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No person shall be . . . deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.[1]

THE PURPOSE OF THE REQUIREMENT of just compensation contained in the above quoted section of the United States Constitution, where private property is taken for public use, is to place the financial losses caused through public improvements on the public rather than entirely upon those who happen to lie in the path of the project.[2] Since the nation is proliferating with ever-expanding highways and urban renewal programs, and these programs involve the exercise of the power eminent domain, controversies related to fair value for property taken are numerous. Relatively few cases in modern times reach the Supreme Court, but through previous decisions, affirmed or cited with approval in recent cases, the law regarding just compensation has been firmly established.

Eminent Domain

Being an incident of sovereignty, the right of eminent domain requires no constitutional recognition. The requirement of just compensation is merely a limitation upon the exercise of a pre-existing power[3] to which all private property is subject.[4] This power exists in favor of the Federal and State Governments as well as municipal subdivisions of the state and any public or private corporation vested with a public use, so long as the pow-

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1 Constitution of The United States, Amendment V.

2 United States v. Willow River Power Co., 324 U. S. 499, 65 S. Ct. 761 (1944). See generally, Oleck, Cases on Damages, c. 36 (1962); Oleck, Damages to Persons & Property, c. 21 (1961 rev. ed.).

3 United States v. Jones, 109 U. S. 513, 518, 3 S. Ct. 346 (1883); United States v. Carmack, 329 U. S. 230, 241, 67 S. Ct. 252 (1946); 3 Nichols on Eminent Domain, §§ 8.6, 43 (3d ed. 1965); United States v. Miller, 317 U. S. 369, 375, 63 S. Ct. 276 (1943).

4 United States v. Lynah, 188 U. S. 445, 465, 23 S. Ct. 349 (1903);

er is exercised when necessary for the public good.[5] Regarding the appropriation by the Federal Government of lands in a State, it has been held that Congress may authorize that they be taken, either by proceedings in the courts of the State, with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the State.[6]

Condemnation

The term "condemnation" is defined as the taking of private property for public use, with compensation to the owner,[7] and recently has been used to refer to proceedings instituted for the purpose of exercising the sovereign power of eminent domain.[8] It was earlier defined as the "means by which the sovereign may find out what any piece of property will cost . . . (with) title not (passing) until compensation has been ascertained and paid."[9] Condemnation has remained basically the same over the years, though prior to World War II the appropriation of private property for public use was largely the result of a physical taking, without the formality of a condemnation action, leaving the owner to a suit for compensation under the Tucker Act[10] or in accordance with procedures outlined under the Lever Act.[11]

Amendment Fourteen

The Fourteenth Amendment to the United States Constitution prohibits any State from "depriv(ing) any person of life, liberty, or property, without due process of law. . . ." When this Amendment was first enacted, the question arose whether the above provision gave property owners the same protection of just compensation as did the Fifth Amendment. The first case ruled in the negative.[12] Shortly afterwards, however, it was held that even though the State ". . . legislature may prescribe a form of procedure to be observed in the taking of private property for

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[5] Semenow, Questions and Answers on Real Estate, 61 (3rd ed. 1957).

[6] Chappell v. United States, 160 U. S. 499, 510, 16 S. Ct. 397 (1896).

[7] Semenow, *op. cit. supra* n. 5.

[8] United States v. Dow, 357 U. S. 17, 78 S. Ct. 1039 (1958).

[9] Danforth v. United States, 308 U. S. 271, 60 S. Ct. 231 (1939).

[10] Act of March 3, 1887, C. 359, 24 Stat. 505, 28 U. S. C. 1346(a)(2), 1491 (1952).

[11] Act of August 10, 1917, c. 53, 40 Stat. 276, 279.

[12] Davidson v. Board of Administrators, City of New Orleans, 96 U. S. 97, 105, 24 L. Ed. 616 (1878).

public use, . . . it is not due process of law if provision be not made for compensation." [13] Such compensation should be "full, adequate and just, not excessive or exorbitant." [13a] The cited case of *Chicago B. & Q. R.R. Co.* is recognized as the first incorporation of "just compensation" into the 14th Amendment. Even though this requirement of just compensation has been made applicable to the States, the rules regarding compensation in the State and Federal courts are not always the same, and they are not required to be the same.[14] In the case of *Roberts v. City of New York*,[15] junk value was allocated to an elevated structure, but a high value was attributed to the underlying easement. The high court held that a "mere underestimate of compensation to be paid for property taken in condemnation" is neither unfair nor a denial of due process; the alleged error must be gross and obvious. Unless the State court prevents the property owner from obtaining substantially any compensation, its findings as to damages will not be overruled even though the complainant received less than he should have received.[16]

Just Compensation—What is it?

The Fifth Amendment contains no definite standards of fairness for just compensation,[17] though the word "just" may be said to connote the feeling of "fairness" and "equity." [18] Attempted definitions of the term have fallen short of providing quick solutions to problems of compensation, but the general definition most widely used seems to be, "the full and perfect equivalent, in money, of the property taken,[19] not to exceed mar-

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[13] Chicago B. & Q. R. R. Co. v. Chicago, 166 U. S. 226, 236, 17 S. Ct. 581 (1897).

[13a] Chicago B. & Q. R.R. Co. v. Chicago, *supra* note 13; A. Backus Jr. & Sons v. Fort Street Union Depot Co., 169 U. S. 557, 18 S. Ct. 445 (1898); cited with approval in Malloy v. Hogan, 378 U. S. 1, 4, 84 S. Ct. 1489, 1491 (1964) (2 dissents on other grounds) cited with approval in Griggs v. Allegheny County, 369 U. S. 84, 82 S. Ct. 531 (1962).

[14] State of Nebraska v. United States, 164 F. 2d 866 (8th Cir. 1947) cert. den. 334 U. S. 815, 68 S. Ct. 1070 (1948).

[15] 295 U. S. 264, 55 S. Ct. 689 (1935).

[16] McGovern v. City of New York, 229 U. S. 363, 33 S. Ct. 876 (1913).

[17] United States v. Cors, 337 U. S. 325, 69 S. Ct. 1086 (1949) dissents by Justices Frankfurter, Jackson, Burton and C. J. Vinson.

[18] Monongahela Navig. Co. v. United States, 148 U. S. 312, 13 S. Ct. 622 (1893); United States v. Virginia Electric & Power Co., 365 U. S. 624, 81 S. Ct. 784 (1961).

[19] Monongahela Navig. Co. v. United States, *supra* n. 18.

ket value fairly determined." [20] It seems to be clear that if there *is* a taking, compensation must be made to the owners *in money*.[21] It was established long ago that, generally, compensation should be just to both the condemner and the condemnee,[22] and "when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge, . . . the requirement of just compensation is satisfied." [23] One expert has suggested that just compensation can be expressed in terms of the following formula:

Just Compensation = Value of land taken *plus*
Damage to remainder *minus*
special benefits[24]

A better and more widely used formula, however, is the difference between the value of the property before and after the taking.[25]

How Is Just Compensation Determined?

As in most areas of the law, the determination of just compensation is dependent on the particular facts; however, there are certain basic rules which can be followed in this field. The rules of compensation are judicial in nature and it is up to the courts to determine what is or is not just compensation and what rules are to be applied.[26] But where the Federal Government is involved in the taking, State law cannot be used to determine just compensation, since the right to compensation is based on the Federal Constitution, even though Federal Courts are bound by local procedural laws.[27]

One of the more prevalent methods of establishing just compensation is by use of recent sales of comparable properties,

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[20] Seaboard Air Line Ry. v. United States, 261 U. S. 299, 43 S. Ct. 354 (1923); United States v. New River Collieries Co., 262 U. S. 341, 43 S. Ct. 565 (1923).

[21] See discussion in Ghaster Properties, Inc. v. Preston, 20 Ohio Op. 2d 51, 194 N. E. 2d 158, rev. on other grounds, 176 Ohio St. 425 (1963).

[22] Searl v. School District No. 2, 133 U. S. 553, 10 S. Ct. 374 (1890).

[23] Joslin Mfg. Co. v. City of Providence, 262 U. S. 668, 677, 43 S. Ct. 684 (1923).

[24] Nichols, *op. cit. supra* n. 3.

[25] Dugan v. Rank, 372 U. S. 609, 83 S. Ct. 999 (1963).

[26] United States v. New River Collieries Co., *supra* n. 20.

[27] United States v. Miller, *supra* n. 3.

which sales are usually confined to a reasonable period prior to the date of taking,[28] and to properties similar "in their situation, relative position and other factors relating to value," such sales being "fair and in the open market." [29] In Ohio, use of comparable sales, however, does not include evidence of unaccepted offers of purchase for any property except the subject property "even though elicited on cross-examination." [30] An attempt to prove value by use of the price paid for property is only admissible as tending to show present value so long as the purchase was not so far removed in time from the appropriation as to make such comparison unjust or impossible.[31] However, in a case involving personal property, original cost was termed the "false standard of the past. . . ." [32]

In determining just compensation, mineral and timber resources are to be included in the value,[33] but in Ohio mineral deposits cannot be determined separately from the land.[34] Reproduction cost is another method of determining value, but is not a good factor when no one would think of reproducing the property.[35] Still another basis is the use of earnings through an income approach to value, but the period used must be reasonably near the date of taking.[36] The methods of arriving at just compensation are many, and, as mentioned previously, will vary with the particular problems faced in an area. Reproduction may not be feasible, income may not be present, or sales may be so few, far between and unstable as to reflect no market whatsoever. These are problems that the court constantly tries to

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[28] United States v. 63.04 acres, 245 F. 2d 140 (C. A. 2, 1957); Also see United States v. The Meadow Brook Club, 259 F. 2d 41 (C. A. 2, 1958) cert. den. 358 U. S. 921, 79 S. Ct. 290 (1958).

[29] Ohio Turnpike Commission v. Ellis, 164 Ohio St. 377, 131 N. E. 2d 397 (1955).

[30] In re Appropriation of Easement for Highway Purposes, 110 Ohio App. 88, 168 N. E. 2d 436 (1959).

[31] In re Appropriation of Easement for Highway Purposes, 118 Ohio App. 207, 193 N. E. 2d 702 (1962).

[32] United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U. S. 396, 70 S. Ct. 217 (1949).

[33] United States v. Shoshone Tribe, 304 U. S. 111, 58 S. Ct. 794 (1938); United States v. Klamath & Moadoc Tribes, 304 U. S. 119, 58 S. Ct. 799 (1938).

[34] In re Appropriation of Easements for Highway Purposes, 174 Ohio St. 441, 190 N. E. 2d 446 (1963).

[35] United States v. Toronto Nav. Co., *supra* n. 32.

[36] *Ibid.*

deal with in deciding appropriation contests. The goal is to indemnify the owner whose property has been taken by eminent domain.[37]

The Measure of Compensation

Damages are measured by the loss to the owner, not the gain to the taker.[38] If the property has a special value to the taker because of its adaptability for his project or a special value to the owner because of its adaptability to his needs, these elements are not used to arrive at market value; likewise, an increase in value because of the government's great need is excluded.[39] Cost of or investment in a property is not recoverable as such, for the law protects the market value and not the cost,[40] and the owner is entitled to just and adequate compensation but is not entitled to realize profit.[41] One case held that Congressional authorization of Indian occupancy of lands does not equal ownership and such occupancy may be extinguished without any compensation.[42]

The "highest and best use" of a property should always be considered in making a proper evaluation, and "the general rule is that compensation 'is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future,' . . . (but) 'mere possible or imaginary uses, or the speculative schemes of its proprietor, are to be excluded.' " [43] However, fluctuations in property value as a result of the legal authorization of a Government project, or from the starting or finishing of a project, are "incidents of

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[37] Monongahela Navig. Co. v. United States, *supra* n. 18; Bauman v. Ross, 167 U. S. 548, 17 S. Ct. 966 (1897); United States v. Dickinson, 331 U. S. 745, 67 S. Ct. 1382 (1947), citing Bauman v. Ross with approval.

[38] United States ex rel. T. V. A. v. Powelson, 319 U. S. 266, 63 S. Ct. 1047 (1943); United States v. Miller, *supra* n. 3; United States v. Causby, 328 U. S. 256, 66 S. Ct. 1062 (1946); Roberts v. New York, *supra* n. 15; United States v. Virginia Electric & Power Co., *supra* n. 18.

[39] United States v. Cors, *supra* n. 17; United States v. Chandler-Dunbar Co., 229 U. S. 53, 33 S. Ct. 667 (1913).

[40] United States ex rel. T. V. A. v. Powelson, *supra* n. 38; Olson v. United States, 292 U. S. 246, 54 S. Ct. 704 (1934).

[41] In re Appropriation of Easements for Highway Purposes, *supra* n. 34.

[42] Tee-Hit-Ton Indians v. United States, 348 U. S. 272, 75 S. Ct. 313 (1955).

[43] Chicago B. & Q. R.R. Co. v. Chicago, *supra* n. 13; McGovern v. New York, *supra* n. 16; also see Griggs v. Allegheny County, *supra* n. 13; United States ex rel. T. V. A. v. Powelson, *supra* n. 38.

ownership" and any increase or decrease in value because of this is non-compensable.[44] The rule varies, depending on whether the property was within the scope of the project from the beginning or was merely adjacent and included by subsequent enlargement of the project. If the latter, the owner should not be deprived of the added value to the property, before enlargement, because of his proximity.[45]

Fair Market Value

The normal measure of recovery, where it can be determined, is the market value of the property.[46] Market value has been defined as "the amount that in all probability would have been arrived at by fair negotiation between a willing seller and a willing purchaser," [47] but the following definition appears more encompassing and meaningful:

> Market value (or fair market value) is the amount at which a property would exchange, for cash, in the current real estate market, between a willing buyer and a willing seller, both well informed as to all possible uses to which the property is adapted, both motivated by reactions of typical users, and both allowed a reasonable time to test the market.[48]

(This presupposes that all rights or benefits inherent in and attributed to the property were included in the transfer.)

The cost of reproduction of the building, less depreciation, (discussed *supra* in determination of compensation) is not the same as fair market value and is not necessarily a part of fair market value, but it may be considered in determination of fair market value in condemnation cases.[49]

Following are a few of the rules which have been applied to the determination of market value by the United States and Ohio courts:

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[44] Danforth v. United States, *supra* n. 9; United States v. Miller, *supra* n. 3.

[45] United States v. Miller, *supra* n. 3.

[46] United States ex rel. T. V. A. v. Powelson, *supra* n. 38; United States v. New River Collieries Co., *supra* n. 20; United States v. Cors, *supra* n. 17; United States v. Toronto, Hamilton & Buffalo Navigation Co., *supra* n. 32.

[47] United States v. Miller, *supra* n. 3; also see Olson v. United States, *supra* n. 40; see Kimball Laundry Co. v. United States, 338 U. S. 1, 69 S. Ct. 1434 (1949).

[48] Edmunds, What Constitutes Just Compensation, 27 The Residential Appraiser 11 (April, 1961).

[49] In re Appropriation for Highway Purposes, 89 Ohio L. Abs. 580, 187 N. E. 2d 413 (1962).

1) Market value may indicate the use to which a property may be readily converted as well as its present use,[50] but where there is no probability of a zoning change within a reasonable time, only the zoned use may be the basis of market value.[51]
2) Special value to the owner is non-compensable,[52] for he receives only indemnity for his loss,[53] and, likewise, he is not constitutionally entitled to a return of his investment.[54]
3) A determination of market value is not unjust even though the value arrived at is less than the aggregate values of various interests in the land.[55]

In 1959 the Supreme Court was confronted with the question of the constitutionality of a Pennsylvania statute which denied compensation to owners of property affected by the designation of a "limited access highway" unless the property was actually taken.[56] Respondents were claiming a property right in their access to the highway which was to be destroyed. The State courts had denied present relief to respondent but the District Court, in *Creasy v. Stevens*,[57] issued a general decree prohibiting the State from proceeding because of "irreparable harm" facing the plaintiffs. The Supreme Court reversed the District Court, dismissing on jurisdictional grounds. The dissenting opinion conceded the impropriety of the District Court decree but maintained that plaintiffs were entitled to a declaratory judgment determining whether or not the access to a highway was a property right and therefore compensable. The dissenting view appears the better reasoned position, for a system of law as is proposed here does not, as the law was intended,

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[50] Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206 (1879); McCandless v. United States, 298 U. S. 342, 56 Sup. Ct. 764 (1936); supported in a strong 4 justice dissent in United States v. Twin City Power Co., 350 U. S. 222, 76 S. Ct. 259 (1956).

[51] In Re Appropriation of Easement for Highway Purposes, 118 Ohio App. 315, 194 N. E. 2d 582 (1963).

[52] United States v. Cors, 337 U. S. 325, 69 S. Ct. 1086 (1949); United States v. Miller, *supra* n. 3.

[53] United States v. Miller, *supra* n. 3.

[54] United States ex rel. T. V. A. v. Powelson, *supra* n. 38.

[55] Hughes v. City of Cincinnati, 175 Ohio St. 381, 195 N. E. 2d 552 (1964).

[56] Martin v. Creasy, 360 U. S. 219, 79 S. Ct. 1034 (1959); Justice Douglas dissenting in part.

[57] Creasy v. Stevens, 160 F. Supp. 404 (W. D. Pa. 1958), revd. 360 U. S. 219 (1959), sub nom. Martin v. Creasy.

prevent the possible doing of a wrong. Rather, it affords "possible" relief after the commission of the wrong. This system of law is not complete, and is inadequate to meet the present needs of society.[58]

The area in which the Supreme Court seems to have rendered the most decisions involving just compensation for real property relates to water power and flowage right cases. Four decisions within the past ten years stand out as establishing the law in this area. The first of these discusses the issue of whether or not just compensation includes the value of land as a site for hydroelectric power. (*i.e.,* does it include the value of the water power?)[59] The court, in a 5-4 decision, invoked the theory of the United States' "dominant power" over navigable streams, and held that since this power exists, the landowner has no "right" to the flow of the stream since the Government can grant or withhold it as it chooses. The court indicates that a different result would probably be reached if a privately owned stream were involved. The strong dissent says the highest and best use must be included (*i.e.,* value due to its riparian character) in determining the fair market value.

The next case involved the Federal appropriation of timber, without notice to the owner but in accordance with State law, which grew on land between the low and high water mark of a river and which was subject to servitude for use in levee construction.[60] The court felt that the Federal Government obtained by "donation" what the State had already appropriated through legislation. The dissent said that this appropriation, without giving the owner an opportunity to salvage his property, was "sheer confiscation."

The third decision was rendered by a unanimous court and involves the incorporation of a non-navigable tributary as part of a comprehensive plan of the Federal Government.[61] There was no compensation made to the State agency created to develop power on this tributary for either its loss of water power rights or its franchise to develop power. The court held that the

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[58] Vanderbilt v. Mitchell, 72 N. J. Eq. 910 (1907).

[59] United States v. Twin City Power Co., *supra* n. 50, dissenting by Justices Burton, Frankfurter, Minton, and Harlan.

[60] General Box Co. v. United States, 351 U. S. 159, 76 S. Ct. 728 (1956) dissent by Justices Douglas and Harlan.

[61] United States v. Grand River Dam Authority, 363 U. S. 229, 80 S. Ct. 1134 (1960).

frustration of an enterprise by exercise of a superior governmental power is not a taking of property.

The minority in the above cases seems to have emerged partially victorious if the fourth case can be a criterion.[62] Here, the United States acquired a flowage easement by condemnation. This included a smaller parcel over which respondent owned a perpetual and exclusive flowage easement which was destroyed by the appropriation. The court unanimously agreed that there is no private property in the flow of a navigable stream and therefore this part was non-compensable; however, the easement has value not attributable to the flow of the river and this is compensable. The court said, "the valuation of an easement upon the basis of its destructive impact upon other uses of the servient fee is a universally accepted method of determining its worth." In other words, look at the highest and best use of the servient land, determine its value and then determine what is destroyed of that value by the easement.

Fair market value, like just compensation, cannot be simply defined. The above examples were intended to merely show some directions which the courts have taken. Every case must be determined on its own fact situation and rare are the cases which parallel previous decisions.

Date of Valuation

As a general rule, the determinative date for the ascertainment of compensation is the date of taking possession or title, whichever is earlier.[63] Where, however, the special equities of a particular situation require the application of a different rule, the courts remain flexible. In a recent Ohio case, where the court found, (1) a substantial decrease in a property owner's gross income as a direct result of the activities of the City and Urban Renewal authorities, (2) that the owner was required by the City to expend considerable money to keep his buildings in reasonably good condition, and (3) that the City placed a valu-

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[62] United States v. Virginia Electric & Power Co., 365 U. S. 624, 81 S. Ct. 784 (1961) dissent by Chief Justice Warren and Justices Whittaker and Black.

[63] Anderson v. United States, 179 F. 2d 281, cert. den. 339 U. S. 965, 70 S. Ct. 1000 (1950); 11,000 Acres of Land v. United States, 152 F. 2d 566, cert. den. 328 U. S. 835, 66 S. Ct. 980 (1946); United States v. Dow, 357 U. S. 17, 78 S. Ct. 1039 (1958); United States v. 63.04 acres, 154 F. Supp. 198 (E. D. N. Y. 1957), affirmed 257 F. 2d 68 (2d Cir., 1958); Danforth v. United States, 308 U. S. 271, 60 S. Ct. 231 (1939).

ation on the property based on values at the time of trial, the owner was held entitled to receive, as just compensation, "the fair market value of (the property) as it was immediately before the City took active steps to carry out the work of the project which to any extent depreciated the value of the property." [64]

Interest

Ordinarily, property is taken under a condemnation suit upon payment of the money award by the condemner and no interest accrues.[65] If, however, the property is actually taken before payment is made, just compensation includes "an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking." [66] This interest is calculated from the time payment should have been made to the time it is actually made.[67] But where the owner and the Government enter into a contract, setting the purchase price and omitting any mention of interest, the owner cannot recover interest even though payment is delayed.[68] It should be kept in mind that the allowance of interest is only applicable in cases where the basis of the taking is in the Fifth Amendment or where a relevant statute exists, but it is not otherwise applicable even where a statute directs payment of "just compensation." [69]

Partial Takings

One of the most difficult areas of just compensation involves the taking of only a part of a parcel and attaching a fair market value to that part. The landmark case in this area was decided prior to 1900,[70] but is still the guidepost for present decisions. That case held that in order to arrive at just compensation where part of one entire parcel of land is appropriated for public use,

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[64] City of Cleveland v. Carcione, 118 Ohio App. 525, 190 N. E. 2d 52 (1963).

[65] Danforth v. United States, 308 U. S. 271, 60 S. Ct. 231 (1939).

[66] United States v. Klamath and Moadoc Tribes of Indians, 304 U. S. 119, 58 S. Ct. 799 (1938); Jacobs v. United States, 290 U. S. 13, 54 S. Ct. 26 (1933).

[67] United States v. Rogers, 255 U. S. 163, 41 S. Ct. 281 (1921); United States v. Highsmith, 255 U. S. 170, 41 S. Ct. 282 (1921); United States and City of N. Y. v. Benedict, 261 U. S. 294, 43 S. Ct. 357 (1923); Liggett & Myers Tobacco Co. v. United States, 274 U. S. 215, 47 S. Ct. 581 (1927).

[68] Albrecht v. United States, 329 U. S. 599, 67 S. Ct. 606 (1947).

[69] United States v. Alcea Band of Tillamooks, 341 U. S. 48, 71 S. Ct. 552 (1951).

[70] Bauman v. Ross, 167 U. S. 548, 17 S. Ct. 966 (1897); cited with approval in United States v. Dickinson, 331 U. S. 745, 67 S. Ct. 13 (1947).

all proximate effects of the taking must be considered. This includes (1) the withdrawal of the part taken from the domain of the former owner, (2) the damage to the residue by the severance, and (3) the benefit immediately accruing to the residue from the beneficial use of the part taken for a particular public use. Exclusion of any of these factors results in compensation that is either more or less than just. In these partial takings, therefore, just compensation includes "any element of value arising out of the relation of the part taken to the entire tract." [71] So, where the taking of a strip of land closed a private right of way, an allowance was properly made for the value of the easement.[72]

The basic rules are outlined above, but the issue still arises as to whether a beneficial use to the part taken can be considered in the valuation of the remainder, and if it can be, to what degree. If the benefit is permanent in nature the possibility of its removal because of the ending of the project is not ground for eliminating consideration of the benefit.[73] By the same token, where it is possible that the project may end, thus eliminating the benefit, there should be some consideration given to this in valuing the remainder.[74] This represents the Federal rule regarding consideration of benefits to remaining land. The state rule presents a "vexed question which has given occasion for numberless decisions in different states, as well as much legislation." [75] The Fourteenth Amendment provides a basic guarantee that a property owner shall not be deprived of just compensation. This is not to say that he shall receive a positive pecuniary advantage from a public project whenever his neighbor does. Property not taken should be valued in light of the peculiar and individual benefits conferred on it, and it is not a deprivation of any fundamental right when a state allows consideration of such benefits as a "set-off," even though the entire

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[71] United States v. Miller, 317 U. S. 369, 375, 63 S. Ct. 276 (1943).

[72] United States v. Welch, 217 U. S. 333, 30 S. Ct. 527 (1910); United States v. Virginia Electric & Power Co., *supra* n. 62.

[73] United States v. River Rouge Improvement Co., 269 U. S. 411, 46 S. Ct. 144 (1926); Reichelderfer v. Quinn, 287 U. S. 315, 53 S. Ct. 177 (1932) where land was condemned for park purposes and a fire station was subsequently erected.

[74] *Ibid.*

[75] McCoy v. Union Elevated R.R. Co., 247 U. S. 354, 38 S. Ct. 504 (1918); also see Dohany v. Rogers, 281 U. S. 362, 50 S. Ct. 299 (1930).

neighborhood receives the same advantages.[76] In Ohio, opinion evidence as to damages suffered by an appropriation is inadmissible, but a qualified witness may give his opinion as to the value before and after the taking, as well as the reasons for such opinions, and may then give a mathematical calculation of this difference for the benefit of the jury.[77] This method of "before and after value" is also used in the Federal Courts.[78]

Where the owner owns adjoining tracts, one of which is affected by the taking, there is no constitutional requirement of payment of consequential damages to the other properties,[79] for the "severance damage" doctrine has been confined to the partial taking of a separate and distinct parcel unless ownership in several parcels has been so "actually and permanently" used and integrated as to make the several parcels in fact a separate and distinct parcel.[80] As a corollary, where there are two separate but contiguous parcels and one is left untouched by the taking but is benefited by the improvement, the benefit cannot be used as a set-off against the compensation for the taking of and damage to the first parcel.[81]

Consequential Damages

Under Federal law, consequential or incidental damages are noncompensable in fixing just compensation.[82] These noncompensable damages have included properties not actually taken or suffering a pro tanto taking in a community through which a contemplated turnpike was to run.[83] Consequential damage such as destruction of a business,[84] the expense of moving fix-

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[76] McCoy v. Union Elevated R.R. Co., *supra* n. 75; also see Monongahela Navig. Co. v. United States, 148 U. S. 312, 13 S. Ct. 622 (1893), which held that there may not be taken into account any benefit which the owner may receive in common with all the public.

[77] American Louisiana Pipe Line Co. v. Kennerk, 103 Ohio App. 133, 144 N. E. 2d 660 (1957).

[78] Aaronson v. United States, 79 F. 2d 139 (D.C. Cir. 1935).

[79] Sharp v. United States, 191 U. S. 341, 24 S. Ct. 114 (1903).

[80] Campbell v. United States, 266 U. S. 368, 45 S. Ct. 115 (1924).

[81] United States v. Miller, 317 U. S. 369, 375, 63 S. Ct. 276 (1943).

[82] United States v. Petty Motor Co., 327 U. S. 372, 66 S. Ct. 596 (1946); Mitchell v. United States, 267 U. S. 341, 45 S. Ct. 293 (1925).

[83] State ex rel. Ohio Turnpike Commission v. Allen, 158 Ohio St. 168, 107 N. E. 2d 345 (1952), cert. den. *sub nom.* Balduff v. Ohio Turnpike Commission, 344 U. S. 865, 73 S. Ct. 107 (1952).

[84] Mitchell v. United States, *supra* n. 82.

tures and personal property from the premises, or the loss of goodwill which is derived from the location, are not recoverable *when property is taken in fee.*[85] Nor is the United States obligated to pay for the loss of a business opportunity under condemnation law.[86] By the same token, "just compensation is not allowable for any unwillingness of the owner to part with his property, nor for loss of business or future profits. . . ." [87]

Where the Government took occupancy of leased premises for only a part of an unexpired term, just compensation included: [88]

1) Fair market rental on basis of rental value by long-term tenant to temporary lessee.
2) Cost of removing stored property.
3) Preparation of space for Government occupancy "including labor, materials, transportation, and possibly the cost of temporary storage and returning goods to premises."
4) "Destruction, damage or depreciation" of fixtures and permanent equipment.

The above removal, and relocation preparation and depreciation damages were not allowed where the lease was shorter than the Government taking period.[89] In a later case involving the temporary taking of a laundry, it was held that loss of going-concern value (*i.e.*, trade routes) was a compensable taking, but a vigorous four-man dissent failed to see the reason for compensation in this case and no compensation where the entire lease is taken.[90] A still later case cited the latter case with approval, and went on to say that in a "temporary taking" market value is not a certain enough guide to be of practical use.[91]

Finally, just compensation has been held not to include the taking of an easement of access when the owner has other, al-

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85 United States v. General Motors Corp., 323 U. S. 373, 65 S. Ct. 357 (1945).

86 United States ex rel. T. V. A. v. Powelson, *supra* n. 38.

87 MacLeod, Adequacy of Compensation in Condemnation, 31 The Appraisal Journal 477 (October, 1963).

88 United States v. General Motors, *supra* n. 85.

89 United States v. Petty Motor Co., *supra* n. 82.

90 Kimball Laundry Co. v. United States, 338 U. S. 1, 69 S. Ct. 1434 (1949); but see Joslin Mfg. Co. v. City of Providence, 262 U. S. 668, 43 S. Ct. 684 (1923) which held good will or going concern value to be noncompensable.

91 United States v. Pewee Coal Co., Inc., 341 U. S. 114, 71 S. Ct. 670 (1951) dissent by C. J. Vinson, and Justices Burton, Clark and Minton.

though less convenient, access,[92] or to include attorney's fees and expenses.[93] There is a sole exception to the rule excluding consequential damages, and this is the allowance of compensation for a private corporation franchise to take tolls.[94] The exception was based on the theory that the value of realty is determined by its productiveness, a theory which is the essence of much of the law of just compensation.

Conclusion

The law which has been developed regarding just compensation for real property could and does fill volumes. This analysis, primarily based on United States Supreme Court decisions, is a small part of the existing law, for the majority of the cases begin in the State courts and never reach the high court. Nevertheless, the Supreme Court has adhered to the law in this area, without change, for almost as long as there has been a Constitution. The present Court has often cited the landmark cases outlined here, and has not, as of this writing, overruled one of those cases. While many areas of the law are undergoing almost constant interpretation, this area remains solid and firm. While alterations and refinements have been adopted by the courts, the fundamental law in respect to just compensation for real estate condemnation has remained remarkably stable.

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92 Rigano v. State of New York, 38 Misc. 2d 480, 236 N. Y. S. 2d 820 (1963).

93 Dohany v. Rogers, *supra* n. 75.

94 Monongahela Navig. Co. v. U. S., 148 U. S. 312, 13 S. Ct. 622 (1893).