A Full and Perfect Equivalent for Just Compensation: The Historical Context and Practice

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Is just compensation the next big thing?

WHEN THE U.S. SUPREME COURT began selectively applying the Bill of Rights to the states under the Fourteenth Amendment, it started with the Just Compensation Clause.[1] The Fifth Amendment's Takings Clause provides, of course, that "nor shall private property be taken for public use without just compensation."[2] "The critical terms are 'property,' 'taken' and 'just compensation.'"[3] In the past half-century, the Court has addressed—if not clarified—in what circumstances a valuable interest qualifies as "property" for purposes of the Takings Clause.[4] The Court has also established the standards for when an exercise of the eminent domain power is "for public use."[5] However, guidance from the

[1] See *Chicago, B. & Q. R. Co. v. City of Chicago,* 166 U.S. 226, 235 (1897) ("It is proper now to inquire whether the due process of law enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State.").

[2] U.S. Const. amend. V.

[3] *United States v. General Motors Corp.,* 323 U.S. 373, 377 (1945).

[4] *See, e.g., Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (interest generated by money deposited in lawyers' trust accounts is property); *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980) (interest on monies deposited in court is property); *Babbitt v. Youpee,* 519 U.S. 234 (1997) (the ability to transfer property by descent or devise is property).

[5] *See, e.g., Kelo v. City of New London,* 545 U.S. 469 (2005) (takings supported only by claims of economic development are not always vio-

Court regarding the third part of the eminent domain equation, just compensation, has been largely absent. The last time the Supreme Court took up a just compensation case was nearly thirty years ago.[6] The lack of scrutiny in the interim is not because the law governing compensation in condemnation cases is well-settled, uniformly applied, and truly "just." A quick scan of state court decisions should make that painfully clear.[7] To the contrary, the long absence of the Court's attention has permitted some lower courts to wander in the jurisprudential wilderness, and apply compensation rules that differ from the established rules, with no discernible reason for the difference; sometimes with bizarre and inequitable results.

The compensation issue has not escaped the Court's attention entirely, however. In two recent oral arguments, the issue appeared to be of interest even when the question was not presented by either petition. At the arguments in *Kelo*, a case involving the Public Use Clause, Justices Kennedy and Breyer raised the compensation issue:

JUSTICE KENNEDY: In all of those cases, I think the economic feasibility or economic success test would have been easily met. I mean, what you're doing is trying to protect some economic value[.] But I think it's pretty clear that most economists would say this development wouldn't happen unless there is a foreseeable chance of success.

Let me ask you this, and it's a little opposite of the particular question presented. Are there any writings or scholarship that indicates that when you have property being taken from one private person ultimately to go to another private person that what we ought to do is to adjust the measure of compensation, so that the owner—the condemnee—can receive some sort of premium for the development?
MR. BULLOCK: There may be some scholarship about that. This Court has consistently held that the property owner is simply entitled to just compensation of the appraised value of the property. Of course, the property owner—
JUSTICE KENNEDY: And you have to prescind the project when you fix the value.
MR. BULLOCK: I'm sorry?
JUSTICE KENNEDY: You have to prescind the project—you have to—you have to ignore the project when you determine the value. The value is a willing buyer and a willing seller, without reference to the project.
MR. BULLOCK: Yes, that is right. And so they simply get the—
JUSTICE KENNEDY: But what I am asking is if there has been any scholarship to indicate that maybe that compensation measure ought to be adjusted when A is losing property for the economic benefit of B.[8]

Justice Breyer also asked:
JUSTICE BREYER: So going back to Justice Kennedy's point, is 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?"[9]

More recently, in the arguments in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*,[10] Justice Kennedy asked:

lative of the Public Use Clause); *Hawaii Hous. Auth. v. Midkiff,* 467 U.S. 229 (1984) ("public use" is coterminous with the police power); *Berman v. Parker,* 348 U.S. 26 (1954) (taking of non-blighted property as part of a larger redevelopment project is not inconsistent with the Public Use Clause).

[6] *See United States v. 50 Acres of Land,* 469 U.S. 24 (1984).

[7] For a flavor, see Professor Gideon Kanner's blog, *Just Compensation*, www.gideonstrumpet.info, which regularly features "Lowball Watch," reports highlighting differences between condemnor offers and the eventual compensation awarded.

[8] *Transcript, Kelo v. City of New London,* 2005 WL 529436, at *15-16 (Feb. 22, 2005).

[9] *See id*. at 32-33.

[10] *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl Protection,* 560 U.S. 702 (2010).

JUSTICE KENNEDY: Let me ask you this question on Florida valuation. Assume you prevail, there's a cause of action for a taking. You have a beachfront area, beachfront home, in which there's a hurricane and there's a loss of the beach and a sudden drop, so that it's now a 60-foot, a 60-foot drop. The State comes in and says the only way they can fix this is to extend the beach and make it a larger beach on what was formerly our submerged land, and it does that, and it has the same rule. Under your view, is the State required to pay you for the loss of your right of contact to the beach, your littoral right, because there's let's say another 100 foot of new beach? Are they entitled to offset that against the enhanced value to your property by reason of the fact that they've saved it from further erosion and have given you a beach where there was none before?[11]

But even though there have been a few requests for the Court to reenter the field in the interim, it has not taken up the invitations, denying certiorari in cases that have presented meaningful questions regarding how just compensation is determined.[12]

THREE ISSUES TO WATCH • What are the pressing issues in this area? While there is a substantial body of case law on the subject of just compensation, three areas stand out as calling for guidance, if not from the U.S. Supreme Court, from the highest courts of the states. In the absence of guidelines, systematic undercompensation may be the result.

Compensation When an Owner Has No Concrete Development Plans

One principle from which courts have "not deviated is that just compensation 'is for the property, and not to the owner.'"[13] However, some courts hold that in order to be admissible, the property owner must show the use it claimed is the highest and best use "must be established as reasonably probable and not a 'speculative or hypothetical arrangement in the mind of the claimant.'"[14] In that case, the New York court also required the property owner to show that it "would bring the project to fruition in the near future."[15] In order to be "just," the compensation provided when the government exercises eminent domain and forces a private owner to surrender her property for the public good must be the "full and perfect equivalent for the property taken."[16] In measuring compensation, the Fifth Amendment requires a court to put the owner "in as good position pecuniarily as he would have occupied if his property had not been taken."[17] Compensation is measured "by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably ex-

[11] Transcript, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envt'l Protection,* 2009 WL 4323938, at *19 (Dec. 2, 2009).

[12] *See, e.g., River Center, LLC v. Dormitory Auth. of the State of N.Y.,* 905 N.Y.S.2d 18 (N.Y. App. Div. 2010), *cert. denied*, 132 S. Ct. 2102 (2012).

[13] *United States v. Bodcaw Co.,* 440 U.S. 202, 203 (1979) (per curiam) (holding that attorneys' fees are not embraced within just compensation because value is based on the property, not the owner's loss) (quoting *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 326 (1893)).

[14] *See, e.g., River Center, supra,* 905 N.Y.S.2d at 19-20 (quoting *In re Shorefront High School, City of New York,* 250 N.E.2d 333, 334 (N.Y. 1969)).

[15] *Id.*

[16] *Monongahela Nav. Co. v. United States,* 148 U.S. 312, 326 (1893).

[17] *Id. See also United States v. 50 Acres of Land, supra,* 469 U.S. at 25-26 (1984) ("The Fifth Amendment requires that the United States pay 'just compensation'—normally measured by the fair market value—whenever it takes private property for public use.") (footnote omitted).

pected in the immediate future."[18] But "mere possible or imaginary uses or the speculative schemes of its proprietor, are to be excluded."[19]

Thus, the central question and the guiding principle under the Fifth Amendment is whether the market (a seller and a buyer) would consider the proffered evidence of potential uses relevant.[20] This includes uses of land that may be restricted by law at the time of the taking; "[w]here potential uses are reasonably likely in the foreseeable future, we allow their consideration, but 'with discounts for the likelihood of their being realized and for their futurity.'"[21] Thus, contrary to the New York court's rule that the lack of tangible property owner plans to develop her property allows omission of evidence to support highest and best use, the relevant inquiry is what is the highest and best use to which the property may be put in the reasonable future, and plans that the property owner may or may not have are not dispositive. Indeed, the condemnor's intended use may even be the highest and best use of the property.[22] Two cases illustrate this established principle.

In *City of Bristol v. Tilcon Minerals, Inc.*,[23] the Connecticut Supreme Court held that the highest and best use of property was for residential development, even though the owner had no plans to develop the property in the immediate future. In that case, the court concluded the compensation owed to the owner of property that was being used for mining purposes adjacent to a municipal landfill was as a residential subdivision.[24] Even though the land was zoned for residential purposes, the property owner had extended its mining permit for an additional two years before the taking and was using the property as a storage site. It "did not intend to develop or to market the property for single-family homes in the immediate future."[25] The court examined other factors such as the zoning, access to the site, and whether utilities were available—and not the property owner's intent—to conclude that the property must be valued as a residential subdivision.[26] Similarly, in *Brazos River Authority v. Gilliam*,[27] the court held that land must be valued for use as a gravel operation, despite the fact that there was "no evidence that such would be conducted within the immediate future or within a reasonable time."[28]

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[18] *Mississippi & Rum River Boom Co. v. Patterson,* 98 U.S. 403, 408 (1878).

[19] *Chicago, B. & Q. R. Co.*, 166 U.S. at 250 (citations omitted).

[20] *See United States v. Miller,* supra, 317 U.S. at 373-74 (1943) ("It is usually said that market value is what a willing buyer would pay in cash to a willing seller."); *Boston Edison Co. v. Mass. Water Res. Auth.,* 947 N.E.2d 544, 552 (Mass. 2011) ("Because the determination of fair market value is based on what a reasonable buyer would believe the property to be worth, the highest and best use of the property is not limited to the present use of the property but includes potential uses of land that a reasonable buyer would consider significant in deciding how much to pay.").

[21] *Boston Edison*, 947 N.E.2d at 552 (quoting *Skyline Homes, Inc. v. Commonwealth,* 290 N.E.2d 160, 162 (Mass. 1972)). *See also Hietpas v. State,* 130 N.W.2d 248 (Wis. 1964) (property owner may introduce evidence that existing zoning regulations will be changed in the immediate future); *Sayers v. City of Mobile,* 165 So.2d 371 (Ala. 1964) (property owner is entitled to consideration on the basis of the highest and best use to which the property could be put).

[22] *See*, *e.g.*, *Monongahela Nav. Co.*, *supra,* 148 U.S. at 328 (highest and best use of the property was as a lock and dam, the very purpose for which the government condemned the property).

[23] *City of Bristol v. Tilcon Minerals, Inc.,* 931 A.2d 237 (Conn. 2007).

[24] *Id*. at 244.

[25] *Id.* at 246-47 (emphasis original) (footnote omitted).

[26] *Id.* at 247.

[27] *Brazos River Authority v. Gilliam,* 429 S.W.2d 949 (Tex. App. 1968).

[28] *Id*. at 952 ("Plans to so mine the property or not within any particular period would have no effect upon the general rules applicable to condemnation cases.").

The Courts Have Not Settled on a Standard for When Precondemnation Activities Influence Valuation

The lower courts have not settled on the standard to review a property owner's claim that the condemnor depressed the market value of property in anticipation of condemnation. Some discount such a claim entirely. Others apply a "primary purpose" or "intent" standard under which a property owner must show that the primary purpose of the regulation alleged to have depressed value was to accomplish that goal, and the entity that applied the value-depressing regulation was the same entity that took the property or was acting in concert with the condemning authority.[29] Other courts utilize a "nexus" standard, and look to the circumstances of each case to determine linkage between regulatory activity and property valuation.[30]

The Supreme Court should clarify that the Fifth Amendment requires courts to consider evidence the condemnor depressed the value of the property in anticipation of condemnation, and to set the appropriate standard of review. This rule is described by courts by a variety of labels including "inequitable precondemnation activities," "condemnation blight," and the "scope of the project rule." It also arises in a number of contexts.

In cases where the government institutes an eminent domain action and subsequently dismisses or discontinues it, or where a condemnor announces a taking but delays actually instituting the action, some courts consider it an form of inverse condemnation.[31] When it arises in eminent domain actions, some courts, this Court included, consider it within the "scope of the project rule" which requires a court to disregard any decrease (or increase) in value that is attributable to the project after the date the condemnor is committed to the project.[32] But Whatever label is attached, the rationale is the same and was explained best by the California Supreme Court in *Klopping v. City of Whittier.*[33] In that case, the court recognized two substantive rules: (i) when a condemnor delays acquisition of the targeted property for an unreasonably length of time or otherwise acts unreasonably and this causes serious economic harm to the property owner, the owner may recover just compensation; and (ii) the condemnor may not use the depressed "fair market value" as the measure of compensation. Rather, the owner is entitled to the fair market value of her property as it would have been without the precondemnation activities. The court explained that "the constitutional standard of 'just compensation' remains the guide."[34] Government remains free to plan to take property, but

[29] *See*, *e.g.*, *United States v. 480.00 Acres of Land,* 557 F.3d 1297 (11th Cir. 2009) (rejecting "nexus" test in holding that government did not leverage regulation to depress value), *cert. denied*, 558 U.S. 1113 (2010); *United States v. Land,* 213 F.3d 830 (5th Cir. 2000), *cert. denied,* 532 U.S. 904 (2001) (Corps of Engineers' denial of levee permit was not within the scope of the National Park System's eventual condemnation of the land); *United States v. 27.93 Acres of Land,* 924 F.2d 506 (3d Cir. 1991) (municipality's rezoning was not attributable to National Park Service); *United States v. Meadow Brook Club,* 259 F.2d 41 (2d Cir. 1958), *cert. denied,* 358 U.S. 921 (1958) (rejecting a "sole motive" test to hold that the Air Force was not influencing value when it rezoned the property).

[30] *See*, *e.g.*, *United States v. Truro,* 476 F. Supp. 1031 (D. Mass. 1979) (Congress motivated municipality to downzone property); *Assateague Island Condemnation Opinion No. 3,* 324 F. Supp. 1170 (D. Md. 1971) (local government adopted development moratorium at the urging of the Department of the Interior).

[31] *See*, *e.g.*, *Foster v. City of Detroit,* 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd,* 405 F.2d 138 (6th Cir. 1968).

[32] *See Miller*, supra, 317 U.S. at 375 (owners of property not originally part of a project are entitled to be compensated for any enhancement in value attributable to the project); *Jersey City Redevelopment Agency v. Kugler,* 267 A.2d 64 (N.J. Super. Ct. App. Div. 1970), *aff'd,* 277 A.2d 873 (N.J. 1971) (court rejected agency's argument that it had a constitutional right to acquire the affected land at its blighted price).

[33] *Klopping v. City of Whittier,* 500 P.2d 1345 (Cal. 1972).

[34] *Id*. at 1349.

"[I]t would be manifestly unfair and violate the constitutional requirement of just compensation to allow a condemning agency to depress land values in a general geographical area prior to making its decision to take a particular parcel located in that area. The length of time between the original announcement and the date of actual condemnation may be a relevant factor in determining whether recovery should be allowed for blight or for other oppressive acts by the public authority designed to depress market value."[35]

In *Klopping*, the city instituted condemnation proceedings to take land for a parking lot, but when it ran into problems selling its bonds, it dismissed the case. In the course of doing so, however, it expressly resolved that it would revive the condemnation when it got its financial house in order.[36] As a consequence, the properties became pariahs in the local market. One owner lost his commercial building by foreclosure when its tenants left and the rent stream dried up. The court held that these losses were recoverable.[37] Although other courts are in accord, this is not the universal rule that it should be.

The Fifth Amendment Protects a Property Owner's Right To Testify About Value

Finally, the Fifth Amendment should require a court always to admit a property owner's testimony regarding the value of his or her property. Most ourts allow such testimony as a matter of course.[38]Some, however, reject this rule and bar an owner from testifying, permitting only "expert" appraisal testimony to show the property's value.[39] Although the U.S. Supreme Court has held that owners of surrounding properties may testify regarding value even when they are unfamiliar with any comparable sales,[40] it has never squarely affirmed that the testimony of property owners must also be admissible, and cannot be subject to a blanket exclusion for lacking "expertise." Property owners understand the few protections available if they find themselves on the receiving end of an exercise of eminent domain, the "most awesome grant of power."[41] Consequently, what rights they do possess must be vigilantly safeguarded. This case presents the Court with an opportunity to confirm that property owners have special knowledge of property they own, and cannot be prohibited from testifying about its value simply because they may not be "experts."[42]

CONCLUSION • Will the U.S. Supreme Court take up any of these or other issues surrounding just compensation in the near future? We'll see.

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[35] *Id.* at 1350 n.1 (citations omitted). *See also* Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 Notre Dame Law. 765 (1973).

[36] *Klopping*, *supra,* 500 P.2d at 1348.

37 *See*, *e.g.*, *Luber v. Milwaukee County,* 177 N.W.2d 380 (Wis. 1970); *Lincoln Loan Co. v. State Highway Commission,* 545 P.2d 105 (Or. 1976); *Lange v. State,* 547 P.2d 282 (Wash. 1976); *Washington Market Enterprises v. City of Trenton,* 343 A.2d 408 (N.J. 1975).

[38] *See*, *e.g.*, *Porras v. Craig,* 675 S.W.2d 503 (Tex. 1984) (property owner may testify regarding value of his land, even if incompetent to testify about another's property); *Mississippi State Highway Comm'n v. Franklin County Timber Co., Inc.,* 488 So.2d 782 (Miss. 1986) (co-owner and former owner could testify about value); *Langfeld v. State Dept. of Roads,* 328 N.W.2d 452 (Neb. 1982) (owner familiar with property is competent to testify as to value); *Johnson's Apco Oil Co., Inc. v. City of Lincoln,* 282 N.W.2d 592 (Neb. 1979) (owner who is shown to be familiar with property may testify without further foundation); *Acheson v. Shafter,* 490 P.2d 832 (Ariz. 1971) (owner may testify whether or not he qualifies as an expert).

[39] *See*, *e.g.*, *River Center, LLC v. Dormitory Auth. of the State of N.Y., supra.*

[40] *Montana Ry. Co. v. Warren,* 137 U.S. 348, 354 (1890).

[41] *City of Oakland v. Oakland Raiders,* 220 Cal. Rptr. 153, 156 (Cal. Ct. App. 1985), *cert. denied,* 478 U.S. 1007 (1986).

[42] *Cf. United States v. 329.73 Acres of Land,* 666 F.2d 281, 284 (5th Cir. 1982) ("Such testimony is admitted because of the presumption of special knowledge that arises out of ownership of the land.") (citing *United States v. Sowards,* 370 F.2d 87, 92 (10th Cir. 1966)).