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## Unjust Compensation: The Continuing Need for Reform

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# Unjust Compensation: The Continuing Need for Reform

*Michael DeBow\**

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## I. INTRODUCTION

The federal law interpreting and applying the calculation of “just compensation” under the Fifth Amendment does not adequately protect the rights of property owners. The key internal inconsistency that plagues the jurisprudence is easily seen in the Supreme Court’s 1979 opinion in *United States v. 564.54 Acres of Land*.<sup>1</sup> According to the majority opinion, in just-compensation cases the Court “has sought to put the owner of condemned property ‘in as good a position pecuniarily as if his property had not been taken.’”<sup>2</sup> But, after noting this aspiration, the opinion immediately admits that “this principle of indemnity has not been given its full and literal force,”<sup>3</sup> and therein lies the difficulty.

“Because of serious practical difficulties in assessing the worth an individual places on particular property,”<sup>4</sup> the federal courts have rejected a full-indemnification approach in favor of “a relatively objective working

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1. 441 U.S. 506 (1979).

2. *Id.* at 510 (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)).

3. *Id.* at 510-11.

4. *Id.* at 511.

rule.”<sup>5</sup> The rule they have adopted for most takings is known as the “fair market value” (FMV) standard. “Under this standard, the owner is entitled to receive ‘what a willing buyer would pay in cash to a willing seller’ at the time of the taking.”<sup>6</sup> For reasons discussed below, FMV’s focus on real estate market values excludes other direct damage to property owners. Put simply, the federal courts’ embrace of FMV in valuing condemned property has the effect of systematically undercompensating property owners.

As a result of this tendency to undercompensate, the federal law has been severely criticized in a large body of commentary, dating to 1916.<sup>7</sup> Virtually no one has defended the federal courts’ definition of just compensation.<sup>8</sup>

5. *Id.*

6. *564.54 Acres of Land*, 441 U.S. at 511 (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)).

7. For an annotated bibliography of 51 titles published from 1916 through 1983, see D. Michael Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises Are Condemned*, 15 SETON HALL L. REV. 483, 526-40 (1985). Later critiques include RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 51-56, 182-86 (1985); Laura H. Burney, *Just Compensation and the Condemnation of Future Interests: Empirical Evidence on the Failure of Fair Market Value*, 1989 B.Y.U. L. REV. 789; James G. Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277 (1985); Ann E. Gergen, *Why Fair Market Value Fails as Just Compensation*, 14 HAMLINE J. PUB. L. & POL’Y 181 (1993); Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721 (1993); H. Dixon Montague, *The Wonderful World of Eminent Domain: A Factual Analysis of a Fantasy World’s Determination of Just Compensation*, Institute on Planning, Zoning, and Eminent Domain 12-1 (1992); Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. REV. 283 (1991); Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829 (1989); Note, *Condemnations, Implicit Benefits, and Collective Losses: Achieving Just Compensation Through “Community,”* 107 HARV. L. REV. 696 (1994).

8. Of the 51 titles in the bibliography in Risinger, *supra* note 7, only one “contains anything that could be called an attempt at evaluative defense of [undercompensating property owners] . . . , and 42 condemn the assumed rule on justice grounds.” *Id.* at 526. All of the post-1983 writings included in note 7, *supra*, criticize federal practice as less than fully compensating property owners.

There is, however, an ongoing debate as to whether a reasonable basis exists for a constitutional requirement that compensation be paid in eminent domain actions. For descriptions of this debate, see Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT’L REV. L. & ECON. 125 (1992), or Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279 (1992). This discussion is too far afield to consider here; I will simply assume that the constitutional requirement will remain in place and that it should be given a reading consistent with the intention of its framers. See generally William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985). Readers interested in the debate to be avoided here may refer to Robert Tollison, *A Comment on Economic Analysis and Just Compensation*, 12 INT’L REV. L. & ECON. 139 (1992), or Barton H. Thompson, Jr., *A Comment on Economic Analysis and Just Compensation*, 12 INT’L REV. L. & ECON. 141 (1992), for defenses of a constitutional

Remarkably, this withering critique has not resulted in any substantial reform of federal law or federal land-acquisition policies. However, there have been some attempts at reform at the state level, perhaps inspired, at least in part, by the criticism of the federal approach.

Part II of this Article briefly sketches the outlines of the federal law of just compensation, the doctrinal flaws exposed by several commentators, and the nature of the reforms at the state level that repair, at least partially, similar flaws in state law. Part III then asks why, if the flaws in just-compensation law and practice are so clear, there has been so little done to end this injustice. Part II offers a tentative explanation for the longevity of unjust compensation and suggests a reform strategy that may help overcome the barriers to solving this problem. Part IV provides some concluding thoughts.

## II. JUST COMPENSATION AS CURRENTLY UNDERSTOOD

The fairness of compensation varies between the formula employed by the federal government and most state governments, on the one hand, and the formulas used by those state governments that have reformed their practices, on the other.

### *A. Federal Law and Its Critics*

From the owner's perspective, a federal taking can prove unpleasant. Relevant federal case law, statutes, and regulations empower federal agencies to condemn property without paying sufficient compensation to its owners to make them whole through the use of the FMV standard.

As suggested above, the FMV standard, which has been "repeatedly" endorsed by the Supreme Court, provides "that just compensation normally is to be measured by 'the market value of the property at the time of the taking contemporaneously paid in money.'"<sup>9</sup> Although the Court has stated that market value is not a "fetish" and that the market value approach "may not be the best measure of value in some cases[,]"<sup>10</sup> the kinds of cases that call for different measures of compensation have been narrowly defined.<sup>11</sup> As a practical matter, market value is the polestar in determining just compensation.

The market value of a piece of property may be ascertained through the use of three methods of valuation:

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requirement of full compensation.

9. *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)).

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

11. Lunney, *supra* note 7, at 729-31.

- (1) “Comparable sales” or “market data” approach: the sales and prices of comparable properties (in size, location, and time) are gathered to arrive at the value of the subject property;
- (2) “Income capitalization” approach: the amount of income the property generates and is projected to generate—generally based on past history—over the reasonably foreseeable future is determined, and then discounted to its present value; and
- (3) “Reproduction or Replacement cost less depreciation” or “cost” approach: the present cost to construct a similar or comparable structure to that being taken less depreciation is estimated.<sup>12</sup>

Although, as we will see shortly, there is some question about the proper interpretation of the case law in this area, it is widely understood that in practice the Supreme Court shows a strong preference for the comparable sales approach. “Indeed, if the taken property is of a kind regularly traded on an established market, the Court has held that the prevailing market price is the *sole* measure of just compensation.”<sup>13</sup> While the Court has recognized categories of takings in which the comparable sales approach is not appropriate, these exceptions have been defined narrowly.<sup>14</sup>

While the comparable sales approach may not appear unfair on its face, it becomes so because of the Court’s insistence that “the Fifth Amendment does not require any award for consequential damages arising from a condemnation.”<sup>15</sup> Accordingly, business people faced with a federal taking do not have a constitutional right to be compensated for relocation costs, although they may have some limited rights to compensation under a federal statute.<sup>16</sup> Further, business owners do not have a constitutional right to compensation for lost profits, the destruction of goodwill or going-concern

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12. Montague, *supra* note 7, at 12-29 (citing AMERICAN INST. OF REAL ESTATE APPRAISERS, *THE APPRAISAL OF REAL ESTATE* (6th ed. 1974)).

13. Lunnery, *supra* note 7, at 728 (citing *United States v. New River Collieries Co.*, 262 U.S. 341, 344-45 (1923)).

14. *Id.* at 728-29; Montague, *supra* note 7, at 12-29 to 12-32.

15. *United States v. 50 Acres of Land*, 469 U.S. 24, 33 (1984) (citing *United States v. General Motors Corp.*, 323 U.S. 373, 382 (1945); and JACQUES B. GELIN & DAVID W. MILLER, *THE FEDERAL LAW OF EMINENT DOMAIN* § 2.4(B) (1982)).

16. The Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601-4655, provides some limited assistance to homeowners and businesses who are the targets of federal takings or state takings involving federal funds (such as highway projects). Nonetheless, the maximum amounts payable under the statute may, in any given case, be inadequate. In particular, no provision is made for lost profits or goodwill. *See generally* *Norfolk Redev. & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30 (1983). For a good overview of this statute, see Catherine R. Lazuran, Annotation: *Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970*, 33 A.L.R. FED. 9 (1977).

value occasioned by relocation of their business, or the attorney fees and other expenses incurred in fighting the taking.

These rules of noncompensation are sometimes referred to collectively as the “business losses rule.” It is an appropriate name, because the rule means that businesses lose if the government desires their commercial property. Simply put, the approach to valuation sanctioned by the Court focuses on hypothetical sales prices based on supposedly similar sales in the real estate market and ignores the government’s destruction of nonreal estate assets of the business.

To be sure, there is considerable confusion and uncertainty in the case law. Accordingly, do business owners not have some room to argue for fuller compensation? The answer is yes, but only to a point.

Most commentators agree that the case law in this area is confusing. Professor Glynn Lunney recently took the position that,

[a]s has been the case with respect to the issue of whether a taking has occurred, the Court has tried to pretend that its decisions regarding the proper measure of compensation are consistent with one another—a suggestion that, despite the frequency with which it is made, is no more plausible here than it is when made with respect to the Court’s rulings on whether a taking has occurred.<sup>17</sup>

Lunney further asserts that, in its just-compensation decisions,

the Court has vacillated between a realistic award that is intended to indemnify the former owner fully for the loss suffered, and a less generous award that is intended to limit, as much as reasonably possible, the government’s obligation to pay. The central difficulty for a practitioner in the area is that the Court has never overruled expressly its inconsistent decisions. Thus, even today, when the Court’s most recent decisions seem to prefer the less generous measure of compensation,<sup>[18]</sup> the more generous standards reflected in some of the Court’s earlier decisions<sup>[19]</sup> remain good law, and may legitimately be applied by a court, if it should choose to do so.<sup>20</sup>

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17. Lunney, *supra* note 7, at 722-23 (footnotes omitted).

18. *See* *United States v. 50 Acres of Land*, 469 U.S. 24 (1984); *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979); *United States v. Fuller*, 409 U.S. 488 (1973). *But see* *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973).

19. *See, e.g., Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

20. Lunney, *supra* note 7, at 769 (footnotes in original).

Lunney's conclusions are echoed in the advice given to practicing attorneys by Dixon Montague, a partner in Houston's Vinson & Elkins:

Remember that in eminent domain, each case turns on its own facts. It is a mistake to rely wholly on precedent to structure a condemnation case. Be novel, be creative, always using as the foundation the rule stated by the United States Supreme Court in *United States v. Miller*:

The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken.<sup>21</sup>

While the unsettled state of the law gives property owners and their advocates some room to maneuver, they clearly face an uphill struggle. As Lunney notes, the trend in Supreme Court decisionmaking is in favor of unjustly meager compensation.<sup>22</sup> This trend is not likely to escape the notice of the lower federal courts or, perhaps more significantly, the attention of those federal agencies that routinely condemn private property.

Nor can much solace be taken from the fact that most condemnation matters are settled without litigation.<sup>23</sup> Such settlements do not prove that most property owners, if not perfectly satisfied with the amounts offered by the agencies in question, nonetheless receive an amount at least close to just compensation. If, as argued above, the law of just compensation is structured in a way that strengthens the government's bargaining position vis-a-vis the owners of condemned property, then the negotiations between the government and property owners will take place in the shadow of this law and of the likely outcomes at trial under the law. Even though most property owners' complaints are settled without trial, this fact certainly is no argument in favor of the status quo with respect to just compensation. These settlements almost certainly are lower than they would be if the law of just compensation was more justly defined.

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21. Montague, *supra* note 7, at 12-40 (quoting *United States v. Miller*, 317 U.S. 369, 373 (1943)) (footnotes omitted).

22. See *supra* note 20 and accompanying text.

23. According to one observer, "[m]ost—perhaps ninety-eight percent—of the land acquired by eminent domain is obtained without litigation, by private negotiation; hence, without constitutional disputes." GEORGE LEFCOE, *LAND DEVELOPMENT LAW: CASES AND MATERIALS* 108 (1966). Note, however, that the author does not cite any source for the 98% figure.

*B. State Law Reforms*

In the case of a taking by a state or local government entity, the level of compensation may, in some jurisdictions, be more nearly just compensation than under federal law. Although most states generally follow the federal approach to compensation, several have seen the injustice of their ways and have adopted fairer compensation schemes—either through legislation, judicial opinions, or constitutional provision. A recent article by Professor Lynda Oswald provides an excellent description and discussion of these reforms, which recognize, to one degree or another, “that losses of goodwill, going-concern value, or profits are real losses for which the property owners should be compensated.”<sup>24</sup> Which of these state-level reforms could be used as a model for reform efforts in other states and at the federal level?

Consider first the state legislative response to the problem of unjust compensation. Professor Oswald explains that none of the reform statutes “provide comprehensive recovery for business owners. Rather, in each instance, we see the legislatures picking and choosing among categories of aggrieved landowners, offering compensation (usually quite limited in scope) to some and denying it to others.”<sup>25</sup> Oswald’s article describes the turn of the century water supply acts passed in several states,<sup>26</sup> the Florida statute that allows recovery of business losses in a limited set of partial takings situations,<sup>27</sup> the Vermont statute that permits recovery for business losses due to takings for highway construction,<sup>28</sup> and the California and Wyoming statutes adopting the provision in the Uniform Eminent Domain Code dealing with recovery for loss of goodwill.<sup>29</sup>

After discussing each of these reform statutes, Oswald concludes that “[t]he legislative reform that has occurred to date has tended to be haphazard and weak. The legislatures have drawn arbitrary lines between categories of landowners and classes of injury, creating a crazy-quilt pattern of recovery.”<sup>30</sup>

Oswald then turns to the judicial opinions that have changed the law of just compensation in several states. She identifies five states, beginning with Georgia in 1966,<sup>31</sup> whose state supreme courts have concluded that their state constitutions require compensation for at least some business losses that flow

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24. Oswald, *supra* note 7, at 284.

25. *Id.* at 321.

26. *Id.* at 321-22.

27. *Id.* at 322-26 (discussing FLA. STAT. ANN. § 73.071(3) (b) (West 1987)).

28. *Id.* at 326-29 (discussing VT. STAT. ANN. tit. 19, § 501 (1987)).

29. Oswald, *supra* note 7, at 329-34 (discussing CAL. CIV. PROC. CODE § 1263.510 (West 1982) and WYO. STAT. § 1-26-713 (1988)).

30. *Id.* at 334.

31. *Id.* at 334-38 (discussing *Bowers v. Fulton County*, 146 S.E.2d 884 (1966)).



from the exercise of eminent domain. In addition to Georgia, these jurisdictions are Minnesota,<sup>32</sup> Michigan,<sup>33</sup> Wisconsin,<sup>34</sup> and Alaska.<sup>35</sup>

Oswald argues that the Alaska Supreme Court's decision presents "the most analytical and comprehensive reasoning for rejecting the [business losses] rule."<sup>36</sup> The decision, *State v. Hammer*,<sup>37</sup> deals with the condemnation of a building by the state for highway construction. One of the building's tenants, a bar, took nine months to reopen at another location following the taking. It then sought recovery of "temporary loss of profits due to business interruption directly resulting from [the] state's taking . . . ."<sup>38</sup> As Oswald describes the Alaska court's decision:

The court examined the rationales traditionally presented for denying recovery of business losses, and found them lacking. First, the argument that damage to personal property need not be compensated was clearly inapplicable, for Alaska law explicitly makes the loss of such property compensable.<sup>[39]</sup> Second, the *Hammer* court found the reasoning articulated by the United States Supreme Court in *Mitchell* that the condemnor takes only the land, not the business, equally unpersuasive. Third, the *Hammer* court rejected the theory that business losses, particularly lost profits, are too speculative and uncertain in amount to award. The court noted that damages for loss of profits are awarded in a variety of other civil contexts, provided the loss is supported by sufficient evidence. If the aggrieved party can prove its damages with reasonable certainty, it can recover them; if the proof is lacking, the damages are not allowed. The court found it "incongruous that courts allow proof of loss of profits damages in most types of actions, on a case by case basis, and yet in eminent domain cases bar all such claims as inherently speculative."<sup>40</sup>

The Alaska court clearly is correct in concluding that the business losses rule lacks a persuasive evidentiary foundation. Recognition of business losses

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32. See *Minnesota v. Saugen*, 169 N.W.2d 37 (Minn. 1969).

33. See *Michigan State Highway Comm'n v. L & L Concession Co.*, 187 N.W.2d 465 (Mich. Ct. App. 1971).

34. See *Luber v. Milwaukee County*, 177 N.W.2d 380 (Wis. 1970).

35. See *Alaska v. Hammer*, 550 P.2d 820 (Alaska 1976).

36. Oswald, *supra* note 7, at 351.

37. 550 P.2d 820 (Alaska 1976).

38. *Id.* at 823.

39. *Hammer*, 550 P.2d at 823 & n.6 (citing ALASKA STAT. § 01.10.060 (1982)) ("In the laws of the state, unless the context otherwise requires . . . , 'property' includes real and personal property."); *Alaska v. Ness*, 516 P.2d 1212, 1214 n.9 (Alaska 1973); *Stroh v. Alaska State Housing Authority*, 459 P.2d 480, 483 (Alaska 1968).

40. Oswald, *supra* note 7, at 351-52 (quoting *Hammer*, 550 P.2d at 825) (footnote in original) (footnotes omitted).

would not impose burdens on the court system that the system does not already bear in other areas of commercial litigation. The experience in states that allow recovery has borne out this point.<sup>41</sup>

Oswald is more enthusiastic about the state judiciaries' attempts at reform than she is about the state legislative efforts. For Oswald, the former "evidence a fundamental shift in the legal reasoning underlying the business losses rule."<sup>42</sup>

In addition to the statutory and case law developments, Oswald describes Louisiana's experience with a state constitutional provision, added in 1974, that provides that the owner of property taken by the state "shall be compensated to the full extent of his loss."<sup>43</sup> According to her reading of the history of this language, the delegates to the state constitutional convention intended to bring about "extensive changes in the law."<sup>44</sup>

The Committee Report stated that "[t]he term 'full extent of the loss' is intended to permit the owner whose property has been taken to remain in equivalent financial circumstances after the taking." The phrase was intended to include items "which, perhaps, in the past may have been considered *damnum absque injuria* [sic], such as cost of removal," costs of litigation and attorneys fees, costs of reestablishing a business, inconvenience, or loss of business profits. To facilitate this comprehensive measure of damages, the delegates intended that "owner" and "property" be defined in their "broadest sense."<sup>45</sup>

In spite of this history, there were questions about the working definition that would be given this language by the organs of state government that effect takings and by the judiciary. These questions were largely answered by the Louisiana Supreme Court in *Louisiana Department of Highways v. Constant*,<sup>46</sup> which read the new constitutional provision as a "mandate[] that business owners receive sufficient compensation to restore their business facilities to their pre-condemnation condition, even where the compensation so required exceeds the market value of the entire parent tract."<sup>47</sup> Subsequent decisions have expanded on the *Constant* court's holding that "[t]he very

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41. This is particularly true of Vermont's experience, for according to Oswald, "The Vermont courts have had little trouble dismissing the old chestnut that business losses are too speculative to permit recovery." *Id.* at 328.

42. *Id.* at 334.

43. LA. CONST. art. I, § 4.

44. Oswald, *supra* note 7, at 356.

45. *Id.* at 356-57 (footnotes omitted). For a discussion of this constitutional provision by its author, see Louis "Woody" Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 19-27 (1975).

46. 369 So. 2d 699 (La. 1979).

47. Oswald, *supra* note 7, at 359 (construing *Constant*, 369 So. 2d at 705).

purpose of the constitutional language was to compensate an owner for any loss he sustained by reason of the taking, not restricted . . . to the market value of the property taken and the loss of market value of the remainder.”<sup>48</sup> Professor Oswald concludes that Louisiana law

afford[s] property owners in Louisiana greater protection than they would receive virtually anywhere else in the United States. This provision rejects the notions that the public fisc cannot support full and complete compensation for takings, that public projects would be thwarted by increased costs if such compensation were allowed, and that individuals should be forced to endure a loss for the sake of a public gain.<sup>49</sup>

### III. REFORMING JUST-COMPENSATION LAW

#### A. *Why So Little Reform?*

The preceding materials demonstrate three points. First, there are significant flaws in the federal approach to just compensation that have the effect of systematically undercompensating property owners, particularly business owners. Second, these flaws and their consequences are well-known. Third, the reforms instituted in several states—particularly Louisiana and Alaska—could be used as models for reform of federal law and the laws of those states that follow the federal example.

The persistence of the critics of FMV-based compensation and the limited successes of reform proposals made at the federal and state levels present an interesting puzzle. Why, given the virtual unanimity of opinion as to the presence of injustice in this area,<sup>50</sup> has there been no real reform of the business losses rule at the federal level<sup>51</sup> and only sporadic efforts among the states to address this problem?

One explanation is that political officeholders, whom we will assume prefer a broader range of discretionary power, do not wish to be constrained by the requirement of just compensation. To the extent that a just-compensation rule lessens the number of projects the government can undertake, those

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48. 369 So. 2d at 702 (citation omitted).

49. Oswald, *supra* note 7, at 362. For a similar assessment of the impact of the 1974 amendment, see Tracy L. Howard, Comment, *Compensating an Owner to the Full Extent of His Loss: A Reevaluation of Compensable Damages in Louisiana Expropriation Cases*, 51 LA. L. REV. 821 (1991).

50. See *supra* note 8.

51. The Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601-4655, described in note 16, *supra*, allows the recovery of some moving and relocation expenses, but does not address the other types of “consequential damages” that are disallowed by the dominant case law under the Fifth Amendment.

in the government have a vested interest in adopting rules of thumb in just compensation matters that undercompensate property owners in order to expand the reach of government.

A parallel explanation begins with a recognition that Congress and state legislatures clearly have the power “to make provision for compensation in excess of the minimum to which the owner is constitutionally entitled . . . .”<sup>52</sup> Keep this point in mind and consider the dynamics of the debate over just compensation using a few basic ideas from “public choice” theory—the branch of economics that analyzes politics.

If the legislature can authorize more compensation to be paid than a constitution (as incorrectly interpreted) is said to require, then its members have a rather valuable opportunity to perform constituent services whenever the government seeks to condemn private property. These services probably can be provided with the expectation that they will generate the kind of reciprocity that greases the wheels of politics.<sup>53</sup> That is, the grateful property owners who receive the help of their legislators in getting fuller compensation from the state are likely to view the helpful legislators in a favorable light and be more disposed than previously to provide support—political and financial—to the inevitable re-election efforts of the legislators who helped them.

One can find traces of this kind of constituent service. The most obvious are special legislative acts to benefit individual property owners or small groups of owners. The water supply acts mentioned earlier<sup>54</sup> fit this description; they provided for recovery of lost goodwill and going-concern value by business owners whose property and business were taken for the construction of reservoirs.<sup>55</sup>

Legislators and other elected officials also could extend their assistance to besieged property owners in less formal ways. The elected official might become the advocate of the property owners with the relevant bureaucrats—in the highway department or the urban renewal bureaucracy, for example—and seek to negotiate a greater compensation for the property owners. The imprecision of the valuation methods used provide the government bureaucracies with considerable room to negotiate a settlement figure; perhaps the intervention of legislators on behalf of the property owners could skew this figure in favor of the owners. I can offer no proof that this occurs.<sup>56</sup> It does

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52. 3 JULIUS L. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 8.21, at 8-182 (rev. 3d ed. 1993).

53. For a discussion of the importance of constituent services to elected representatives' maintenance of their political power bases, see RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978).

54. See *supra* notes 24-26 and accompanying text.

55. See Oswald, *supra* note 7, at 321-22.

56. I would note that my argument seems to be consistent with the results of the classic empirical investigation of takings compensation, which concludes that owners of “high-valued

seem logical, however, that a reasonably sophisticated property owner would explore any possible avenue for relief and likely that the owner would think of contacting his or her elected representatives for help.

This theory of the likely role of legislators in the compensation process provides at least a partial explanation for the “crazy-quilt pattern of recovery”<sup>57</sup> detected by Professor Oswald in the state statutes she analyzed. If legislation is produced in response to “interest group” pressures, it should not be surprising that legislatures draw “arbitrary lines between categories of landowners and classes of injury.”<sup>58</sup> The seemingly “arbitrary” lines reflect the boundaries between groups and individuals who have mobilized and entered the political arena and those groups and individuals who have not. To an elected official, this is not arbitrariness, but the very stuff of politics.

A related point may explain the absence of broadly drawn just-compensation statutes in the states. Why should a legislator vote for a statute that would protect all property owners when he can protect the property owners in his district one at a time and, thus, extract the loyalty and support of these owners? This is the difference between giving away protection wholesale and selling it retail.<sup>59</sup> Perhaps this explains the lack of interest among most legislators, in most jurisdictions, in broadly drawn reform legislation respecting just compensation.

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parcels systematically receive more than market value and [owners of] low-valued parcels receive less than market value.” Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 495 (1976). It seems likely that the owners of high-valued parcels would be in a better position to seek the assistance of legislators and other elected officials than would the owners of low-valued parcels.

57. Oswald, *supra* note 7, at 334.

58. *Id.*

59. Viewed in this way, the threat of unjust compensation performs the same function for the legislators involved in helping the property owners as “milker bills” introduced in the legislature:

Early on in my association with the California legislature, I came across the concept of “milker bills”—proposed legislation which had nothing to do with milk to drink and much to do with money, the “mother’s milk of politics.” . . . Representative Sam, in need of campaign contributions, has a bill introduced which excites some constituency to urge Sam to work hard for its defeat (easily achieved), pouring funds into his campaign coffers and “forever” endearing Sam to his constituency for his effectiveness.

Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 108 (1987) (quoting W. Craig Stubblebine, On the Political Economy of Tax Reform 1, 2 (paper presented at the meeting of the Western Economic Association, 1985)).

My hypothesis that legislators retail help to property owners seeking just compensation also seems consistent with Professor McChesney’s further observation that “as courts have retreated from affording constitutional protection against legislative takings, potential private victims have been forced to employ more self-help remedies by buying off politicians rather than submit to rent-extracting regulation.” *Id.* at 109.

*B. Strategies for Just Compensation Reform*

Given the track record of reform proposals regarding just compensation, it is easy to be pessimistic about the possibility of real reform in this area. Nonetheless, a few bright spots may be seen in this picture, and some strategies drawn from them.

Perhaps most importantly, the public's awareness of issues that flow from governmental takings of private property seems to be increasing. The "property rights revolt" at the state level has had some early successes in legislating new approaches to regulatory takings.<sup>60</sup> The groups that have spearheaded this effort—including Defenders of Property Rights and the American Legislative Exchange Council—should seriously consider adding just compensation to their package of issues. The lessons of Vermont, Alaska, and Louisiana provide models for either a state legislative or a state constitutional response to the problem of undercompensation. In the event that none of these models is attractive, there is the simple alternative proposed by Professor Michael Risinger: A definition of just compensation inclusive of all "general damages" that flow from the taking.<sup>61</sup>

Further, the arguments for just compensation reinforce the arguments these groups have made on behalf of reforming regulatory takings, and vice versa. It should be easy to blend a debate on just compensation into the debate about regulatory takings. In addition to state legislative action, property-rights advocates might consider launching ballot initiatives, or constitutional amendments drives, in those states where these strategies are open to them.

One lesson for attorneys representing property owners is clear: Make the constitutional argument for just compensation whenever possible. While it is older, the Supreme Court never has explicitly overruled the case law that supports the position that fair market value as currently defined may not satisfy the constitutional requirement of just compensation.<sup>62</sup> In any given case, it may be possible to persuade a state's judiciary to follow the others who have begun to reform this mess.

At the federal level, the outlook for reform has brightened considerably. With respect to changes via litigation, one is confronted with the fact that the most recent Supreme Court decisions favor the narrow FMV definition of just compensation.<sup>63</sup> Nonetheless, one senses that something near a majority of

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60. See generally Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings,"* 46 S.C. L. REV. 613 (1995); see also Marianne Lavelle, *The "Property Rights" Revolt*, NAT'L L.J., May 10, 1993, at 1.

61. Risinger, *supra* note 7, at 490-91.

62. See *supra* notes 19-21 and accompanying text.

63. See *supra* note 18 and accompanying text.

the Justices recognizes that the Court's Takings Clause jurisprudence is not serving its intended function and is open to opportunities to issue corrective, if incremental, decisions. The House's passage of the Private Property Protection Act of 1995 strongly suggests that the time for just compensation reform has arrived. As this Article goes to press, the fate of the legislation in the Senate is not clear. However, the fact that the House saw fit to order compensation for several categories of regulatory takings when the regulations reduced the "fair market value" of the property by 20 percent or more is a signal achievement in the effort to reform takings law.<sup>64</sup> Moreover, congressional action might be made more likely by a cascade of state-level reforms. This might, for example, move Congress to amend the Uniform Relocation Assistance and Real Property Acquisition Policies Act<sup>65</sup> to provide for recovery of lost profits and goodwill and fuller recovery of relocation and moving expenses.

In short, it is likely that we will see meaningful reforms adopted by the states before we see serious reform at the national level.

#### IV. CONCLUSION

After nearly eighty years of criticism, the law of just compensation remains, for the most part, a "Serbonian Bog."<sup>66</sup> Perhaps the shabby state of just-compensation law should come as no surprise; after all, a just-compensation requirement with real bite would constrain those in government with an appetite for unfettered discretion and increased budgetary power. Given government's reluctance to admit that regulatory takings are, in fact, takings,<sup>67</sup> we probably should expect that, in those cases where the government has to admit that it is taking property, it will prefer to shortchange the property owner.<sup>68</sup>

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64. The Act defines "fair market value" as "the most probable price at which property would change hands, in a competitive and open market under all conditions requisiteto a fair sale, between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts, at the time the agency action occurs. 141 CONG. REC. H2630 (March 3, 1995). It is not apparent from the face of the Act that the House addressed any of the problems noted in this article with respect to the current definition of just compensation used by federal bureaucrats and courts.

For an overview of the Act, see Bob Benenson, *House Passes Property Rights Bill*, CONG. Q., March 4, 1995, at 680.

65. See *supra* note 16.

66. *Brazos River Authority v. City of Graham*, 354 S.W.2d 99, 105 (Tex. 1961), *quoted in* Montague, *supra* note 7, at 12-4. The author endorses this dictum, although he admits that he has no idea what a "Serbonian Bog" is.

67. For a fascinating example of such a denial, see the city government's characterization of its land-use regulations in *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2315 (1994).

68. For proof that government seeks to pay unjustly low prices in eminent domain actions one

But explaining government's unconstitutional behavior does not excuse it. Current federal law and practice, as well as state law that follows the federal, are inconsistent with the original meaning of the Fifth Amendment. By adopting the just-compensation requirement, the Framers chose a Lockean conception of property over the English feudal conception of property ownership as a concession of the crown that had manifested itself in numerous ways in the American colonies.<sup>69</sup> In 1979, however, the Supreme Court admitted that the "principle of indemnity" is not currently "given its full and literal force."<sup>70</sup> The Framers' bequest to us has been lost, and it is time to reclaim a just conception of just compensation.

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need only look to the fact that the federal government seeks to acquire property owned by state or local governments in such fashion. *See generally* Schill, *supra* note 7. The current federal policy on this issue states:

Public condemnees have sought to extend application of the replacement cost measure of compensation to properties of a more conventional nature than streets, highways, roads and alleys, such as buildings and landfills. The Supreme Court has ruled, however, that notwithstanding the need to replace the taken facility, when the fair market value of the property is ascertainable, fair market value is the proper measure of compensation.

UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS 60-61 (1992) (citing *United States v. 50 Acres of Land*, 469 U.S. 24 (1984)).

If one level of government is willing to shortchange another when both are nominally dedicated to the advancement of the public interest, an individual property owner whose property is condemned should not delude himself about the nature of what he is facing.

69. Treanor, *supra* note 8, at 695-98.

70. *See supra* notes 1-2 and accompanying text.



