹⁶⁵ Today, five state Supreme Courts recognize some business losses, Georgia, Minnesota, Michigan, Wisconsin, and Alaska.¹⁶⁶ Constitutional reforms have been even more limited than judicial reforms. Louisiana is the only state that has reconsidered its constitutional definition of just compensation.¹⁶⁷

C. Model States

Two states' reforms stand out from otherwise minimal efforts to improve just compensation standards. Alaska's just compensation statute provides a number of protections to property owners, including but not limited to 10.5 percent interest on fair market value for the time elapsed between taking and payment, excluding decrease in value from precondemnation activity when determining fair market value, and the most comprehensive compensation for business losses of any state in the country.¹⁶⁸ The Alaska Supreme Court expressly rejected the general rule against business losses in *State v. Hamer*,¹⁶⁹ rejecting the Supreme Court's rule in *United States v. Mitchell*, for being unfounded and unjust.¹⁷⁰ Alaska's bold decision in *Hamer* protected lessees and property owners alike, and insisted that its state constitution required recovery for consequential damages like temporary loss of profits.¹⁷¹ The Alaska Supreme Court determined in 1976 what Linda Oswald argues today: that a business itself is property, and that the rule against business damages lacks foundation.¹⁷²

Louisiana's constitutional reforms regarding just compensation give Louisiana property owners greater protection against becoming "net-losers" to eminent domain than they would receive in any other state in the

¹⁶⁵ *Bowers v. Fulton*, 146 S.E.2d 884, 886 (Ga. 1966).

¹⁶⁶ DeBow, *supra* note 105, at 585–86 (citations omitted).

¹⁶⁷ See Oswald, *supra* note 75, at 355.

¹⁶⁸ ALASKA STAT. § 09.55.440 (2006).

¹⁶⁹ 550 P.2d. 820, 826 (Ala. 1976).

¹⁷⁰ DeBow, *supra* note 105, at 586. See also *Mitchell v. United States*, 267 U.S. 341 (1925).

¹⁷¹ *Hamer*, 550 P.2d 820 at 826–27.

¹⁷² Oswald, *supra* note 75, at 353–54.

country.¹⁷³ In 1974 the Louisiana legislature redrafted its constitution.¹⁷⁴ Its previous just compensation provision required “just and adequate compensation,” but its new constitution replaced this language with a requirement that “the owner shall be compensated to the full extent of his loss.”¹⁷⁵

The new constitutional requirement intentionally expanded property rights in condemnation actions. It limited the state’s power to condemn through ensuring compensation that would account for all of a property owner’s losses, and guaranteed a jury trial for determination of compensation.¹⁷⁶ The constitution modified language from “the Montana constitution, which requires compensation to the ‘full extent of *the* loss’” to indicate “the full extent of *his* loss” so that it would be clear to courts that compensation should be determined based on owners’ actual losses rather than the fair market value of the property according to the condemner.¹⁷⁷ The State Supreme Court had its first chance to address the new constitution in *State ex. rel. Department of Highways v. Constant*.¹⁷⁸ In its decision, the court recognized an enlarged measure of damages aimed at putting the property owner in equivalent financial circumstances after taking as he had been prior.¹⁷⁹ Property owners in Louisiana are entitled to compensation for loss of property, and business or consequential losses resulting from a taking.¹⁸⁰ Louisiana courts have said property owners can recover for loss of future rental income, and lessees can recover for loss of business interests.¹⁸¹ The broad protections Louisiana provides property owners through its understanding of just compensation serves the Fifth Amendment’s fairness purpose, and is consistent with property law’s general indemnity of property owners from interference. It also shows that the public fisc can support greater compensation without thwarting public projects.

D. Comparison Between Legislative, Judicial, and Constitutional Reforms

Legislative reforms have the potential to encourage settlement and compromise.¹⁸² If legislative reforms required higher compensation, property owners would be less likely to resist eminent domain actions. Or, as was probably the case in *Kelo v. New London*, property owners would

¹⁷³ *Id.* at 354-61.

¹⁷⁴ *Id.* at 355.

¹⁷⁵ *Id.* at 355-56.

¹⁷⁶ *Id.* at 354-61.

¹⁷⁷ *Id.* at 356.

¹⁷⁸ 369 So.2d 699 (La. 1979).

¹⁷⁹ *Id.* at 701.

¹⁸⁰ Oswald, *supra* note 75, at 354-56.

¹⁸¹ *Id.* at 361.

¹⁸² Michelman, *supra* note 38, at 1254.

be less likely to take their cases to court. However, legislative reforms reflected in a number of state statutes do not appear to be bringing much progress to just compensation law or solving the problem of eminent domain overuse. The prospects for future legislative reform are not great because legislators' voting blocks are comprised of taxpayers who are more likely to be concerned about possible increases in taxes from increased just compensation than the possibility that eminent domain will affect their properties. Legislators are not enthusiastic to authorize greater compensation.¹⁸³ Therefore, reform should come from the judiciary or constitutional amendment. A Constitutional amendment may hold the greatest potential for just compensation progress among the states, but this is an idealistic solution. It would probably be less worthwhile to hope for constitutional amendments to the meaning of just compensation than for legislators to pass statutes increasing compensation packages. There is potential for courts to create the same reforms through case law as Louisiana drafted into their constitution, though.¹⁸⁴ Thus, the judiciary appears to be the most promising venue for meaningful just compensation reform.

VI. CONCLUSION: MAKING JUST COMPENSATION JUST

The Supreme Court's attention to just compensation in *Kelo*¹⁸⁵ implies its willingness to confront the question of whether and when fair market value provides adequate compensation to property owners. The Uniform Relocation Act and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act of 1970¹⁸⁶ provides a model for greater consequential indemnification to guide the Court in its interpretation of just compensation. If the Court even imposed the limited consequential provisions in the Act for state and local eminent domain actions, renters and owners would benefit greatly. However, whether and when the Supreme Court will actually confront questions surrounding the just compensation clause is unknown. In the meantime, eminent domain reform will remain a state objective. The majority in *Kelo* emphasized that states may place additional conditions on takings than those imposed by the federal government.¹⁸⁷ Successes in Alaska and Louisiana reveal that it is possible for states to compensate for consequential damages, and to revise the fair market value standard for compensation. Suggested reforms include a net-harm rule that accounts for parcel aggregation, consideration of replacement value in place of fair market value, indemnification of

¹⁸³ DeBow, *supra* note 105, at 588–89.

¹⁸⁴ See Oswald, *supra* note 75, at 376.

¹⁸⁵ *Kelo*, 545 U.S. 469, 507-08 (2005).

¹⁸⁶ See Callies & Saxer, *supra* note 69, at 152 n.150.

¹⁸⁷ *Id.* at 150 (citing *Kelo v. New London*, 545 U.S. 469 (2005)).

property owners from losses associated with precondemnation activity, and payment for consequential things such as relocation expenses, business losses, and emotional damages. Property owners and renters deserve some award in excess of fair market value in order to account for the reality that they are *not* willing sellers in the open market. Courts should bear these possible reforms in mind when revisiting whether just compensation standards are, indeed, “just”.

It is imperative that states seize the opportunity the Supreme Court has offered because just compensation reform is the most promising, prudent means to address current eminent domain problems of overuse and abuse. Ultimately, just compensation reform poses redress for what many argue constitutes a violation of individuals’ constitutional rights. While the government must exercise its right of eminent domain at times, it must only do so in a way that does not violate individual liberty or property rights, and only in a way that is both fair and efficient.

The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a “personal” right In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.¹⁸⁸

Adequate protection of the liberty right inherent in property necessitates eminent domain reform, and effective eminent domain reform necessitates a shift in focus from public use to just compensation. If Putnam is correct that “trustworthiness lubricates social life,”¹⁸⁹ then governments will also benefit from increasing compensation for takings through increased trust in the government’s assessment of the public interest and private rights. Building trust would likely stimulate the development of real and perceived networks of reciprocity among individuals and between individuals and government that could, in time, reduce resistance to eminent domain.

¹⁸⁸ Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

¹⁸⁹ PUTNAM, *supra* note 2, at 21.