

DIRECT DAMAGES: THE LOST KEY TO CONSTITUTIONAL JUST COMPENSATION WHEN BUSINESS PREMISES ARE CONDEMNED

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I most especially want to thank my research assistant Robert K. Curtis, without whose patience and diligence I could never have stumbled through the fog I originally found myself in when I first encountered the law of “just compensation.”

I. INTRODUCTION

This article is pretty far afield from my usual areas of academic interest. I got involved in it when I had my car fixed a number of years ago. I randomly took my car to a Sunoco station in the town where I live. Though I was a stranger, the proprietors of the station fixed my car for about six dollars when they could easily have charged me ten times that amount. I became a regular customer, and I also became fairly friendly with the proprietors.

To make a very long story short, the gas station premises were condemned as part of an urban renewal project, and when I learned the shockingly small amount the proprietors were to receive as "just compensation" as a result of the condemnation, I agreed to represent them.

That case was ultimately settled, but I think it is important for me to share what I discovered as a result of that case. I think the reader will find it surprising, perhaps most especially the reader who believes himself or herself already familiar with the law in this area.

II. WHAT THIS ARTICLE IS NOT ABOUT

The scope of this article is in a sense narrowly limited. I will deal as little as possible with the question: "What kinds of actions may a government take and not have to pay anybody anything for any damage to them which may result?" Instead, I will consider only situations where the nature of the government action is such that everyone concedes and assumes that the government will have to pay someone something as a result of that action . . . that is, I deal only with explicit exercises of the power of eminent domain. Further, I will deal as little as possible with the question: "Are there people whose injuries as a result of the exercise of the power of eminent domain, if any, are so remotely related to the exercise of the power that they have no compensable interest at all?"¹

¹ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), (like many Holmes opinions) contains many quotable lines, a number of which might be used to buttress at various points the analysis set out in this article. However, it will not be cited again. This is because *Mahon* on its facts presents (in my opinion) primarily issues of the first and second types described above with which this article does not deal. On the other side of the same coin, Justice Douglas's opinion in *United States ex rel TVA v. Powelson*, 319 U.S. 266 (1943), contains many quotable lines which might be invoked in opposition to one point or another of this article. *Powelson* on its facts, however, dealt with a claim by a condemnee that, because the condemnee

Instead, I will consider only situations where the claimant is concededly in that pool of people which is most circumscribed, and to which slippery slope arguments conjuring images of governmental bankruptcy on the one hand or governmental paralysis on the other² least apply: people who concededly have a traditional, narrow, "real property" interest, generally either a fee interest or some sort of leasehold, relative to land taken by eminent domain.³ Without doubt, such people are entitled to "just" compensation.⁴ It is equally clear that many of them don't receive it.

One final introductory note: The main theses of this article

held the potential but unexercised power of eminent domain prior to condemnation by superior sovereignty, it ought to get, not the market value of the property it lost, but a premium reflecting a claimed increment in the value of its parcel resulting from hypothetical future assembly of a larger parcel by the eminent domain power which was in fact never exercised. The Court rightly rejected *that* claim, which has little to do with anything in this article. The narrowness of the actual issue in *Powelson* was recognized by the majority in *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 476 n.3 (1972). Finally, whatever interest one might have in the rhetoric of *Powelson* is greatly diminished by the post-1960 Supreme Court cases discussed *infra* section VII(B). For these reasons *Powelson* is not dealt with in the text of this article, though it is referenced in occasional footnotes.

² See the discussion of such hobgoblins in Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 597 (1954).

³ In the past two decades the puzzles generated by "takings" analysis have been a favorite subject of heavyweight academic examination. See, e.g., B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) [hereinafter cited as Sax, *Police Power*]. While not explicitly separating the issues, this literature concentrates mostly on the first two questions in the text. The measure of compensation due is dealt with, if at all, as an afterthought. Michelman, particularly, tends to make all three of the text questions sound as if they were parts of a single intractable puzzle better left to partial payment legislative solutions. Michelman, *supra*, at 1245-58. I dissent. However persuasive it may be to say that many government actions ought not to be found to give rise to takings, and that any compensation in such context ought to be through a system of part payments based on legislative grace, it is inappropriate for the courts to apply the same analysis to surrender the question of what constitutes just compensation for the clear victims of core takings. This remedial issue is of a traditional judicial sort, and presents no particularly difficult choices of constitutional policy, unless one is to accept as tenable an extreme political balancing model in which just compensation is *always* to be only part compensation, legislatively determined. Such a vision is inconsistent with nearly 200 years of judicial rhetoric, and with actual practice when only land is taken from a fee owner.

⁴ U.S. CONST. amend. V. This constitutional provision is applicable to the states through the fourteenth amendment. *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 122 (1978).

are developed and illustrated by reference to a hypothetical set of facts involving a petroleum marketing franchise business. The special characteristics of such a business make it especially useful in bringing home clearly and realistically the constitutional arguments and principles involved in this article. However, this is not in the end a "gas station" article. The principles of just compensation that emerge are constitutional principles of general application to all condemnations of business premises, and the implications of this generality of application are dealt with in the concluding sections of the article.

III. A TYPICAL CASE

Let us imagine a man named Smith. Smith is a resident of New Jersey who has been employed as an auto mechanic for some years and has saved a little money. Smith wants to be his own boss, which for many is as much a part of the American dream as owning their own home. Smith decides to do something which is meaningfully referred to in everyday terms as "buying a gas station business," and becoming its "proprietor."

What Smith buys, and what he will pay for it, depends upon an identifiable market mechanism. There is an ongoing market in gas stations, and that market provides a means of determining what the various options that Smith has are worth, and, therefore, will cost him. First, we assume that Smith wants to run a station which is an outlet for a major oil company, because of the associated benefits: a guarantee of supplies, advertising, credit card services, customer recognition, quality control of products, etc. To end up with such a business, Smith has four general options: first, he can purchase a piece of land with a vacant gas station on it (or build his own) and hope to obtain a major franchise;⁵ second, he can purchase a going station (land and building) with a franchise already attached; third, he can purchase a lease and franchise⁶ business where the actual land

⁵ The term "franchise" is here used in its most widespread current sense of a right granted by one person or corporation to another authorizing the other to carry on a business utilizing various exclusive proprietary rights of the first, such as trade names and trade secrets, generally coupled with various obligations on the part of the franchisee regarding the format and quality control of the business so conducted. The term "franchise" in this sense is now often found in statutes. See N.J. STAT. ANN. § 56:10-3(a) (West Cum. Supp. 1984-1985); *see also* Westfield Centre Serv. v. Cities Serv. Oil Co., 86 N.J. 453, 432 A.2d 59 (1981) (discussing franchise relationship).

⁶ The phrase "lease and franchise" is used here for the situation obtaining when a non-franchisor is the lessor of the premises where the franchise is operated.

and buildings are owned by some private party; or fourth, he can purchase a lease-franchise⁷ where the fee in the land and buildings is owned by the oil company.

All other factors being equal, each of these options will cost Smith a different amount of money. Of the four, the purchase of land and buildings without a franchise is least common, though it might end up being the cheapest, simply because it is so risky. A purchaser of only the land and buildings takes the chance that he will be unable to obtain a franchise from a major oil company. Oil companies issue franchises for their own business purposes. For example, to prevent unauthorized transfers from place to place, station franchises are almost universally restricted to a location designated in the franchise agreement. This restriction, not illegal under any applicable Federal regulatory legislation,⁸ allows the oil company to control market saturation and both inter-brand and intra-brand competition. It is not much of an overstatement to say that any station located where a major oil company would want a franchise will very likely already have one. Thus, it is not clear that a suitable "land and buildings" will even be on the market in any given community. Even beyond this risk, obtaining a franchise from a major oil company and its attachment to Smith's location may entail both purchase and transaction costs.

At the other extreme is the purchase of the fee interest in a gas station, with a franchise already attached. This option will cost Smith the most money. The difference between this option and the first option is the difference between buying a Checker car in New York City, and buying a Checker car with a taxi medalion attached to the hood. The purchase price represents the market evaluation of the package as an organic living whole, no matter what an accountant says later about rough and inevitably artificial allocations among various dissected parts.

If Smith does not have the money for a land-franchise package, there remain the other two options. Of those, the purchase of a lease and franchise package attached to non-oil company land is cheaper because it is riskier. Non-oil company landlords

Where the franchisor is also the landlord, many of the lease terms may be subject to regulation under various state and Federal protective laws applying to franchise businesses. Hence where the franchisor is also the landlord, I have used the hyphenated term "lease-franchise."

⁷ See *supra* note 6.

⁸ See Petroleum Marketing Practices Act, 15 U.S.C. §§ 2802-2841 (1982) (PMPA).

are not subject to the same legal restrictions as an oil company landlord, simply because they are not franchisors themselves and not subject to applicable protective legislation.⁹ Hence, they may evict at the end of terms for years, raise rents, and change land uses to take advantage of new usage opportunities much more freely than a franchisor landlord.

However, because of market control policies undertaken by major oil companies, a very common pattern of ownership in the industry involves the last of our four options: a lease-franchise with the fee in the land and buildings in the oil company.¹⁰ We will assume that that is what Smith buys. We will further assume that Smith pays \$25,000 for it.

Initially, we note here, for reasons that will be apparent later, that Smith did not buy "a mere future expectation" or "future profits"¹¹ except to the extent that all property represents such expectations, nor did Smith buy something divided up between such intangible parts as "franchise" and "good will" along with such tangible items as "stock." Smith bought an organic operating entity with a market value. Further, this asset that Smith bought today Smith could sell tomorrow, presumably for the same price. This market entity called a "going business" is as much property, and as an asset as much representative of Smith's current wealth, as a bond in a safe deposit box.

Our story continues as Smith devotes some years to his business. As a result of inflation, and of hard work, the market value of his business increases. Let us assume it doubles, to \$50,000.

⁹ See specifically *id.* and any supplementary state franchise protection not preempted by PMPA's preemption provision, *id.* § 2806, such as certain provisions of the New Jersey Franchise Practices Act, N.J. STAT. ANN. §§ 56:10-1 to -15 (West Cum. Supp. 1984-1985). See *Westfield Centre Serv. v. Cities Serv. Oil Co.*, 86 N.J. 453, 432 A.2d 59 (1981).

¹⁰ Though changing economic conditions have changed oil company attitudes about the desirability of the company-owned lease franchise station in recent years, there are still over 50,000 of them in the U.S. N.Y. Times, Oct. 6, 1984, at 31, col. 3.

¹¹ The terms "mere future expectation" and "future profits" are two labels sometimes slapped conclusively onto all forms of business loss through condemnation to render them "consequential" and therefore supposedly not subject to a requirement of compensation under the fifth amendment. Much of the rest of this article is devoted to an attack on the tenability of such a ploy either conceptually or under applicable U.S. Supreme Court authority. It has long been recognized that current market value of an asset reflects in part the market evaluation of those intangible future "expectations." Market value represents a "series of annual incomes capitalized into a fund of value." Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 254 n.156 (1931) (citing R. ELY & E. MOREHOUSE, *ELEMENTS OF LAND ECONOMICS* (1924)).

Because he is on a busy arterial street, Smith's business is thriving. However, there is a cloud on the horizon. Smith's station is on the edge of a zone comprised mostly of unused railroad property. This zone has been declared blighted, and is slated to be the site of a billion dollar urban renewal project to erect a high-rise office and residential complex. Smith's station is in the project zone, and it is condemned by the local redevelopment authority using the power of eminent domain, for transfer to the private developer undertaking the project.¹²

Smith is not happy to lose his business, but he remembers from his high school civics class that a collective improvement takes precedence over individual property, as long as just compensation is paid. This is some comfort until he finds out that the law says that he, Smith, gets a maximum of \$10,000 "in lieu of . . . actual relocation payments,"¹³ and nothing more. To add insult to this injury, he is informed that even this sum is a grace, because the requirement of "just compensation" pursuant to the Constitution would be satisfied if Smith were given *nothing*. This for an asset which he could have sold the day before for \$50,000.

The reason Smith gets, at most, the statutory \$10,000 is the result of a combination of two seriously flawed doctrines. As a result of a process of confused analysis, Smith's injuries may likely be labelled "merely consequential" and, therefore, not subject to compensation by the requirement of just compensation.¹⁴ Another way to put it is that there is an almost universal assumption that injuries to business resulting from condemnation of business premises need never be paid for pursuant to the just compensation requirements of the fifth amendment—the assumed "no business damages" rule.¹⁵ Secondly, while the lease part of Smith's lease-franchise arrangement is by statute indefinite, and cancellable only for cause,¹⁶ these favorable conditions are not taken into account in dividing the unitary award for the fee interest between Smith and the oil company. All that counts in Smith's favor is "the difference between the market rent and

¹² This is normal procedure for accomplishing large urban renewal projects. See Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504 (1959).

¹³ 42 U.S.C. § 4622(c) (1982).

¹⁴ See *supra* note 11.

¹⁵ See 2 P. NICHOLS & J. SACKMAN, NICHOLS' LAW OF EMINENT DOMAIN § 5.24 (rev. 3d ed. 1983). For a classically egregious case manifesting the assumption, see *Community Redev. Agency v. Abrams*, 15 Cal. 3d 813, 543 P.2d 905, 126 Cal. Rptr. 473 (1975).

¹⁶ 15 U.S.C. § 2802 (1982).

the rent reserved in the lease.”¹⁷ And since these leases typically have “floating” rents which are reestablished yearly, limited by the market rate as a ceiling, the value of the lease, under *that* formula, is nearly always zero, or close to it. Moreover, “relocation” for Smith is a meaningless concept, since to get what he had yesterday, *he’s going to have to pay somebody else \$50,000*, whether it’s down the street or across the state, and he now has, at most, only \$10,000.

IV. WHAT THIS ARTICLE IS ABOUT—DIRECT DAMAGES AND THE MYTHICAL “NO BUSINESS DAMAGES” RULE

In *Armstrong v. United States*,¹⁸ the Supreme Court of the United States defined the central policy of the fifth amendment as follows: “The Fifth Amendment guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing the people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁹ In light of this principle, any rule which denies a right of compensation to franchisees whose entire business net value has been destroyed by the exercise of the power of eminent domain must seem slightly suspect, to say the least. Indeed, in its generally assumed form, the “no business damages” rule in just compensation cases is virtually universally condemned on, ironically, *justice* grounds.²⁰ I shall show in this article that such a rule turns out to be more than merely suspect; it turns out to be *non-existent*. What a franchisee is *constitutionally* entitled to, as a *minimum*, is the market value of whatever salable package is taken *from* him by the condemnor’s seizing of his lease interest. This is nothing more than what is meant in modern remedies parlance by “general damages” when the term is used with any precision.²¹ For the purposes of this article, I will refer to these as “direct damages,” however, for historical reasons which will become apparent shortly.

As applied to this “present market value” definition of direct

¹⁷ *City of Newark v. Cook*, 99 N.J. Eq. 527, 133 A 875 (Ch. 1926).

¹⁸ 364 U.S. 40 (1960).

¹⁹ *Id.* at 49.

²⁰ See authorities collected and analyzed in, appendix *infra*. See particularly Kanner, *When is “Property” Not “Property Itself”: A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W.L. REV. 57 (1969); and Kanner, *Condemnation Blight: How Just Is Just Compensation*, 48 NOTRE DAME LAW. 765 (1973).

²¹ See D. DOBBS, *HANDBOOK OF THE LAW OF REMEDIES* 138-45 (1972).

damages, the “no business damages,” rule is not a rule, it’s a *myth*. Depending on how affected one has been by the myth, carefully fostered by condemning authorities, one will find the following theses more or less surprising:

(1) The Supreme Court of the United States has *never* failed to hold that properly claimed direct damages were the required measure of just compensation under the fifth amendment. On the contrary, for nearly a century, the Supreme Court has *always* required the payment of such direct damages in every case in which they were asserted.

(2) Every U.S. Supreme Court case cited in support of some more general “no business damages” rule did not in fact deal with a claim of direct damages, and does not stand for a general “no business damages” rule under the fifth amendment.

(3) Recent decisions of the U.S. Supreme Court make it clear that just compensation under the fifth amendment requires the payment of the market value of whatever salable package the condemnee *loses* as a result of the condemnation. Far from being revolutionary, this is consistent with Supreme Court authority of over ninety years standing.

V. THE HISTORY OF THE MYTHICAL “NO BUSINESS DAMAGES” RULE

The progenitor of all Federal and state “no business damages” cases was *Schuylkill Navigation Co. v. Thoburn*.²² This case was so influential that later cases referred to “the Rule in Thoburn’s case.”²³

Thoburn owned land with a stream on it which emptied into the Schuylkill River.²⁴ On the stream he had a water-driven mill, in which he installed machinery for the spinning of cotton thread.²⁵ The Schuylkill Navigation Company was a company authorized by the Commonwealth of Pennsylvania to erect dams and locks to make the Schuylkill navigable.²⁶ One of the company’s dams raised the water level of the stream so that part of Thoburn’s land was flooded, and the flow of the stream on his land was reduced to a point that it was worthless as a mill stream,

²² 7 Serg. & Rawle 411 (Pa. 1821).

²³ See, e.g., *Schuylkill Navigation Co. v. Farr*, 4 Watts & Serg. 362, 376 (Pa. 1842).

²⁴ *Thoburn*, 7 Serg. & Rawle at 412.

²⁵ *Id.*

²⁶ *Id.* at 411.

and thus his mill was rendered useless.²⁷

All parties agreed that the company, acting under delegated authority from the Commonwealth, had the obligation to pay just compensation, as required by the Pennsylvania Constitution, and as further required by statute.²⁸ At the trial, the company requested the judge to instruct the jury that Thoburn could recover only for injuries to his land and equipment, and not for any damages to his business.²⁹ The trial judge ruled that Thoburn could recover for any injury which was not the result of an asserted emotional or idiosyncratic attachment peculiar to Thoburn and allowed testimony concerning, not Thoburn's business, but the high profits to be made in the cotton spinning business in general.³⁰ Meanwhile, Thoburn had *relocated* his machinery to another mill and was once again in business.³¹ No claim for relocation expenses or profits lost while the relocation was undertaken seems to have been separately made.

The Supreme Court of Pennsylvania ruled that the case should have been resolved by the application of what was then ordinary damage theory.³² The court found that the agency of the injury complained of was the raising of the water level.³³ At the instant that rise was complete, certain damages came into existence.³⁴ There were the direct damages. In Thoburn's case they consisted of flooding his land in such a way as to put some acres under water and to destroy the value of a preexisting stream as a mill stream. The direct damages were the difference in value of the land flooded and unflooded (plus diminution in value of any equipment injured by the water). Any other injuries which accrued only as time passed, such as asserted lost profits, were consequential,³⁵ and could not be recovered as just compensation *because they could not be recovered under ordinary damage theory in 1821, even from a wrongdoer who caused such a flood.*

Thoburn has many interesting aspects. First, it was not a complete-destruction-of-business case—Thoburn could relocate and did.³⁶ Insofar as he was to be compensated for the loss of a mill

²⁷ *Id.* at 412.

²⁸ *Id.* at 420-21.

²⁹ *Id.* at 418.

³⁰ *Id.*

³¹ *Id.* at 412.

³² *Id.* at 421.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 421-22.

³⁶ *Id.* at 412.

stream and some buildings, he could apparently obtain a similar package by rent or purchase from the proceeds. Second, *Thoburn* was being a pig, and piggy plaintiffs have repeatedly gotten courts angry in this area and made bad law. The "lost profits" he was seeking were apparently not reduced to present value, and even if they were, they were also in some part attributable to the value of the mill stream, for which even the court's final formulation was already compensating him. Third, the court saw its ruling as being dictated by the application of the then-normal damage theory, in which damages to business such as lost profits could not be recovered *by anyone* because they were "consequential."³⁷ In so doing it set out a formulation of the difference between "direct" and "consequential," which was perhaps harsh, but at least intelligible and uniform.

The theoretical distinction between direct and consequential in *Thoburn* is not essentially different than that found today between "general" and "special" damages in the current leading treatise, Dobbs's *Handbook on the Law of Remedies*.³⁸ But now comes the truly astounding part of the story. The decisional rule in *Thoburn* that consequential damages could not be recovered was of course left far behind by damage theory over the next hundred years as courts began to allow the recovery of consequential damages in most contexts.³⁹ However, the rule in *Thoburn* was anachronistically retained in so-called "just compensation" law. Even worse, it was over the course of time applied in a degenerate form such that elements of damage "direct" under the *Thoburn* rule were sometimes labelled "consequential" in condemnation proceedings, and recovery denied.⁴⁰ The position of such decisions seemed to have been that the measure of constitutional "just compensation" was not simply 1821 damage the-

³⁷ *Id.* at 422.

³⁸ See D. DOBBS, *supra* note 21.

³⁹ See generally R. DUNN, RECOVERY OF DAMAGES FOR LOST PROFITS (1978). On "goodwill," see Comment, *Constitutional Law: Eminent Domain: Compensation for Injury to Business*, 11 CORNELL L. REV. 215, 217 & n.9 (1925). One can make a powerful argument that "just" compensation ought to be in dynamic conformity with prevailing theories of damages in the non-taking context.

⁴⁰ See, e.g., *In re New York, W. Shore & Buffalo Ry.*, 42 N.Y. Sup. Ct. 633 (App. Div. 1885) (denial of relocation expenses). Assuming relocatability, and no change of value upon completion of relocation, at the moment of condemnation a rational purchaser would pay only the previous value of the business less the relocation expenses. Thus relocation costs are and should always have been as direct damages when a business was relocatable, at least when the business owners were also the fee owners (thus eliminating the argument that such relocation would have had to be undertaken at the end of a term anyhow).

ory, but a narrowed and degenerate form of 1821 damage theory at that.

There is a combination of factors which explains this anomaly, at least up to a point. Between the decision in *Thoburn* and the beginning of the twentieth century, the bulk of all condemnations were undertaken by private corporations, generally transportation corporations such as railroads,⁴¹ by virtue of the delegated power of eminent domain which at an early date had been declared valid in the face of attacks that the power was not being employed for a public use.⁴² In any proceedings that occurred, the company was the named party, an obvious deep pocket target for the condemnee's neighbors on the jury.⁴³ Secondly, most condemnations were of undeveloped land in rural areas.⁴⁴ This fact had three ramifications: first, business property was rarely taken; second, when it was, there seems to have been an unstated assumption that the wide availability of land made relocation possible with minimum transaction costs; and finally, and most importantly, valuation proceedings were almost invariably by jury in the same small rural community where the owner of the interest taken resided. There was widespread suspicion, which clearly affected court decisions, that local juries gave inflated "premium price" awards against the railroads and canal companies even under the narrowest possible legal formula.⁴⁵ In the face of this fear, there was a great reluctance to expand the legal standard in any way that might turn juries loose any further,⁴⁶ no matter how just it might appear on its face, and no matter how the general law of damages had changed in the

⁴¹ As to the relative incidence of "private company" condemnation to public authority, a perusal of the reported cases collected at 20 C.J. EMINENT DOMAIN § 234 (1920) shows the dominance of private company cases during the period referred to. See also Freyer, *Reassessing the Impact of Eminent Domain in Early American Economic Development*, 1981 WIS. L. REV. 1263; McCormick, *The Measure of Compensation in Eminent Domain*, 16 MINN. L. REV. 461, 492 (1933); Note, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 66 (1957).

⁴² *Scudder v. Trenton Delacuaro Falls Co.*, 1 N.J. Eq. 694 (1832); *Aldridge v. Tuscumbia C. & D. R.R.*, 2 Stew. & P. 199 (Ala. 1832). See generally Bennett, *Eminent Domain and Redevelopment: The Return of Engine Charlie*, 31 DE PAUL L. REV. 115 (1981), and other authorities collected therein at 115 n.3, 116 n.5, and 116 n.7.

⁴³ Freyer, *supra* note 41, at 1269.

⁴⁴ See Comment, *Some Problems of Consequential Damages in Condemnation Proceedings*, 28 GEO. L.J. 986, 994 (1940); see also Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L. REV. 437, 449-50; Note, *supra* note 41, at 66-67, 89.

⁴⁵ Freyer, *supra* note 41, at 1278-82.

⁴⁶ Justice Douglas expressed concern over such "swollen verdicts" in *United States v. General Motors Corp.*, 323 U.S. 373, 385 (1945) (Douglas, J., concurring).

meantime. With a few notable exceptions,⁴⁷ the business damage question tended to become subject to a rote formula, mechanically and uncritically repeated. This rote formula was virtually cast in concrete by the publication of Lewis's treatise on eminent domain in 1888, a work which set it out in the broadest terms and failed to note such exceptional cases as did exist.⁴⁸ Unfortunately, this situation continued beyond the conditions that gave it some justification, or at least made it understandable. By the second decade of the twentieth century condemnation proceedings were increasing in urban areas,⁴⁹ and they increasingly were brought in the name of public agencies whose presence in the case made jurors think "higher taxes," not "deep pocket." Yet, the old formula survived by mindless repetition. Meanwhile, the law of damages had advanced to a point where in many contexts business damages and lost profits might be awarded.⁵⁰

VI. GENERAL THEORIES FOR THE MEASUREMENT OF "JUST COMPENSATION"

Ironically, the person whose business is totally destroyed by the taking of his business premises would be happy to return to 1821 damage theory, and to *Thoburn* itself. In order to understand this clearly, it is necessary to set out in outline form the various general approaches to constitutional just compensation that have been considered by the courts and commentators.

(1) *Value to the owner*—version 1. This approach would give to the person whose property is subject to an exercise of eminent domain the least amount that, if it had been offered with no condemnation on the horizon, would have persuaded *that* person to give up what he has lost. The problems of this formulation are twofold. First, it allows for the recovery of amounts representing the buyout of idiosyncratic emotional attachments (the family homestead), which can be massive. Second, the amount of compensation may in a given case become infinite if no amount of money would have been accepted in exchange for what was lost.

⁴⁷ See, e.g., *Chicago, S.F. & C. Ry. v. McGrew*, 104 Mo. 282, 15 S.W. 931 (1891) (allowing indirect damages); *Henry v. Pittsburg & Allegheny Bridge Co.*, 8 Watts & Serg. 85 (Pa. 1843) (same).

⁴⁸ See J. LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN § 147, at 196, § 487, at 639-43 (1st ed. 1888). Lewis badly misconstrues *Thoburn* and *Schuykill Navigation Co. v. Farr*, 4 Watts & Serg. 362 (Pa. 1842), as support for his extreme version of the assumed rule. See J. LEWIS, *supra*, at 639 n.1.

⁴⁹ See generally Comment, *supra* note 44.

⁵⁰ See, e.g., *Western Union Tel. Co. v. Hall*, 124 U.S. 444 (1888).

This formulation's unpredictable and uncontrollable inflation of what is due is the straw man knocked down by critics of all aspects of value-to-the-owner theory.⁵¹

(2) *Value to the owner*—version 2. This approach would give to the condemnee not what *he* would require to suffer the loss of condemnation, but the least amount a rational economic person in his position would require to suffer it. This approach includes the transaction costs of relocation and other reflections of the special economic advantage to the condemnee of not moving, but does not allow for idiosyncratic or emotional attachment. This version of value to the owner has been much neglected in analysis. It does not suffer from either the inflation or unpredictability of version 1. The only available criticism of it is that if, because of particular economic disadvantages in moving, the value to the rational economic owner can be shown to be higher than any other person would pay for what was taken, the government will in those cases have to pay more than any other buyer would have been willing to pay for what has been taken.⁵²

(3) *Value to the taker*. This formula would give the condemnee only what a rational economic taker would pay, absent the power of condemnation.⁵³ The problems are twofold. In most cases, where the government only wants ground, for example, but must destroy buildings to get it, the government would often only offer ground value as a matter of rational economics, while other available private buyers would offer more. In this case the government could force a sale to itself for less than an available private buyer would pay.⁵⁴ In other cases, as where land is most valuable only for a use which only a government could undertake, the amount to be paid might end up more than any private buyer would pay.⁵⁵ Nobody seriously argues for value to the taker anymore, and the only anomalous corner of the concept

⁵¹ *Thoburn* considers and rejects this version of value to the owner. *Thoburn*, 7 Serg. & Rawle at 420, 422. Its rejection seems to have been well understood and settled. See the instructions given by the trial court. *Id.* at 414. The theory is partly accepted in Canada. See Todd, *Winds of Change and the Law of Expropriation*, 39 CAN. B.J. 542, 553 (1961).

⁵² See generally McCormick, *supra* note 41, at 469. The rejection of replacement value in *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979) was a rejection of this version of value to the owner theory.

⁵³ See generally Hale, *Value to the Taker in Condemnation*, 31 COLUM. L. REV. 1 (1931); McCormick, *supra* note 41, at 461-67.

⁵⁴ This implication of value to the taker theory was recognized and rejected as unconstitutional in *Kimball Laundry Co. v. United States*, 333 U.S. 1, 13 (1949).

⁵⁵ See McCormick, *supra* note 41, at 461-65.

which occasionally rears its discredited head is found in the occasional attempt to invoke some assumed doctrine that there are elements of economic value in a condemnation setting which a condemnor must pay for if it uses them, but need not pay for if it destroys them.⁵⁶ This statement is at odds with the general implications of the now almost universally recognized theory, the market value theory. And, of course, it is also at odds with the universal requirement that the condemnor pay for the improved value of land even if it wants to tear down the buildings and use only the ground. Most importantly, it is at odds with recent United States Supreme Court authority.⁵⁷

(4) *Market value theory.* Market value theory is the universally accepted theory of valuation in the United States in the eminent domain setting.⁵⁸ Saying this, however, still leaves one very important question to be resolved: What package of economically valuable rights is to be submitted to the valuation of the market? Is it all those things the condemnee has lost that result in a diminution in the market estimate of his net wealth? Or should some things that are normally considered by the market be excluded from the estimate because they are classed as "things we don't pay for in giving just compensation" or "mere consequential damages"?

Here we are, then, at the heart of the reason why I say that "just compensation" law has applied a degenerate form of 1821 damage theory, and also why I say that Smith's quarrel is not so much with 1821 damage theory as with 1821 economic practicalities. When one reads *Thoburn*, it becomes clear from the language that, had Mr. Thoburn had *bona fide* offers to buy his yarn spinning business as a market package the day the waters rose, and because of the damage from the waters the price the yarn spinning business package would have fetched had fallen by half, or even to zero, upon such proof, he would have been entitled to the diminution in the going business package as *direct damages*.⁵⁹ In fact this distinction, and even the propriety of using lost profits evidence to show direct market value injury, was recognized twenty years after *Thoburn* in *Schuykill Navigation Co. v. Farr*.⁶⁰

⁵⁶ See 2 P. NICHOLS & J. SACKMAN, *supra* note 15, § 5.24, at 5-296 to -298.

⁵⁷ See *infra* section VII. See particularly *Almota Farms Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 475 n.2 (1973).

⁵⁸ Comment, *Just Compensation and the Assassin's Bequest: A Utilitarian Approach*, 122 U. PA. L. REV. 1012, 1013 (1974).

⁵⁹ *Thoburn*, 7 Serg. & Rawle at 422-23.

⁶⁰ 4 Watts & Serg. 362, 376 (Pa. 1842).

However, Mr. Thoburn offered no such proof, and the court never in so many words dealt with the possibility. Why? Perhaps sales of going businesses in the expanding United States of 1821 were uncommon and people did not think in those terms as a matter of habitual economic conceptualization. It is not, however, because the law of damages would not have allowed such a recovery had it occurred to somebody to prove such a loss. It is only as a result of the very special conditions prevailing in condemnation proceedings in the nineteenth century, which have already been described, that authorities such as Lewis lost sight of the important distinction between direct and consequential damages. This process of degeneration was reinforced by the unfortunate habit of litigants, courts, and commentators in this specialized area of the law to speak of loss factors as separate entities rather than as inseparable factors in the organic package of the present market value of a business.⁶¹ When one speaks of "lost profits" it sounds as if one is in fact speaking of a future and somewhat speculative item. The same is even more true in regard to "loss or injury to goodwill." In fact, viewing such an intangible as an entity, one may not even be able to say very persuasively what it is,⁶² much less what it is worth when it is concentrated on in isolation. But that approach is rather like the approach of the medieval biologists who looked for the seat of life and the soul by dissection of living animals and rather predictably ended up with only dead parts. A going business has a present organic value which is usually much more certain than the value attributable to such isolated factors. Nothing is more well established in the field of economic valuation than the current market valuation of a going business.⁶³ While such a process may have the same problems as any other valuation process, it is certainly no less established and routinized, nor more problematic, than the process of land valuation, which is universally resorted to in condemnation cases when land is properly the only

⁶¹ Remarkably, even those criticizing the rule have habitually made the error from an early point. The error is reflected in *every* authority collected in the appendix *infra*, and only one article comes close to developing the direct damages play. See Aloï & Goldberg, *A Reexamination of Value, Good Will and Business Losses in Eminent Domain*, 53 CORNELL L. REV. 604 (1968).

⁶² See Malek, *Loss of Business Goodwill in Eminent Domain Proceedings*, CAL. ST. B.J. Jan.-Feb. 1978, at 35; Note, *The Lessee and Goodwill in an Eminent Domain Proceeding*, 8 W. ST. U.L. REV. 47 (1980). St. Augustine made a famous similar observation about the nature of time.

⁶³ See generally D. HERWITZ, *BUSINESS PLANNING* ch. 1, § 1 (1966) (enterprise valuation).

issue. And one should never forget, as so much rhetoric in this area appears to, that the obligations of the just compensation clause are in no way limited to paying only for *real* property.⁶⁴

VII. THE RELEVANT UNITED STATES SUPREME COURT DECISIONS

We now turn to the jurisprudence of the United States Supreme Court on the issues. In setting this out, I will divide consideration into two parts: the pre-1960 "business damage" cases *per se*, and the post-1960 cases which bear on the proper modern construction of the just compensation clause, even though some may not deal with asserted business destruction losses.

A. Supreme Court Business Damage Cases Prior to 1960

The "no business damages" rule was developed in the state courts in the nineteenth century in a context where the particular requirements of the fifth amendment were not thought to apply to the states.⁶⁵ Specifically, Federal condemnations raising the

⁶⁴ Specifically, as to such forgetting, note the following sentence given by Nichols as part of one attempted rationalization of the "no business damages" rule: "Under the Constitution compensation need not be made for purely personal property taken." 2 P. NICHOLS & J. SACKMAN, *supra* note 15, § 5.24, at 5-298. How such a line could survive in the supposed standard authority in this area in the face of numerous Supreme Court cases to the contrary, *see, e.g.*, *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950); *Armstrong v. United States*, 364 U.S. 40 (1960), raises other questions which are generally beyond the scope of this article. I will simply say that my impression of Nichols is that the work is often inaccurate in its characterization and use of cases, and almost always these inaccuracies are slanted in favor of condemning authorities.

Two final things should be noted apropos of this. First, Mr. Nichols himself wrote in the second edition of his treatise (1917), in criticizing a New Hampshire case where a railroad company exercising the power of eminent domain was forced to pay compensation for the flooding of land (*Eaton v. B.C. & M.R.R.*, 51 N.H. 504 (1872)), that the fallacy of that opinion "lies in its assumption that the property rights of an individual against other individuals are the same as they are against the public." Cormack, *supra* note 11, at 240 (quoting 1 P. NICHOLS, *EMINENT DOMAIN* 297 (2d ed. 1917)). As to a right of compensation, the criticized assumption is now clearly established constitutional doctrine. *See Ruckleshaus v. Monsanto*, 104 S. Ct. 2862 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). A treatise based on and colored through thousands of pages by this position of its original author must be regarded as suspect. No correction to this bias seems to have been forthcoming from Julius Sackman, who, as general editor of the treatise for two decades beginning in the 1950's, was employed by a condemning authority during much of that period.

⁶⁵ The first cases applying the just compensation requirement to the states were *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403 (1846) and *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 122 (1896). On the assumed inapplicability of the U.S. Constitu-

business damages issue seem to have been quite uncommon. The issue was first potentially before the Supreme Court in 1882 in *Newport and Cincinnati Bridge Co. v. United States*,⁶⁶ but the case was disposed of on another ground. Ten years later came *Monongahela Navigation Co. v. United States*.⁶⁷

Perhaps never in history has a case been so widely misconstrued and cited for propositions directly the opposite of those for which it stands as *Monongahela*. A recent example of this phenomenon may be found in the New Jersey case of *State v. Cooper Alloy Corp.*,⁶⁸ where *Monongahela* is cited for the proposition that "just compensation generally does not include losses or costs that are incidental to a taking such as loss to or destruction of good will, loss of profits, inability to relocate, or frustration of the condemnee's plans."⁶⁹ Nothing could be further from *Monongahela*. This phenomenon of misconstruction goes back at least to the early 1930's.⁷⁰ Its widespread repetition is enough to make one wonder whether anyone has actually bothered to read the *Monongahela* opinion in the last sixty years.

The facts of *Monongahela* were as follows: In 1836 the State of Pennsylvania granted the Monongahela Navigation Company a corporate charter.⁷¹ Both by the terms of its charter and by enabling legislation of the Pennsylvania Legislature, the company was authorized to build and own seven dams and locks on the Monongahela River, to the end that the river would become navigable to vessels in excess of fifty tons in all seasons.⁷² The company built all seven dams and locks, completing No. 7 in 1884.⁷³ No express "franchise" to collect tolls at the locks appears to have been included in any of these statutes and charters, or at least no such provision is quoted in the rather extensive excerpts from those documents reprinted with the reported decision. The right to collect tolls seems to have been taken as implied in the corporate right to construct and own the locks.⁷⁴

tion's just compensation clause to state action, see *Johnston v. Rankin*, 70 N.C. 441, 442 (1874). See generally Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1930).

⁶⁶ 105 U.S. 470 (1882).

⁶⁷ 148 U.S. 312 (1893).

⁶⁸ 136 N.J. Super. 560, 347 A.2d 365 (App. Div. 1975).

⁶⁹ *Id.* at 568, 374 A.2d at 369.

⁷⁰ See, e.g., Cormack, *supra* note 11, at 228-29.

⁷¹ *Monongahela*, 148 U.S. at 314.

⁷² *Id.* at 314-15.

⁷³ *Id.* at 315.

⁷⁴ See *id.* at 344.

In 1888 Congress passed a statute declaring that the Secretary of War was to take lock and dam No. 7 for the United States.⁷⁵ The statute authorized an offer of \$161,733.13 to be made for the lock and dam.⁷⁶ In the event the offer was rejected, the statute directed condemnation proceedings to be undertaken "as prescribed and regulated by the provisions of the general railroad law of Pennsylvania,"⁷⁷ which could be depended upon, in the normal late nineteenth century state manner, to make no allowances for "business damage." The statute further *forbade* the payment of any sum in compensation for the value of the right to collect tolls.⁷⁸

Condemnation proceedings were instituted, and after trial, the court found that the value of the lock and dam No. 7 was \$209,000 "not considering or estimating in this decree the franchise of this company to collect tolls."⁷⁹ The company appealed to the Supreme Court. Justice Brewer delivered the opinion for a unanimous Court, with two Justices not participating.

Justice Brewer first stated that the question presented "is not whether the United States has the power to condemn and appropriate this property of the Monongahela Company, for that is conceded, but how much it must pay for compensation."⁸⁰ The next two and a half pages are devoted to general observations on the proper construction of the fifth amendment in such a case.⁸¹ On the proper meaning of the just compensation clause Justice Brewer quoted from Justice Bradley's opinion in *Boyd v. United States*⁸²—"constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to the gradual depreciation of the right, as if it consisted more in sound than substance."⁸³ Then, apparently in response to an argument that any amount due the Monongahela Company be discounted by the fact that the company might be benefited in regard to its other locks as a result of the operation of lock No. 7 by the Federal government, Justice Brewer set out language on the con-

⁷⁵ *Id.* at 312.

⁷⁶ *Id.*

⁷⁷ *Id.* at 313.

⁷⁸ *Id.*

⁷⁹ *Id.* at 314.

⁸⁰ *Id.* at 324.

⁸¹ *See id.* at 324-26.

⁸² 116 U.S. 616 (1886).

⁸³ *Monongahela*, 148 U.S. at 325 (quoting *Boyd*, 116 U.S. at 635).

struction of the fifth amendment which has been widely, though only partially quoted, and just as widely misconstrued. (The usual quotations stop before the italicized portions set out below, and make the quote seem more broadly intended than was actually the case.).⁸⁴

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 just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. 'No person shall be held to answer for a capital, or otherwise infamous crime,' etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken. *This excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated,* and leaves it, to stand as a declaration, that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.⁸⁵

The historical and linguistic force of this argument is problematical at best,⁸⁶ but it is not in any sense a declaration of either the "value to the taker" theory, or of the proposition that what is to be submitted to market value analysis is that which the taker took to use, as opposed to that which the condemnee had which was de-

⁸⁴ The first example of such truncated quotation appears to have been in Cormack, *supra* note 11, at 237. Cormack's characterization was tentative, but for an egregious example of what it grew into, see Dolan, *Consequential Damages in Federal Condemnations*, 35 VA. L. REV. 1059, 1059-60 (1949). Other examples are noted in the entries in the appendix *infra*.

⁸⁵ *Monongahela*, 148 U.S. at 326 (emphasis added).

⁸⁶ The emphasis given to the change in wording seems to have been rejected in *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189 (1910) where Justice Holmes said that the just compensation clause deals "with persons, not with tracts of land." *Id.* at 195. For historical criticism of Justice Brewer's position, see Note, *supra* note 41, at 68. See generally Sax, *Police Power*, *supra* note 3; Stoebeuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972); Comment, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

stroyed.⁸⁷ Indeed, the remainder of the opinion is in large part devoted to making that crystal clear, which is best summed up in the following language:

It is also suggested that the government does not take this franchise; that it does not need any authority from the State for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, and then either makes the use of it free to all, or exacts such tolls as it sees fit, or transfers the property to a new corporation of its own creation, with such a franchise to take tolls as it chooses to give. But this franchise goes with the property; and the Navigation Company, which owned it, is *deprived* of it. The government *takes it away* from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is *deprived*.⁸⁸

Nor is *Monongahela* a case where the government only had to pay for the "franchise" to take tolls because it "took the business in order to run it" as the opinion of the Court likewise makes clear. Justice Brewer did avert to the irony that after the condemnation the government would have had the *right* to charge tolls.⁸⁹ The language just quoted, however, makes clear that the result is based on the market value of what the government took *from* the company, not whether or not the government itself intended to use the right to collect tolls, and notwithstanding the fact that the government had the right to collect tolls even before the condemnation at any point on the river which it saw fit, and thus obtained no new right itself by virtue of its destruction of the company's right.

Nor does the decision depend on anything peculiar to the river lock business, as an extended discussion concerning the applicability of the opinion to an attempt to condemn the physical assets of a railroad independent of its going business value makes clear.⁹⁰ It is

⁸⁷ Such a misconstruction has occasionally been put on *Monongahela* even in high places. See dictum by Justice Douglas in *United States ex rel TVA v. Powelson*, 319 U.S. 266, 282 (1943).

⁸⁸ *Monongahela*, 148 U.S. at 343 (italics supplied). For a similar emphasis on what was destroyed, see *id.* at 341.

⁸⁹ *Id.* at 337.

⁹⁰ *Id.* at 342-43. Attempts to view *Monongahela* as limited in its applicable principles to condemnations of governmentally granted special franchises are unpersua-

true that in light of the Federal government's absolute power over navigable waters, a line of later cases construes the requirement of *any* compensation in *Monongahela* to be based upon an estoppel theory because the Federal government itself invited the construction of the dam and lock.⁹¹ However, none of these cases affects the vitality of *Monongahela*'s construction of what constitutes just compensation under the Constitution, assuming the obligation to pay *something*.⁹²

It was twenty-three years before another case raising a business damage issue under the just compensation clause made it to the Supreme Court. That case, *Bothwell v. United States*,⁹³ grew out of the construction of the Pathfinder Dam in Wyoming. A man named Bothwell and some partners owned a large tract of land in Wyoming, and in June of 1909 they had one thousand head of cattle on the land, plus a large quantity of hay, apparently intended as feed.⁹⁴ The dam arrested the flood waters and caused inundation of the Bothwell land.⁹⁵ The hay was destroyed, and it was necessary to remove the cattle and sell them.⁹⁶ The land was paid for.⁹⁷ The hay

sive given the language of the opinion, but have been common. See, e.g., Cormack, *supra* note 11, at 242 (citing 1 J. LEWIS, EMINENT DOMAIN § 407 (3d ed. 1909); 1 P. NICHOLS, EMINENT DOMAIN § 68, at 361 (2d ed. 1917)).

⁹¹ See *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82 (1913); *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915).

Implied reservations of power to take without compensation no longer play any role in our constitutional "takings" doctrines, *Ruckelshaus v. Monsanto*, 104 S. Ct. 2862 (1984), though express reservations may still be made which defeat any argument of compensability on destruction or taking. *United States v. Fuller*, 409 U.S. 490 (1972).

For some history on the reservation argument and the use of express reservations for road purposes in colonial land grants, see Stoebuck, *supra* note 86, at 557-59.

⁹² In fact, it seems that the Court in *Monongahela* not only held that the Constitution required an award of direct damages, but may also have assumed that the Constitution might require compensation of some "consequential" damages as well. This is underscored by the Court's opinion four years later in *Backus v. Fort St. Union Depot Co.*, 169 U.S. 557 (1897), where Justice Brewer, discussing just compensation due a business which might relocate, said:

The profitableness of the business was undoubtedly a matter to be considered, and so the judge fairly intimated in these prior colloquies. But the profits of a business are not destroyed unless the business is not only there stopped, but also one which in its nature cannot be carried on elsewhere. If it can be transferred to a new place and there prosecuted successfully, then the total profits are not appropriated, and the injury is that which flows from the change of location.

Backus, 169 U.S. at 574-75.

⁹³ 254 U.S. 231 (1920).

⁹⁴ *Id.* at 232.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

was paid for.⁹⁸ Bothwell claimed that the cattle were sold "at prices below their fair value"⁹⁹ and sought to recover the asserted difference.¹⁰⁰

Justice McReynolds delivered a page and a half opinion for the Court denying Bothwell's claim. It is true that in so doing he wrote that nothing could be "recovered for the destruction of a business or loss sustained through enforced sale of the cattle. There was no actual taking of these things by the United States, and consequently no basis for an implied promise to make compensation."¹⁰¹ The very sparse record of the facts of the case, however, makes it difficult to know exactly what was meant by the quoted language, and the actual claim to which it was applied.¹⁰²

Most importantly, whatever the facts, note what Bothwell was clearly *not* offering to prove. He was not offering to prove the market value of the ranch as an operating entity less the sale price, or salvage value, of the cattle. Had he done so his case would have been a case of direct damages controlled by *Monongahela*, and nothing in the Court's short opinion can be read as requiring a different

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 233.

¹⁰² Consider the facts of the case, so far as they are known. I say so far as they are known because the case was decided in the Court of Claims without opinion, and the only clue we have to certain important facts is that the claim seems to have been that the cattle were sold for less than their *fair* value, not for less than their *market* value.

The Union Pacific Railroad linked Montana with Chicago in 1867. Given the presence of rail service in Montana in 1909, it seems very unlikely that Bothwell's sale was below prevailing cattle market prices and was merely the result of his neighbors taking advantage of his hardship. Rather, it appears more likely that Bothwell was complaining that prices would have been better later, especially in regard to yearlings and calves that he could have held until fattened and sold in a more attractive condition onto a market he thought he could predict would be seasonally better.

However, *that* claim is clearly a problematical and consequential claim. For one thing, his forced sale not only denied Bothwell the potential benefits of the expected rise in the market, it also removed the potential risk that the market would go down. Further, it removed the risk that the cattle would all get hoof and mouth disease and die. It further removed from Bothwell the need to expend resources tending and feeding the cattle. And to have allowed Bothwell his claim would have given him a double recovery insofar as he was already being compensated for the hay he would have had to feed the cattle to take advantage of the expected better market. In short, Bothwell seems to have been another of those over-reaching claimants whose attempts at double recovery have so long been a factor in keeping this area of the law confused.

result, or creating a different principle.¹⁰³

The next case in which the issue of business damages was peripherally raised was *Joslin Manufacturing v. Providence*.¹⁰⁴ This is the first case in which the Court repeats the by-then hornbook state court rule, "[i]njury to a business carried on upon lands taken for public use, it is generally held, does not constitute an element of just compensation."¹⁰⁵ The Court cites only Lewis's treatise on eminent domain¹⁰⁶ and *Cox v. Philadelphia Railroad*,¹⁰⁷ a Pennsylvania case factually similar to, and based directly on, *Thoburn*. This rather off-hand statement is clearly dictum, however. The case before the Court dealt with an attack on the constitutionality of a Rhode Island statute providing for the payment of such damages, and the Supreme Court's opinion merely holds that such a statute is constitutional even assuming that such payment is not required as a constitutional minimum.

In 1925 the Supreme Court decided *Mitchell v. United States*,¹⁰⁸ the condemning authorities' all time favorite Supreme Court case in this area. Once again the case means a great deal less than is usually claimed.

The Mitchell Brothers owned 440 acres of farmland near Aberdeen, Maryland, upon which they had a factory devoted to the canning of a premium variety of corn known as Shoe Peg corn.¹⁰⁹ They themselves grew 200 acres of Shoe Peg corn, and the rest of the capacity of the canning plant was filled by another 300 acres' worth grown by farmers in the surrounding area.¹¹⁰ In 1917 Congress passed a statute providing for the taking of all the lands in the vicinity for use by the ordinance branch of the military as the Aberdeen

¹⁰³ Even if some tenable scenario could be constructed whereby Bothwell actually was forced to sell his cattle below their then current market value, Bothwell's claim would not have been a true claim for direct damages insofar as it sought to split up the tradable entity (the operating cattle ranch) into subparts, each valued independently. Such splitting, especially where parts are to be valued by different theories of value, always raises problems of double recovery and is generally not allowed. Even if one were to construe *Bothwell* as a direct damages case, it would mean little in light of the relevant more recent Supreme Court decisions discussed *infra* section VII(B).

¹⁰⁴ 262 U.S. 668 (1922).

¹⁰⁵ *Id.* at 675.

¹⁰⁶ 2 J. LEWIS, EMINENT DOMAIN § 727 (3d ed. 1909).

¹⁰⁷ 215 Pa. 506, 64 A. 729 (1906).

¹⁰⁸ 267 U.S. 341 (1925).

¹⁰⁹ *Id.* at 343.

¹¹⁰ *Mitchell v. United States*, 58 Ct. Cl. 443, 444 (1923), *aff'd*, 267 U.S. 341 (1925).

Proving Ground.¹¹¹ To compensate those whose land was to be used, negotiations were entered into.¹¹² The statute provided that if the government's offers were unacceptable to the condemnee, seventy-five percent of the final offer could be drawn down, and an action brought for such just compensation as was due under the law.¹¹³ The government offered the Mitchells \$76,000 for their land and canning factory, a sum which, according to a finding of the Court of Claims, "did not make any allowance for damage for plaintiff's loss of the business in which they were engaged prior to and at the time of the taking of said property";¹¹⁴ but the exact meaning of that finding is somewhat problematical as we shall see. The Mitchells accepted that sum, without protest.¹¹⁵ Some time later, the Mitchells figured out that they could not take their \$76,000 and return to the Shoe Peg corn canning business, at least in Maryland, because all of the land in Maryland suitable for growing Shoe Peg corn had likewise been taken by the government. They then filed suit in the Court of Claims seeking to recover \$100,000 as "losses sustained from being foreclosed from conducting [their] business enterprise, coupled with the complete extinction of [their] source of supply,"¹¹⁶ resulting in their being "unable to reestablish their canning industry anywhere in the United States"¹¹⁷ even though their "whole training and experience" had been in the growing and canning of "whole grain Shoe Peg corn."¹¹⁸

On these facts the Court of Claims made two rulings: first, that under the terms of the statute, they were foreclosed from raising this new claim as a result of their acceptance of the offer of the government of \$76,000;¹¹⁹ and second, that even if they could raise the claim they had received just compensation because they had failed to prove that they had "upon the whole, sustained any reduction or loss in net income or any other loss by reason of the government's taking their said property and the discontinuance of their said busi-

¹¹¹ *Mitchell*, 267 U.S. at 342-43.

¹¹² *Mitchell v. United States*, 58 Ct. Cl. 443, 444 (1923), *aff'd*, 267 U.S. 341 (1925).

¹¹³ *Mitchell*, 267 U.S. at 343-44.

¹¹⁴ *Mitchell v. United States*, 58 Ct. Cl. 443, 445 (1923), *aff'd*, 267 U.S. 341 (1925).

¹¹⁵ *Mitchell*, 267 U.S. at 343.

¹¹⁶ *Mitchell v. United States*, 58 Ct. Cl. 443, 448 (1923), *aff'd*, 267 U.S. 341 (1925).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 445.

¹¹⁹ *Id.* at 448.

ness of the growing of corn.”¹²⁰ The Court of Claims pointed out that plaintiffs’ average annual income for the preceding five years from the entire enterprise package of farming, canning, and selling corn had been \$6000.¹²¹ Without invasion of capital, their \$76,000 yielded them an almost risk-free \$4560 per year, leaving them free to employ their time to make up the remaining \$1440 per year.¹²² It is clear that the Court of Claims was skeptical that their previous experience as growers and canners of *Shoe Peg* corn had not left them with salable skills.¹²³ It is also clear that the exact issue of the fair market value of the farm and canning business as a package was not directly raised by the Mitchells, or ruled upon by either the Court of Claims or the Supreme Court. It seems fair to say, though, that the Court of Claims was suspicious that the \$76,000 was as much as they could ever have hoped to get from the sale of the package as a going business, when one considers that any buyer would have had to make up for their labor to keep the \$6000 per year profit coming in. What the Mitchells’ asserted \$100,000 claim seems to have been based upon mostly was a variety of “value to the owner” theory, version 1.¹²⁴ Success under that theory would have awarded them a kind of *Wiergelt* premium for forcing them to change occupations even though their financial position had not in fact been diminished by the results of the taking of their property, and they appear to have been paid “direct damage” enterprise value. And, to the extent their claims were based on anything economic, they almost certainly were seeking double recovery. In sum, the Mitchells were two more very greedy claimants.

The Supreme Court disposed of their claim in a four page opinion by Justice Brandeis. In reading the opinion, two things must be kept firmly in mind. First, the plaintiffs never claimed that they did not receive market value for their canning operation as of the date of payment. Second, the “destruction of their business” they were asserting was not the result of the taking of their canning factory property *per se*, but was asserted to have been the result of the condemnation of the surrounding land belonging to others. That destruction would have substantially occurred if they had been left alone and all the other corn land taken.¹²⁵ Complaints about the effects of the taking of *their* property were foreclosed by their settle-

¹²⁰ *Id.* at 446.

¹²¹ *Id.* at 448.

¹²² *Id.* at 449.

¹²³ *Id.*

¹²⁴ See *supra* section VI.

¹²⁵ At least, the effect would have been substantially the same even if their own

ment,¹²⁶ but the effects springing from the taking of other property could still be raised. Thus understood, the issue was whether their relationship to those *other* takings by the government was such as to give them any right to claim anything at all under the fifth amendment.

Consider the quote from *Mitchell* usually relied upon as relieving condemning authorities from a constitutional obligation to pay for a destroyed business, usually quoted without reference to the facts of the case, or worse, with a summary of the facts which makes it sound as if the destruction of business theory put forth by the Mitchells was one flowing directly from the taking of their own land and property:¹²⁷

The special value of land due to its adaptability for use in a particular business is an element which the owner of land is entitled, under the Fifth Amendment, to have considered in determining the amount to be paid as the just compensation upon a taking by eminent domain. Doubtless such special value of the plaintiffs' land was duly considered by the President in fixing the amount to be paid therefor. The settled rules of law, however, precluded his considering in that determination consequential damages for losses to their business, or for its destruction. No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land.¹²⁸

All Justice Brandeis says is that they are not entitled to *consequential* damages for the loss to their business, or for its destruction, which was the "*unintended incident of the taking of land*" . . . not *their* land, but the land around them. He then says "no recovery can be had *now* as for the taking of the business."¹²⁹ The "*now*" in this sentence is significant. All they were asserting *now* was consequential damages. They had never asserted direct damage market value destruction of their business as a result of the taking of their own

corn land had not been taken, since they depended on the other land for 60% of their supply.

¹²⁶ *Mitchell v. United States*, 58 Ct. Cl. 443, 448 (1923), *aff'd*, 267 U.S. 341 (1925).

¹²⁷ See Comment, *Just Compensation for the Small Business Man*, 2 COLUM. J.L. & SOC. PROBS. 144, 147-48 (1968). For a misconstruction of *Mitchell* with an inaccurate summary of the facts, see Kratovil & Harrison, *supra* note 2, at 615-16.

¹²⁸ *Mitchell*, 267 U.S. at 345 (citations omitted).

¹²⁹ *Id.* (italics supplied).

land, and even if they had tried, the Court of Claims had already all but held that they had already received it.

As such, *Mitchell* is in fact not very relevant to the subject of this article, a direct damages claim for destruction of a business by the condemnation of the business premises. It is more closely related to the problems raised by cases where one's sole supplier is condemned—cases raising hard questions of line drawing on the "taking-no taking" front¹³⁰—but bearing hardly at all on the measure of just compensation when something requiring compensation is concededly in issue.

The business damages question did not arise again in the Supreme Court until the 1940's, in *United States v. General Motors Corp.*¹³¹ That case was the first of three that form a sort of package: *General Motors*, *United States v. Petty Motor Co.*,¹³² and *United States v. Westinghouse Co.*¹³³ All three of these cases deal with a nefarious condemnation device which concededly created special problems, and some dismiss the implications of these cases on that ground.¹³⁴ The device was the condemnation of a leasehold interest rather than a fee interest to enable the government to obtain space in a building cheaply. When the taking of such a leasehold evicted the possessor (either the fee owner or the holder of a leasehold interest longer than that taken by the government), especially unfair problems were created in that the possessor had to move out, but could not permanently relocate because he had to hold himself ready to move back when the government was through.

In *General Motors* a condemnation of a one-year term and option to renew was sought from a lessee of a warehouse who had a twenty-year term.¹³⁵ In this case, Justice Roberts, while rejecting removal cost as an independent item of value, rephrased the market value rule so as to allow its consideration. He said that the normal market value rule would pay the rental value of a vacant building to be leased for a long term.¹³⁶ Here he would construct a hypothetical market—the value which a hypothetical long-term tenant in possession would exact when leasing to a temporary occupier requiring his

¹³⁰ See, e.g., *Omnia Commercial Co. v. United States*, 261 U.S. 501 (1922); see also *supra* note 3.

¹³¹ 323 U.S. 373 (1945).

¹³² 327 U.S. 372 (1945).

¹³³ 339 U.S. 261 (1949).

¹³⁴ See *Dolan*, *supra* note 84.

¹³⁵ *General Motors*, 323 U.S. at 375.

¹³⁶ *Id.* at 381.

removal.¹³⁷

The result of *General Motors* with its artificial resort to non-existent hypothetical markets and its flirtation with value-to-the-owner theory, is perhaps subject to any number of criticisms,¹³⁸ but it is hardly a case supporting the existence of a constitutional doctrine that business damages need never be compensated pursuant to the just compensation clause. Indeed, it undermines such a claim even as to consequential damages, as all the removal costs and other elements raised in that case certainly were. Nor does the fact that *Petty Motors* and *Westinghouse* later restricted the conceptually flawed *General Motors* approach exclusively to cases of partial takings bear on the case at hand, because the only issues in *Petty Motors* and *Westinghouse* were not assertions of immediate market value destruction, that is, "direct damages." The case that *did* contain an assertion of direct damages was *Kimball Laundry Co. v. United States*,¹³⁹ and once again, the condemnee prevailed.¹⁴⁰

In *Kimball Laundry* the United States took over a laundry's facilities to do washing for the army.¹⁴¹ The laundry, having no other means of serving its customers, suspended business for the duration of the army's occupation.¹⁴² The company was given rental value of the facilities for the period the army used the premises, but no award for the loss of customers and resultant diminution in going business value, which was claimed by the company and recognized as probable by the appraisers.¹⁴³ The Court, through Justice Frankfurter, made the government pay the diminution in the going concern value of the business. In reaching this conclusion, Justice Frankfurter first observed that the loss in going concern value, though related in part to intangibles, is property capable of being destroyed by the government so as to give rise to an obligation of

¹³⁷ *Id.* at 382-84.

¹³⁸ For a criticism of the practical unintelligibility of the *General Motors* approach to appraisers and lawyers, see Dolan, *supra* note 84.

¹³⁹ 338 U.S. 1 (1949).

¹⁴⁰ It is true that there is language in *General Motors* assuming the existence of the mythical "no business damages" rule in general and, as a starting point of analysis, an unjustifiably broad meaning for *Mitchell* and *Bothwell* apparently accepted from secondary sources. See *General Motors*, 323 U.S. at 379. Similar statements may be found in *Petty Motors*, *Westinghouse*, and indeed in *Kimball Laundry*—even in *United States ex rel TVA v. Powelson*, 319 U.S. 266 (1943), which doesn't even deal with a business damages issue. These dicta do not change the actual facts of either the cases cited, or of the cases citing them.

¹⁴¹ *Kimball Laundry*, 338 U.S. at 3.

¹⁴² *Id.*

¹⁴³ *Id.* at 4.

just compensation under the fifth amendment.¹⁴⁴ Then, he posed the question: "When do such circumstances occur?"¹⁴⁵ Justice Frankfurter conceded, *arguendo*, that such circumstances do not arise in the *normal* taking of a fee interest, making the by then predictable mis-citations to *Mitchell* and *Bothwell*.¹⁴⁶ This, he said, could only be justifiable because the intangible parts of the value of the business are *normally* transferable. Note that he did not say that there can never be a fee condemnation situation giving rise to an obligation to give full going business value as just compensation. In fact, he illustrated that obligation by cases involving the taking of the land and buildings of a public utility.¹⁴⁷ He then went on:

But the public utility cases plainly cannot be explained by the fact that the taker received the benefit of the utility's going concern value. If benefit to the taker were made the measure of compensation, it would be difficult to justify higher compensation for farm land taken as a firing range than for swamp or sandy waste equally suited to the purpose. It would be equally difficult to deny compensation for value to the taker in excess of value to owner. The rationale of the public utility cases, as opposed to those in which circumstances have brought about a diminution of going concern value although the owner remained free to transfer it, must therefore be that an exercise of the power of eminent domain which has the *inevitable effect of depriving the owner of the going concern value of his business* is a compensable "taking" of property.¹⁴⁸

Note that the "inevitable effect" test is in no way limited to condemnations of terms for years.¹⁴⁹ Note also that in bringing the laundry itself within the terms of the "inevitable effect" test, Justice Frankfurter relied on the economic practicalities of the laundry business and the inability of the laundry to create another plant economically when it was going to eventually have to take the first plant back. It was not the normal situation where a condemnee receives enough from the taking of the first plant to obtain a second.

It seems clear that on the facts of our typical case set out earlier in this article, Smith's loss of his gas station business meets Justice Frankfurter's "inevitable effect" test. First, as is generally the case,

¹⁴⁴ *Id.* at 11.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 11-12.

¹⁴⁷ *Id.* at 12-13.

¹⁴⁸ *Id.* at 13 (*italics supplied*).

¹⁴⁹ Some commentators have misconstrued *Kimball Laundry* on this point. See Note, *Eminent Domain: Compensation for Value of Trade Routes Destroyed by Condemnation for Temporary Use*, 37 CALIF. L. REV. 680, 683 n.26 (1949).

his franchise was tied to a particular location. It is what we might call an incorporeal fixture. Hence, it *inevitably* disappears as a result of the taking of the land. Second, as a practical inevitability, the value it represents cannot be “relocated”—to be replaced it must be repurchased. Indeed, the “inevitable effects” test appears to be the concept of “direct damages” reinvented.

B. Relevant Post-1960 United States Supreme Court Cases

The next case of direct bearing on the issues under consideration is *Armstrong v. United States*.¹⁵⁰ *Armstrong* dealt with the destruction of liens on a vessel by virtue of its transfer to the United States. Though the Court never adverts to any such argument, on its facts *Armstrong* might be considered a sort of “taking of value for use by the government” case. The recent decision of *United States v. Security Industrial Bank*,¹⁵¹ dealing with the lien avoidance provision of the Bankruptcy Reform Act,¹⁵² however, makes it clear that such abolition of liens by the government requires just compensation no matter *who* the economic beneficiary of the destruction may be, even if not the government.

Viewed in that light, consider the following passage from the *Armstrong* opinion:

The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of the Fifth Amendment “taking” and is not a mere “consequential incidence” of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterward, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens, something . . . which no private purchaser could have done. Since this acquisition was for a public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government’s action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the Fifth Amendment.¹⁵³

Assuming for the moment that Smith’s lease-franchise package

¹⁵⁰ 364 U.S. 40 (1960).

¹⁵¹ 459 U.S. 70 (1982).

¹⁵² Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-151326 (1982)), *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 93-353, 98 Stat. 333.

¹⁵³ *Armstrong*, 364 U.S. at 48.

is compensable property, the relevance of the quoted passage to Smith's situation is made crystal clear simply by substituting the word "franchise" for the word "lien" in the passage.

If there was ever any doubt that a gasoline retailer's business operated pursuant to a lease-franchise arrangement with an oil company constitutes a single unitary "compensable property" package subject to fifth amendment protection and compensation requirements, that doubt has been dispelled by decisions of the United States Supreme Court over the last fifteen years. In a series of cases beginning with *Goldberg v. Kelly*,¹⁵⁴ and continuing through *Board of Regents v. Roth*,¹⁵⁵ *Perry v. Sinderman*,¹⁵⁶ *Paul v. Davis*,¹⁵⁷ and *Bishop v. Wood*,¹⁵⁸ the Court has clarified the proper constitutional approach to distinguishing non-protected, non-property, mere "expectations" from "entitlements," which constitute property for fifth amendment purposes. The test is whether applicable non-constitutional substantive law creates a "legal guarantee of present enjoyment"¹⁵⁹ in a way that is special to the person asserting it, understood in terms of rules that support a "claim to entitlement."¹⁶⁰

Smith's right pursuant to the lease-franchise arrangement, as set out in that contractual document, and as further defined by Federal and state law, are thus significant. First of all, the franchise agreement is a contract, protected by state law. Furthermore, pursuant to section 102(a) of the Petroleum Marketing Practices Act¹⁶¹ (PMPA) no franchisor may terminate or fail to renew a franchise for the distribution of motor fuel except for the reasons specified in section 102(b).¹⁶² Pursuant to that subsection, the only four circumstances for which a franchisor may terminate the lease-franchise without the franchisee's approval are situations which would commonly be described as "for cause." Thus, prior to condemnation, the gasoline retailer had a legally enforceable right to maintain his valuable franchise business—in other words, he was legally "entitled" to do so.

Thus, the franchisee's right to its lease-franchise business con-

¹⁵⁴ 397 U.S. 254 (1970).

¹⁵⁵ 408 U.S. 564 (1972).

¹⁵⁶ 408 U.S. 593 (1972).

¹⁵⁷ 424 U.S. 693 (1976).

¹⁵⁸ 426 U.S. 341 (1976).

¹⁵⁹ *Roth*, 408 U.S. at 577.

¹⁶⁰ *Perry*, 408 U.S. at 601; see *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).

¹⁶¹ 15 U.S.C. § 2802(a) (1982).

¹⁶² *Id.* § 2802(b).

stitutes property under the Supreme Court's test. This would be true if it were only the product of a private contractual arrangement. As the Supreme Court has recently made clear in *Security Industrial Bank*, valid contract-created rights are property for fifth amendment purposes.¹⁶³ The effect of the PMPA and any similar or supplementary state protections of franchisors substantially reinforces the compensable property status of the gasoline retailers' lease-franchise operation. For instance, in Smith's case, since his business is in New Jersey, the effect of the relevant provisions of the PMPA and the New Jersey Franchise Practices Act¹⁶⁴ is that his franchise is terminable only after notice and a showing of good cause as defined by the PMPA, and is generally transferable as long as the New Jersey statutory procedures and conditions are met.¹⁶⁵ This combination of restricted terminability and general transferability created by specific legislation clearly gives the franchise the characteristics of property in both the traditional juridical sense and under the applicable Supreme Court test.

Nor can one persuasively argue that the idea of property reflected in this test is only for the due process clause and not for the just compensation clause.¹⁶⁶ First, the two uses of the word "property" are separated by only seven words in the fifth amendment. Second, the Supreme Court has just recently held in *Ruckelshaus v. Monsanto*¹⁶⁷ that the same test must be applied in the just compensation area. The result of this case was that the Federal government had to pay the diminution in value of trade secrets protected by state law but disclosed to the government under statutory confidentiality guarantees contained in the 1972 to 1978 version of the Federal Insecticide, Fungicide and Rodenticide Act¹⁶⁸ (FIFRA), and then disclosed to competitors by the government. In so holding, the Court said that: "intangible property rights protected by state law are deserving of the protection of the Taking Clause. . . ."¹⁶⁹

¹⁶³ The proposition that contract rights are property for just compensation purposes is not new. See *Brook-Scanlon Corp. v. United States*, 265 U.S. 106 (1924).

¹⁶⁴ N.J. STAT. ANN. §§ 56:10-1 to -15 (West Cum. Supp. 1984-1985).

¹⁶⁵ *Id.* § 56:10-6.

¹⁶⁶ "The body of rules determining which expectations constitute compensable property interests and which do not plainly require reconsideration in light of the broader definition of property interests now employed in the law of procedural due process. There seems no good reason why the broader definition should not be extended to the takings context." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 459 n.11 (1978) (citations omitted).

¹⁶⁷ 104 S. Ct. 2862 (1984).

¹⁶⁸ 7 U.S.C. §§ 136 - 136y (1976 & Supp.II 1978) (current version as amended at 7 U.S.C. §§ 136 - 136y (1982)).

¹⁶⁹ *Ruckelshaus*, 104 S. Ct. at 2873-74.

This is especially true of "reasonable investment-backed expectations,"¹⁷⁰ which the lease-franchise business of a gasoline retailer certainly is.

The Court then held that the FIFRA confidentiality guarantees foreclosed the argument that Monsanto had chosen voluntarily to subject its trade secrets to disclosure in order to obtain the benefits of licensing.¹⁷¹ Finally the Court held that, while a sovereign at the original creation of a new system of legally backed expectations might in some narrowly and clearly defined cases expressly reserve the right to take or destroy such interests without compensation,¹⁷² once an interest is protected in such a way to be compensable property, it may not then be destroyed without compensation by declaring it not to be property, or not to be property as against the sovereign.

[A] sovereign, "by *ipse dixit*, may not transform private property into public property without compensation This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent."¹⁷³

Finally, it was held to be irrelevant to the compensation requirement that the advantages of the trade secret had not been taken over by the United States government, that in great part the economic value they represented had merely disappeared, or that any beneficiaries of disclosure were private enterprises.¹⁷⁴ The destructions were takings; the decision to make the destructions was for "a public use" in the general sense in which that term is interpreted. The clear implication is that the government cannot support its action on the broad definition and then only make provisions for just compensation based on a narrower definition. So much for the "taking for use" doctrine occasionally invoked to justify the "no business damages" rule.¹⁷⁵

Nor can a condemning authority say that it need not pay the price represented by market value of the lease-franchise business as

¹⁷⁰ *Id.* at 2875. Earlier I adverted to a dichotomy between "mere expectations" and "entitlements." See *supra* text accompanying note 158. The cases giving rise to that dichotomy often spoke only of "expectations" as the term for non-property, but apparently, some "expectations," that is "reasonable investment-backed expectations," are property for fifth amendment purposes. See *id.*

¹⁷¹ *Ruckelshaus*, 104 S. Ct. at 2877-79.

¹⁷² See *United States v. Fuller*, 409 U.S. 490 (1972). See generally Comment, *United States v. Fuller: Just Compensation?*, 4 N.Y.U. Rev. L. & Soc. Change 229 (1973).

¹⁷³ *Ruckelshaus*, 104 S. Ct. at 2878 (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)).

¹⁷⁴ *Id.* at 2879-80.

¹⁷⁵ See *supra* note 56.

it is usually sold because such a price contains some undivided increment for some sort of "goodwill." First, these recent Supreme Court cases render the assertion that "goodwill" is not compensable property under the fifth amendment totally untenable in most states. In light of *Ruckelshaus v. Monsanto*, such goodwill is property under most states' laws, even viewed as an independent and rather artificial entity.¹⁷⁶ Second, the lease-franchise business package itself had already been held to be vested with the characteristics of property relevant to the constitutional test by decisions in some states.¹⁷⁷

Finally, even if goodwill were not independently protected property, and even if a state had not already ruled on the issue of the scope of the "property package" in a lease-franchise context, the condemning authority would still have to pay market value of the business less salvage value (direct damages) under *Almota Farmers Elevator and Warehouse Co. v. United States*.¹⁷⁸

The facts of *Almota Farmers* are as follows. There was a piece of land in Washington State owned by a railroad.¹⁷⁹ It was in a farmland area, and it was next to a railroad track.¹⁸⁰ Prior to 1919 there were many parcels of land which were arguably of the same economic potential as sites for grain elevators, but we may assume the area would support only one. Along came the Almota Farmers Elevator and Warehouse Company. Instead of purchasing land, for whatever reason, it leased the land from the railroad and built a grain elevator.¹⁸¹ The elevator company retained the ownership of the grain elevator and other improvements by specific agreement.¹⁸² The railroad and the elevator company entered into an unbroken series of leases, each for a term of years.¹⁸³ The grain elevator company had no legal right to a lease renewal.¹⁸⁴ However, in the event of non-renewal, the company could knock down the improvements, leaving the railroad with only undeveloped land with low income

¹⁷⁶ Even Nichols recognizes the factual predicate of this assertion. "Goodwill is generally held property in matters of private law." 2 P. Nichols & J. Sackman, *supra* note 15, § 5.24, at 5-293 n.4 and authorities there collected.

¹⁷⁷ In New Jersey, for instance, there can be no doubt of the protected property status of a franchise business in general and a petroleum marketing franchise in particular after the New Jersey Supreme Court decision in *Westfield Centre Serv. v. Cities Serv. Oil Co.*, 86 N.J. 453, 432 A.2d 48 (1981).

¹⁷⁸ 409 U.S. 470 (1973).

¹⁷⁹ *Id.* at 471.

¹⁸⁰ *Id.* at 470-71.

¹⁸¹ *Id.*

¹⁸² *Id.* at 471.

¹⁸³ *Id.* at 475.

¹⁸⁴ *Id.* at 473.

potential.¹⁸⁵ If the surrounding environment changed to where the parcel of land without a grain elevator would be worth more than the rental from the one elevator in the area, only then would the lease rationally not be renewed. Hence, unless the surrounding land changed uses by the natural operation of market forces, which Almota Farmers could watch and if necessary guard against, the lease would always be rationally renewed.¹⁸⁶

Apparently no such change in surrounding land uses occurred from 1919 to 1967, as the lease was always renewed. Further, at the point just before the government-as-taker showed up, the lease plus the buildings had a substantial market value far in excess of the formal seven and one-half years left on the lease, because a rational purchaser could see the forces making the lease *de facto* indefinite, and would pay for the added value.¹⁸⁷

In 1967, the United States government decided to take the land for some public project that could only be accomplished by use of eminent domain.¹⁸⁸ It condemned the interest of Almota Farmers and argued that it should only have to pay the market value of the narrow legal right destroyed—the seven and one-half years left on the lease.¹⁸⁹ Not so, said the Court. Just compensation demanded that Almota Farmers get the fair market value of what they had before the government surfaced as a market factor, and without any effect of the government action.¹⁹⁰ Since the market would rationally have paid a certain sum for their lease and buildings, that was what was taken *from* them even though part of that price for the asset resulted from market evaluations of conditions not themselves the property of Almota Farmers. Markets always reflect such estimates. Nor could the government have avoided this result by purchasing the land first, since the government still had to pay just compensation “for those interests ‘probably within the scope of the project from the time the Government was committed to it.’ ”¹⁹¹

It may not take advantage of any depreciation in the property taken that is attributable to the project itself. At the time of the taking in this case, there was an expectancy that the improvements would be used beyond the lease term. But the

¹⁸⁵ *Id.* at 471.

¹⁸⁶ *Id.* at 474-75.

¹⁸⁷ *Id.* at 478.

¹⁸⁸ *United States v. 22.95 Acres of Land, More or Less*, 450 F.2d 125, 126 (9th Cir. 1971), *rev'd sub nom. Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973).

¹⁸⁹ *Almota Farmers*, 409 U.S. at 471.

¹⁹⁰ *Id.* at 478; *id.* at 480 (Powell, J., concurring).

¹⁹¹ *Id.* at 477-78 (quoting *United States v. Miller*, 317 U.S. 369, 377 (1943)).

Government has sought to pay compensation on the theory that at that time there was no possibility that the lease would be renewed and the improvements used beyond the lease term. It has asked that the improvements be valued as though there were no possibility of continued use. That is not how the market would have valued such improvements; it is not what a private buyer would have paid *Almota*.

The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law. It is, of course, true that *Almota* should be in no better position than if it had sold its leasehold to a private buyer. But its position should surely be no worse.¹⁹²

Almota Farmers, one must note, is the Supreme Court's third direct-damage-theory business destruction case. And whether the expression was in terms of "the market value of what was taken from the condemnee" as in *Monongahela*, "inevitable effects" as in *Kimball Laundry*, or those terms just quoted from *Almota Farmers*, the result has always been the same. The Constitution requires such compensation to be paid.

In sum, Mr. Smith's lease-franchise in the fact situation described earlier is compensable property. It had a market value which was completely destroyed by the taking of the land, and hence taken from Mr. Smith thereby. In such a case, the fifth amendment mandates payment, at a minimum, of the market value destroyed (that is, direct damages) as just compensation for the property interest taken from Mr. Smith.

VIII. THE CONSTITUTIONAL RIGHT TO DIRECT DAMAGES BEYOND THE FRANCHISE CONTEXT

The Smith situation throws the injustices of the mythical "no business damages" rule and the treatment of businesses operating on condemned premises into sharp relief for three reasons. First, his service station business is one where it is fairly easy to

¹⁹² *Id.* at 478 (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950)). *Almota Farmers* is surprisingly similar in fact, reasoning, and result to *Mayor of Baltimore v. Rise*, 73 Md. 302, 21 A. 181 (1891), where the court said flatly "A thing is worth what it can be sold for." *Id.* at 311, 21 A. at 182. This is one of the cases which were ignored in the creation of the assumed "no business damages" rule. Note further that the one sentence *arguendo* misconstruction of *Mitchell* in footnote 2 of the *Almota Farmers* opinion in no way detracts from either the facts or reasoning of the decision—indeed, it renders *Almota Farmers* even more clearly an adoption of the direct damages approach, as the rest of footnote 2 makes clear. See *Almota Farmers*, 409 U.S. at 475-76 & n.2.

show by normal valuation techniques what the market value of the business as an organic and going package was, but for the condemnation. Second, his franchise form of business and the structure of gasoline retailing patterns in general make it easy to show that the business is non-relocatable and completely destroyed by the condemnation, since if it is to be continued it must be replaced by repurchase of a similar entity of like value. Third, his status as a lessee means that the injustice of the situation cannot be hidden by submerging the loss in talk of the value of the real property.¹⁹³ Nor can it be partially ameliorated in practice by jury nullification through the award of a price for the fee interest, which is in fact excessive under the theory of the law but which is given in unrecognized compensation for losses the law claims not to pay for.¹⁹⁴ Yet Smith's situation is not in theory different from that of Jones operating a shoe repair shop from property that he owns. There is often a significant difference between the market value of the "land and improvements" and the market value of the enterprise, including the "land and improvements." It may also be true that new premises are practically unavailable, or at least affordable ones close enough to speak sensibly of a business being relocated instead of a new one being started.

To go one step further, Smith's situation is not constitutionally different from that of Whitney running his corner grocery out of leased premises. It is really unsatisfactory to say that Smith's business is compensable property and that of Jones and Whitney is not. Legal protections specifically directed at franchises merely buttress and make clear the property status of Smith's business, they do not create it. In every state a business may, for instance, be sold as an entity, and is protected by unfair competition doctrines; thus, in every state, state law protections which create constitutional property are present in regard to every going enterprise as a whole. It seems unavoidable that under the applicable Supreme Court decisions, Smith, Jones and Whitney all have a right to be compensated for direct damages resulting from the condemnation of their business premises.

The direct damages approach has further significant side benefits. It radically clarifies certain analytical problems. It simplifies the elements of proof in condemnation valuation proceedings, and it is suggestive of the appropriate way of handling

¹⁹³ See the rhetoric employed to this end in *City of Trenton v. Lenzner*, 16 N.J. 465, 109 A.2d 409 (1954).

¹⁹⁴ See Note, *supra* note 41, at 87 n.120.

disputes about "relocatability" or "non-relocatability" in regard to a business operating out of condemned premises.

IX. THE ADVANTAGES OF DIRECT DAMAGE THEORY IN CLARIFYING ANALYSIS

The assumed "no business damages" rule is one of the most universally and uniformly condemned doctrines of American law.¹⁹⁵ Yet the critics' attacks, stretching over a period of seventy-five years, have had less impact than they ought to have had. There are two main reasons for this. First, the critics seem to have assumed a kind of juridical reality and authority for the assumed "rule" which a careful examination of the relevant Supreme Court authorities does not bear out, as we have already seen. Second, every suggestion for a change in the assumed "rule" has involved a procedure in which losses of "good will" and "lost opportunity" would be separately valued,¹⁹⁶ raising fears that valuation of such entities could not be fairly controlled, since the valuation of such artificial entities lacks direct reference to an extant market. Indeed, descriptions of the valuation procedures in those jurisdictions that have adopted these approaches do have a kind of never-never-land flavor at a number of points.¹⁹⁷ The direct damages approach avoids the problem of valuing artificial entities and radically simplifies the proof necessary to arrive at truly just compensation. Its simplicity and its reliance on market-disciplined valuation of normally traded entities are two of its great strengths.

X. DIRECT DAMAGES AND RELOCATABILITY

What about a situation in which the condemning authority is disputing the *total* destruction of the business? What does direct damages theory say about that situation?

One of the long-standing explanations for the no business

¹⁹⁵ See *infra*, appendix.

¹⁹⁶ Good examples of the unnecessary complexity that such an approach can engender are to be found in *State v. Hammer*, 550 P.2d 820 (Alaska 1976); McCormick, *supra* note 41, at 476-82; Todd, *supra* note 51; UNIF. EMINENT DOMAIN CODE § 1016, 13 U.L.A. 1 (1980); Comment, *Non-Compensable Business Losses in Eminent Domain Proceedings: A Time for Re-evaluation*, 46 TEMP. L.Q. 72 (1972); Comment, *An Act to Provide Compensation for Loss of Goodwill Resulting from Eminent Domain Proceedings*, 3 HARV. J. ON LEGIS. 445 (1965). The article which comes closest to developing a direct damages notion is Alois & Goldberg, *supra* note 61.

¹⁹⁷ See, for example, the convoluted process mandated by the well meaning opinion in *State v. Hammer*, 550 P.2d 820 (Alaska 1976).

damages rule is the assumption that a business carried on condemned premises can usually relocate in such a way that nothing is lost but the value of the premises themselves.¹⁹⁸ How such a situation, even if usually true, justifies a totally irrebuttable presumption that it is always true is quite problematical on both justice grounds and constitutional grounds.¹⁹⁹ In a nineteenth century village setting, perhaps the explanation had a sufficient generality to at least explain the genesis of the assumed rule, if not to justify it.²⁰⁰ However, the completely arbitrary and inaccurate nature of the assumption in the context of twentieth century condemnations, most often undertaken in urban areas, has been repeatedly pointed out.²⁰¹ Still, it is possible that relocation can occasionally give the condemnee a going business entity with a value at least equal to that which was lost, at a cost less than the full value of the business.

The solution to this problem and how it should be handled procedurally lies in the normal damage theory concept of avoidable consequences.²⁰² Instead of a rule based on a fictionally assumed ability to relocate, the law ought to proceed from a presumption of non-relocatability. The condemning authority would be free to reduce an award of full value for the business, however, by showing relocation options which could protect the original value of the business with an investment of less than full value in relocation expenses. Since the condemnee is under a duty to mitigate²⁰³ by taking such an available relocation option, the just compensation award would be limited to the amount of relocation expenses in such a situation.

Finally, as in all mitigation situations, the burden of producing evidence and the risk of non-persuasion as to the existence of a relocation option and its cost ought to be on the party relying on the existence of mitigating circumstances to reduce an award—that is, the condemning authority. Not only does this track the normal doctrine of damage theory in other areas, but it

¹⁹⁸ See, e.g., *Kimball Laundry*, 338 U.S. at 11-12.

¹⁹⁹ See generally Risinger, "Substance" and "Procedure" Revisited: With Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions," 30 UCLA L. REV. 189 (1982).

²⁰⁰ See *supra* note 44.

²⁰¹ See Comment, *supra* note 195, at 447-51 (proposed statute).

²⁰² See D. DOBBS, *supra* note 21, at 186-90.

²⁰³ I have used the usual term "mitigate" in the text over the published objections of Professor Dobbs to the use of the term in the context of the doctrine of avoidable consequences. See *id.* at 188. I tried for an elegant synonym and failed.

is generally the condemning authority who has the resources to seek out and to point out such relocation options.

DIRECT DAMAGES AND THE LARGE MULTI-SITE ENTERPRISE

One of the reasons I believe direct damage theory was lost sight of in condemnation law is that it is not an obviously available option to the most well heeled condemnees—those who have premises condemned where a part of a giant integrated operation is carried on.²⁰⁴ If the business carried on at the condemned sight is separately traded, such as might be the case with one of a number of chain stores, some of which are already separately franchised, direct damages might offer an option. However, where the entity is not traded, or is basically unsellable as an entity, as for example, a General Motors assembly plant, then direct damage theory would advance the inquiry very little. Whether you conceive the direct damage as the disappearance of the value of the single plant or the reduction of the net worth of the whole enterprise, you are still faced with a valuation problem not referable to an actual market—a very difficult proof problem. Thus, while constitutionally mandated as an available option, and of great aid to those victims of business condemnation most crushed,²⁰⁵ alas, direct damages theory does not solve all problems. However, it is quite enough for me that it can accomplish what it does.

XII. CONCLUSION

It has become commonplace that the conclusion of a law review article functions as an abstract of the article for those who do not have the time or inclination to read the whole piece. Very well. This is a useful convention, and I will conform:

This article does not attempt to deal with the interesting but involved question of what government actions amount to a “taking” of private property. Instead, I have focused narrowly on the question of the compensation required as “just compensation”

²⁰⁴ This may explain the reason the theory was not explored in such cases as *General Motors* and *Westinghouse*.

²⁰⁵ That is, small business people. The victims of condemnation *most* crushed in general are holders of residential leases, who end up with no homes and no money (though relieved of the obligation to pay rent for the home they no longer have). Direct damage theory does almost nothing for them, but that is another story. See generally Klein, *Eminent Domain: Judicial Response to the Human Disruption*, 46 U. DET. J. URB. L. 1 (1968); Note, *The Interest in Rootedness: Family Relocation and an Approach to Full Indemnity*, 21 STAN. L. REV. 801 (1969).

once all have agreed a taking has occurred. As demonstrated by the hypothetical case of an owner of a service station franchise, many owners of demonstrable and substantial business properties routinely receive far less than *just* compensation when their interests are taken from them by an exercise of the power of eminent domain. These deplorable occurrences result primarily from the blind and uncritical application of the so-called "no business damages" rule.

A close examination of the so-called rule reveals, however, that it is not a rule but a myth. First, it is based upon gross misinterpretations of case law extending back into the nineteenth century, carefully fostered and championed by the leading treatise writers who were clearly biased in favor of condemning authorities. Second, the "no business damages" rule is in clear conflict with United States Supreme Court authority, especially recent cases recognizing the constitutionally protected status under the just compensation clause of rights in reasonable investment-backed expectations created by state law.

In order to ensure just compensation, the proper measure of damages in eminent domain proceedings should be, as a constitutional minimum, all direct damage as defined in the seminal early nineteenth century eminent domain cases. A close analysis of every business damages case that has reached the Supreme Court reveals that the Court has never failed to reach a result consistent with this understanding of direct damages. Moreover, because it tracks the normal application of remedies law in other substantive areas, the use of direct damage theory guarantees a result that not only appears fair, but also approximates as accurately as possible the true loss suffered by the condemnee. The fifth amendment requires nothing less.

So much for the abstract. The real conclusion of this article, however, is a question. Does the clear mandate of the Supreme Court to award direct damages as a constitutional minimum, combined with the near universal recognition of the injustice of the assumed "no business damages" rule stand a chance to alter the law in practice applied in everyday condemnation proceedings by local courts, courts which by habit draw their rules of decision from slogans derived from such sources as Nichols's treatise on eminent domain?

This question puts me in mind of the famous observations of

Lord Camden in *Entick v. Carrington*.²⁰⁶ In order to sustain the validity of general search warrants, the Crown relied on an unbroken practice of seventy years' standing in the use of such warrants. Lord Camden replied that everyone had always known that such warrants were contrary to the common law, and that their survival in practice could only be explained by the fact that they were usually directed only against those without the means or sophistication to resort to the courts, "or such warrants could never have passed for lawful till this time."²⁰⁷ Yet the *Entick* case finally came and the resort to general warrants was halted. Even in the face of settled practice of longstanding it is not wholly irrational to hope.

²⁰⁶ 95 Eng. Rep. 807 (1765).

²⁰⁷ *Id.* at 818.

APPENDIX

This Appendix collects, to the best of the author's ability, every printed discussion since 1900 of the assumed "no business damages" rule, or the "no consequential damages" rule, as they have been assumed to apply on the condemnation of business premises context. They are arranged chronologically. Of these sources, 6 are purely descriptive (these are marked by an asterisk), 2 contain single lines which might be approvals of the rule (these are marked with 2 asterisks), only 1 contains anything that could be called an attempt at evaluative defense of the rule (this is marked with 3 asterisks), and 42 condemn the assumed rule on justice grounds.

Surely these data have something to do with an appropriate evaluation of the justice of the assumed rule, according to prevailing societal standards, and surely justice has something to do with "just compensation."

PERIODICALS

1. Note, *Eminent Domain: Damages: Business*, 4 CALIF. L. REV. 248 (1916).

Takes the rule against business damages to be based upon a decision that business and goodwill are not "property." Highly critical of rule. "A fairer and more logical result will be reached when property is held to include land, business, good will or other intangible attribute, and when for the taking, deprivation or destruction of any of these the owner will be entitled to compensation." *Id.* at 250 (footnote omitted).

2. Note, *Constitutional Law: Eminent Domain: Compensation for Injury to Business*, 11 CORNELL L.Q. 215 (1925) (student author: Doering).

Critical of rule. It creates "a situation which clearly works in-justice." *Id.* at 218.

- **3. Note, *Eminent Domain—Consequential Damages*, 26 COLUM. L. REV. 625 (1926).

Contains a two line description of the rule, the second line of which might be read to agree that such damages are "probably too speculative," or on the other hand may merely be describing the position asserted by courts.

4. Note, *Eminent Domain—Constitutional Law, Requirement of Compensation for Good Will*, 39 HARV. L. REV. 654 (1926).

Critical of rule in its "denial of injury to good will" aspect. "[I]n a case where an important element of good will is the

particular location of the business and removal is compelled, it seems that compensation should be required for the damage to good will." *Id.* at 655.

5. Note, *Eminent Domain—Compensation—Damages for Loss of Good-Will*, 75 U. PA. L. REV. 783 (1927).

Highly critical. "Upon analysis, it seems that the reasons assigned [for the rule] are more specious than real." *Id.* at 783.

6. Note, *Eminent Domain—Loss of Good Will Excluded as an Element of Damages in Condemnation Proceedings*, 78 U. PA. L. REV. 112 (1929).

Highly critical.

In an attempt to explain the reasons for adhering to the general rule, the cases generally proceed upon two theories which are in direct conflict. One theory develops the view that only the land is taken, thereby allowing the business to be continued elsewhere carrying with it the good will previously enjoyed, whereas the second theory recognizes the fact that something more than land has been taken but because of the intangible nature of good will no compensation can be allowed. The first theory fails to recognize the fact that the removal of a business often occasions a loss of good will. In the event that there is such a loss caused by the taking of the land, the owner must bear the loss as has been pointed out in the general rule. That the second theory is questionable is seen from the fact that the courts quite readily protect good will as property in equity cases, and recognize it as a very important item in considering the value of property in taxation. In some states the good will of a foreign corporation is even taxable as capital employed within the state. Because of the vital part that good will plays in any business venture today, this very intangible property right has been properly recognized by our courts and legislatures in other fields of the law. It should behoove the legislatures and courts to also include loss of good will as an element of damages when property is taken for public use.

Id. at 113 (footnotes omitted).

- *7. Note, *Airports—Eminent Domain—Damages—Compensation for Loss to Business*, 2 AIR L. 279 (1931).

Purely descriptive.

8. Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221 (1931).

Highly idiosyncratic work critical of the rule. Believes normal

damage theory should ordinarily be controlling in eminent domain:

Certainly all possible benefit should be derived from the general law of damages wherever the situations presented are essentially analogous.

Id. at 246-47 (footnote omitted).

Contains many enlightening observations on the general procondemnor beliefs of Mr. Nichols, *see, e.g., id.* at 247, and Mr. Lewis. *See, e.g., id.* at 240.

9. McCormick, *The Measure of Compensation in Eminent Domain*, 17 MINN. L. REV. 461 (1933).

Article by Charles T. (Evidence) McCormick highly critical of the justice of the rule, but prescribing "value to the owner," as the proper theory to correct the injustice. *See id.* at 482.

10. Notes, *Some Problems of Consequential Damages in Condemnation Proceedings*, 28 GEO. L.J. 986 (1940) (student author: Brennan).

For the courts and legislatures to close their eyes to this type of damages on the flimsy excuse of the difficulty of measuring them and the fear that excessive and disproportionate damages *might* be awarded, and to make the property owner bear these losses which nowadays are frequently very serious losses, is too reminiscent of the antics of the ostrich, and too productive of injustice and unconscionable burdens to be allowed to continue. The states which have incorporated provisions for compensation for such damages into their constitutions, and those which achieve a like result by indirection in allowing such damages to be considered in determining the diminution in market value, have recognized the untenability of this position. We should not rest until this position is entirely vacated, and the realities faced with honesty and candor.

Id. at 994 (emphasis in original).

- *11. Note, *Loss of Good Will as Damages in Condemnation Proceedings*, 4 WYO. L.J. 133 (1949) (student author: Van Benschoten).

Purely descriptive note on *Kimball Laundry*.

- ***12. Note, *Eminent Domain: Compensation for Value of Trade Routes Destroyed by Condemnation for Temporary Use*, 37 CALIF. L. REV. 680 (1949) (student author: Kinevan).

A note on *Kimball Laundry*. The single attempted defense of the rule. The defense is based on the assertion that intangibles such as good will are difficult to value. While this may be true when they are looked at independently, it totally overlooks the non-speculative nature of valuing the business as one organic whole.

Does this 'principle of indemnity' require the result reached by the Court? A close look at the intangibles "destroyed" reveals that neither good will nor going concern value can be attributed to any single factor, or to any number of factors capable of rational segregation and evaluation. Among other things, they depend upon managerial and personnel ability, the extent and effectiveness of competition, location, general business conditions and the population factor—contributing elements defying the crudest empirical appraisal. The "value" of intangibles founded upon intangibles would not seem to merit inclusion under the "just compensation" clause. Because of weakness in precedent, the possibly prohibitive expense to the public, and the speculative and uncertain character of good will or going concern value, it is submitted that the decision should be given careful consideration before further application or extension.

Id. at 684.

13. Dolan, *Consequential Damages in Federal Condemnation*, 35 VA. L. REV. 1059 (1949).

Article by government lawyer involved in condemnation cases. Surprisingly, largely descriptive, but misconstrues *Monongahela* badly, *id.* at 1059-60, and recognizes that the no business-damages rule produces "harsh results." *Id.* at 1063. Critical of the internal consistency of *General Motors*. *Id.* Prefers "legislative remedy" for the "harsh results." *Id.* at 1062.

- *14. Note, *Compensation Allowed for Loss of Going-Concern Value in Temporary Condemnation Case*, 1 SYRACUSE L. REV. 308 (1949) (student author: Chambers).

Largely descriptive, though does say that the rationale of *Kimball Laundry* "would seem to be applicable to condemnation in fee cases where it is impossible for the owner to relocate and reestablish his business." *Id.* at 309 (footnote omitted).

15. Note, *Eminent Domain—Compensation—Value of Trade Routes Lost in Temporary Taking of Laundry Held Compensable Under the Fifth Amendment*, 63 HARV. L. REV. 352 (1949).

Argues for legislative solution to justice problems of "no business damages" rule.

16. Comment, *Consequential Damages and "Just Compensation" in Federal Condemnations*, 18 U. CHI. L. REV. 349 (1950).

Highly critical of rule. Construes *Kimball Laundry* as overruling *Mitchell sub silentio*. *Id.* at 354.

The cost of paying for property seized for public use should be shared equally by all the taxpayers. The Fifth Amendment was not meant to be a subsidy of the community by the individual.

Id. at 355.

- **17. Note, *Eminent Domain—Determination of Market Value—"Going Business" as Element of Value*, 27 N.D.L. REV. 349 (1951) (student author: Butler).

Largely descriptive, though strongly asserts that changes in the rule "probably" ought to be legislative because the rule "is so universally accepted." *Id.* at 352.

18. Comment, *An Inquiry into the Nature of Goodwill*, 53 COLUM. L. REV. 660, 674 (1953).

Critical of rule.

19. Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954).

Very critical of rule. Misconstrues *Mitchell*, then calls it "hard to defend." *Id.* at 616. Applauds *Kimball Laundry*, says that carrying its logic to cases involving fee takings should have the result that "compensation will be payable for incidental destruction of going concern value in such cases." *Id.* at 619.

20. Moriarty, *What Is "Reasonable Compensation" for "Appropriation", Under the 10th Article of the Bill of Rights, by a City, of Land and the Business Thereon for the Purpose of Conducting the Same Business Thereon?*, 41 MASS. L.Q. 24 (1956).

Critical of rule. Emphasis on *Monongahela*, almost notices the "direct damages" play. *Id.* at 25.

21. Note, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957).

Highly critical of rule. Misconstrues *Monongahela* badly, then destroys its own misconception. *Id.* at 69-70.

Urban renewal projects favor particular private enterprises at the expense of less modern and less highly developed businesses. Under these programs, business property and residences may be taken through eminent domain although their physical condition would not justify governmental condemnation of the property by exer-

cise of police power. Because private developers can secure valuable sites at prices well below their true worth, they in effect are subsidized by governments at the expense of other private property owners. So viewed, the denial of incidental losses imposes on condemnees a greater burden of financing public improvements; condemned businesses are thus forced to contribute to the pecuniary success of other profit-making enterprises.

. . . .

At a minimum, compensation should be awarded for incidental losses sustained in urban renewal programs or in any other takings which redound to the direct benefit of profit-making corporations. Recovery should not, however, be confined to claims arising in this context. Ultimately, the public which benefits from improvements should bear the incidental losses occasioned by any condemnation for which just compensation is required; no reason appears for placing an inordinate burden on the individuals whose property is appropriated for the public benefit.

Id. at 92-93, 96 (footnotes omitted).

22. Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504 (1959) (student authors: Sogg & Wertheimer).

Criticizes rule on "political" grounds.

In view of the increasing number of situations in which a public agency may take private property and of the very limited judicial scrutiny applied to such takings, the traditional measures of compensation paid and the policies underlying them require reappraisal. To make renewal politically more palatable, compensation should be made for loss of profits, devaluation of property, and expenses of moving.

Id. at 526 (footnote omitted).

23. Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63.

Criticizes rule if it results in paying, what no owner would take, for what is lost, (and also, by implication, in failing to pay what some private party *would* pay for what is lost).

Thus the normal rule refusing to award the seller in condemnation extra compensation for cost of removal or loss of business is correct, given the basic assumption of a willing seller. The fact is, however, that there is almost never a willing seller in a condemnation suit; otherwise

there would be no litigation. In fact it may be that these "costs of sale" have led him not to sell at market price. If the assumption is that the "average" man would sell at market, the conclusion that the "unreasonable" man shall not get more is easy to reach. But what of the situations where it is almost inconceivable that the average man would sell willingly?

. . . .

Since market price assumes that a large percentage of rational people would sell at such a price, market price becomes meaningless when most people will not sell. It is not fair to make one owner sell at a price where it is highly unlikely that any owner would sell at such a price.

Id. at 96, 98.

24. Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L. REV. 437 (1962).

Wants all consequential damages recoverable under normal damage theory to be given. Stresses that:

[T]he unfairness resulting from making a few individuals pay a disproportionate part of the cost of a public project.

Condemnation activity is intended and expected to benefit the public or a large segment thereof. Indeed, without a public purpose, though that phrase is liberally interpreted, it is improper. Yet under prevailing rules of compensation a large part of the consequential loss portion of the economic cost of the activity is borne solely by those on whom it falls. And to this extent the public in general benefits at the expense of a relative few. . . . While we concede that the individual must bow before the inherent right of the sovereign to undertake the activities that require condemnation, it does not follow that recovery or loss caused thereby must be denied. On the contrary, the very constitutional provisions which are interpreted to guarantee compensation for some of the ensuing losses refute that logic.

Id. at 451 (footnote omitted).

25. Comment, *An Act to Provide Compensation for Loss of Goodwill Resulting from Eminent Domain Proceedings*, 3 HARV. J. ON LEGIS. 445 (1965).

Generally notes injustice of rule, but looks to a legislative solution.

26. Slavitt, *Inequities and Injustices of Condemnation Acquisitions*, 40 CONN. B.J. 11 (1966).

Critical of general rule as to the non-recovery of "consequential damages" in general, based on doing "substantial justice." *Id.* at 19.

27. Comment, "*Just Compensation*" for the Small Businessman, 2 COLUM. J.L. & SOC. PROBS. 144 (1966).

This article is *the* answer to all those who would rely on legislation to solve these problems. Describes the indefensible, crazy-quilt pattern of legislation then existing (which has not changed much). Very critical of rule.

[P]resent law results in widespread, predictable hardship. A new standard, whether instituted by the legislatures or the courts, might tend to increase litigation as to matters of fact. But to the extent that its adoption would result in a true alignment of law and socio-economic reality, litigation as to matters of law may be substantially reduced.

It is true that a basic alteration of the traditional law in favor of more adequate recoveries would destroy the usefulness of present statistics as a means of projecting probable condemnation costs. But experience under the law could be expected to produce statistics just as accurate for this purpose. Moreover, since these new statistics would gauge the actual cost to condemnees, they would be valuable guides to policy-makers in determining the propriety and reasonable scope of condemnations. The policies of condemnation for public use and of adequately compensating those whose property is taken, are not antithetical, but rather complementary. Some projects may be planned less ambitiously; others may be postponed. But a balance can be struck which renders neither policy subservient to the other. The Sovereign has the power to take for public use; the law must now fully recognize his duty to compensate justly.

Id. at 162-63.

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

Characterizes the rule of no recovery for consequential damage as leading to "violent unfairness" in the redevelopment setting. *Id.* at 1255. Dispairs of a judicial response to solve the problem.

29. Phay, *The Eminent Domain Procedure of North Carolina: The Need for Legislative Action*, 45 N.C.L. REV. 587 (1967).

Highly critical of rule. Misconstrues *Monongahela*. *Id.* at 623. Embraces "value to the owner" as the proper solution.

30. Klein, *Eminent Domain: Judicial Response to the Human Disruption*, 46 U. DET. J. URB. L. 1 (1968).

This article strongly condemns the injustice of the current rule and proposes a version of value to the owner as the solution. "[T]he great body of law operating outside the framework of eminent domain is inconsistent with the law within that framework. . . ." *Id.* at 18. "[T]here must be some better reason for a harsh rule than that it is the rule." *Id.* at 11.

31. Aloï & Goldberg, *A Reexamination of Value, Good Will, and Business Losses in Eminent Domain*, 53 CORNELL L. REV. 604 (1968).

Highly critical of "no business damages" rule. This article comes closest to any to date to the "direct damages" argument.

True value of a going concern and market value of the individual parts may differ. But the difference apparently is overlooked by the courts when they attempt to place a market value on land taken. Although they purport to treat the state and the property owner as vendee and vendor bargaining at arm's length in the private market, the courts generally miss the crucial point that a willing buyer normally pays for the value of the business as a going concern, including the value of equipment especially designed for the building in which the business is housed. The state can *force* a sale on a reluctant owner and, through application of arbitrary valuation rules, become, in effect, a strong-arm buyer. Since traditional condemnation law does not compensate the property owner for going concern value, the inevitable result is that the state gets a bargain price.

Id. at 607 (emphasis in original) (footnotes omitted).

32. Slavitt, *More Inequities and Injustices of Condemnation Acquisitions*, 43 CONN. B.J. 89 (1969).

Article reviews many rules and practices of eminent domain condemnations and shows their injustice. The author points out that "[t]he nature of a one-man or family-run operation and the [inadequate] compensation allowed means that many proprietors of small retail or service establishments are not able to continue doing business. . . . Most have insufficient reserves [including credit resources] to absorb the business interruption losses until they are able to relocate elsewhere." *Id.* at 102.

33. Johnston, "Just Compensation" for Lessor and Lessee, 22 VAND. L. REV. 293 (1969).

Article points up the inadequacy of the current approach to valuation which excludes business losses where "there is considerable disparity between the land's value to the former owner and its value to the condemnor. . . . In the absence of compulsion, no rational person in the condemnee's position would accept less than full indemnity." *Id.* at 300. Article goes on to evaluate the injustices of some ways in which leaseholds are compensated. Misconstrues *Monongohela* and *Mitchell*. *Id.* at 299.

34. Note, *The Unsoundness of California's Noncompensability Rule as Applied to Business Losses in Condemnation Cases*, 20 HASTINGS L.J. 675 (1969) (student author: Sange).

Savagely critical of rule.

This note has attempted to establish the unsoundness of judicially imposed restrictions in denying compensation for lost profits and goodwill by analyzing the weaknesses of the arguments supporting such restrictions. The interpolation of a distinction between tangible and intangible property is invalid; the fiction embodied in holding that a business is not property and, therefore, is not taken is specious. Non-recognition of the right of customer access is a denial of just compensation that imposes an unfair burden upon the property owner, a burden that should be borne by the taxpayers as a whole. Use of the police power to deny compensation for intangible property rights is inconsistent, resulting in unjust losses that are offensive to the constitution. Finally, the speculation argument as applied to a taking or a damaging is inapplicable when proper evidence is presented.

Id. at 692 (footnotes omitted).

35. Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W.L. REV. 57 (1969).

Excoriates the rule of "no business damages" in great detail. After illustrating its operation on a hypothetical Mr. Green, it concludes:

Which brings us to the final point: what *do* we tell Mr. Green? Do we as attorneys simply tell him what "the law" is and hide behind the courts' skirts? Do we just placidly accept the notion that the law of *just* compensation is unjust? (How about: "I know that the result is very unjust to you, Mr. Green, but that's just compensa-

tion?") Or, overlooking our traditional status as "officers of the court," do we cop out by condemning the courts as callous and unfair? Not a very satisfactory choice, is it?

Well, what *do* we tell him? The deplorable fact is that we have precious little to tell him.

What then is to be done? The obvious answer is that the courts who have created the present unsatisfactory conditions, must be prevailed upon to formulate more rational or more just rules.

Id. at 88 (emphasis in original).

36. Bigham, "Fair Market Value," "Just Compensation," and the Constitution: A Critical View, 24 VAND. L. REV. 63 (1970).

Article points out "public dissatisfaction with both the substantive test for damages and the procedures through which the land is obtained . . . [leaving] a trail of unhappy landowners who have lost all faith in the ability or willingness of government to deal fairly with its citizens." *Id.* at 65 (footnote omitted). Author advocates an "indemnity" approach to valuation to rectify the present situation where "compensation is not allowable for the unwillingness of the owner to part with his property, the loss of business or future profits, the frustration of the owner's plans, loss of opportunity, or other so-called consequential or indirect damages." *Id.* at 66 (footnotes omitted).

37. Happy, *Damnum Absque Injuria: When Private Property May Be Damaged Without Compensation in Missouri*, 36 MO. L. REV. 453 (1971).

Article points to erosion of "just compensation" by such exceptions as "police power," "damages too speculative," etc. and concludes that "the significant change in the extent and type of public improvements which are now being undertaken, accompanied by the broader base of real property ownership, requires new methods of determining value be instituted to protect the constitutional guarantee that private property shall not be taken for public use without just compensation." *Id.* at 470.

38. Comment, *Non-Compensable Business Losses in Eminent Domain Proceedings: A Time for Re-evaluation*, 46 TEMP. L.Q. 72 (1972) (student author: Wright).

Very critical of rule.

The current concepts of the measure of compensation required in the acquisition of a going business by eminent domain merit thorough reexamination. Con-

demnors presently acquire business property at bargain-sale prices. No longer should the courts and legislature stand complacently idle while actual and measurable losses remain uncompensated. The small minority directly affected by condemnation should no longer have to bear disproportionate losses occasioned solely by the taking of their property for the benefit of the majority. The losses incurred by business owners are both real and substantial. Just compensation requires no less than total indemnification for all business losses.

Id. at 89.

39. Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAW. 765 (1973).

The article criticizes the rule as harsh, unjust, and Kafkaesque.

The owner is told that he is 'to be put in as good a position pecuniarily as he would have occupied had his property not been taken,' but at the same time he is told that in his post-condemnation pecuniary position he must absorb without compensation a host of economic losses arising directly from the taking of his property. He may, in fact, be economically destroyed by the condemnation, but that's just too bad; the law—says the Court—is "harsh" and any remedy should be sought from the legislative branch of the government. If that is *constitutionally* mandated indemnification then it surely is making its appearance in a convincing disguise.

Id. at 783 (footnotes omitted) (emphasis in original). Misconstrues *Monongahela*.

Id. at 778.

40. Leary & Turner, *The Injustice of "Just Compensation" to Fixed Income Recipients—Does Recent Relocation Legislation Fill the Void?*, 48 TEMP. L.Q. 1 (1974).

Very critical of the justice of the rule of no consequential damages.

The notions of just compensation, full and perfect equivalence, and making the owner pecuniarily whole are essentially emasculated by judicial holdings that the Fifth Amendment does not socialize all losses incident to condemnation and that the government must pay only for what it takes.

Id. at 7 (footnote omitted).

41. Slavitt, *Just Compensation—Updated*, 48 CONN.B.J. 241 (1974).

Critical of rule. Describes recent cases in some states rejecting rule.

42. Masterman & Tully, *Compensation for Business Loss Eminent Domain Proceedings*, B.B.J., May 1976, at 3.

Very critical of rule.

Compensation for business loss resulting from the exercise of the power of eminent domain has traditionally been denied by the courts. Various reasons have been advanced for the denial of compensation, the most commonly cited being that constitutional language mandating just compensation for property taken or destroyed applies only to real property; good will is not "taken" in an eminent domain proceeding, although the taking may well destroy the good will; and, the value or diminution of value of the good will is not susceptible of valuation. Commentators and critics have castigated and pilloried these and other attempts to rationalize the unjust denial of full and fair compensation to condemnees. The consensus has been that the courts have adopted unduly restricted interpretations of the relevant constitutional language, federal or state.

Id. at 3 (footnotes omitted).

43. Payne, *Compensation for Business Loss in Eminent Domain Actions*, 6 REAL EST. L.J. 63 (1977).

Asserts such compensation is desirable.

44. Payne, *A Survey of New Jersey Eminent Domain Law (With Academic Interruptions)*, 30 RUTGERS L. REV. 1111 (1977).

Criticizes the rule as based on a flawed view of market theory.

Id. at 1162-63.

- *45. Sackman, *Business Damages—New Concerns*, 1977 INST. ON PLAN. ZONING & EMINENT DOMAIN 255.

Purely descriptive of recent trends toward compensating for business losses.

46. Comment, *The Lessee and Goodwill in an Eminent Domain Proceeding*, 8 W. ST. U.L. REV. 47 (1980) (student author: Rhoades).

Very critical of "no business damages rule."

The essential question to be answered is whether a failure to compensate for goodwill is asking the owner of private property to bear a disproportionate share of the cost of public improvement. The author believes the answer to that is yes.

Id. at 48.

- *47. Note, *Eminent Domain-Valuation of Condemned Res — Evidence of Business Factors Probative of Future Earnings Is Properly Admissible in Condemnation Proceedings Concerning Certificates of Public Convenience and Necessity*, 52 Miss. L.J. 927 (1982) (student author: Sledge).

Purely descriptive.

BOOKS

- *48. I L. ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* 325-28 (2d ed. 1953).

Purely descriptive.

49. E. RAMS, *VALUATION FOR EMINENT DOMAIN* (1973).

Recognizes the doctrine is unfair to owners, but opposes it, not on that sentimental ground, but on the ground that it results in a poor market allocation mechanism for wise land use (another way of saying redevelopment agencies will do things they shouldn't when they can get the property without paying for all associated costs).

The consequential loss doctrine has the failing of dissociating the incidence of benefits and costs. In supporting a doctrine that denies compensation to the owner and interest holders of a parcel of land, the American judiciary allows the condemning authority to receive the benefits of title without equilibrating costs. The dissociation caused by this encouragement of "uncosted benefits" improperly and unwisely allocates land to a particular use. Because of this lack of wisdom rather than any inequities caused by the doctrine, courts and legislatures should consider alteration of the doctrine, thereby providing for a rational resolution of land use conflicts.

Id. at 148-49.

50. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 459 n.11 (1978).

The owner is entitled to the fair value to the owner (not the worth to the government) at the time of the taking. See *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973); *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326, 343 (1893). See P. Nichols, 3 *Eminent Domain* § 8.62 et seq. (3d ed. 1974). The body of rules determining which expectations constitute compensable property interests and which do not, see, e.g., *Fleming v. Nestor*, 363 U.S. 603 (1960) (social security expectations not property subject to compensation under takings law); *United States v.*

Petty Motor Co., 327 U.S. 372, 379-80 (1946) (leasehold renewal expectation not property), plainly requires reconsideration in light of the broader definition of property interests now employed in the law of procedural due process. See § 10-9, *infra*. There seems no good reason why the broader definition should not be extended to the takings context.

L. TRIBE, *supra*, at 459 n.11.

51. 4 P. NICHOLS & J. SACKMAN, NICHOLS' LAW OF EMINENT DOMAIN (rev. 3d ed. 1983).

Though mainly descriptive, even *Nichols*, an industry publication for decades edited by a man in charge of condemnations for a government agency, concedes "unquestionably the rule sometimes works great hardship" and continues "as a result, recent trends have been in the direction of finding compensability." *Id.* § 13.3, at 13-189.