

**PROPERLY CONSTRUING THE JUST
COMPENSATION CLAUSE**

EMILIO R. LONGORIA

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PROPERLY CONSTRUING THE JUST COMPENSATION CLAUSE

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Abstract: The Fifth Amendment to the U.S. Constitution guarantees that “private property” shall not “be taken for public use, without just compensation.” But what does it mean for compensation to be “just”? To find a practical standard for this tricky constitutional mandate, early courts adopted the concept of “fair market value” as descriptive of the Just Compensation Clause’s parameters. Over time, this formulation of the Just Compensation Clause predominated over all others. So much so, in fact, that many courts now refuse to admit evidence on the question of just compensation if it does not comport with one of the three approaches to ascertaining fair market value developed by the appraisal industry: the comparable sales approach, the cost approach, or the income approach. But the Just Compensation Clause was never intended to be interpreted so narrowly. Especially in eminent domain cases, where damages can be ongoing and conditional and thus are not adequately accounted for in the traditional approaches for assessing fair market value. This Article argues that if the Just Compensation Clause is meant to serve as a meaningful deterrent to government overreach, the current interpretation of the Just Compensation Clause must be broadened to allow for the admission of any evidence of commercially relevant information that would be given weight in negotiation. If it is not, our poor and underrepresented communities will continue to shoulder the burden of this constitutional deficiency.

Of all the terms used in the Taking Clause, just compensation has the strictest meaning. The Fifth Amendment does not allow simply an approximate compensation but requires a full and perfect equivalent for the property taken.

—Penn Central Transportation Company v. New York City, 438 U.S. 104, 150 (1978) (Rehnquist, J., dissenting).

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INTRODUCTION

Despite its elusive reputation,¹ “the broad contours of takings doctrine” are “actually fairly ‘easy to outline.’”² Indeed, some portions of the Takings Clause³ are considered relatively straightforward.⁴ In practice, this has led to the emergence of “basic patterns” in our takings “jurisprudence,”⁵ which allow us to predict the success of certain takings claims with surprising accuracy.⁶

Nevertheless, the “veil of apparent consensus” over portions of the Takings Clause’s meaning should not be mistaken as an indication that the prevailing interpretations for these other terms are correct, just, or even particularly efficient. As is often the case, the greatest injustices exist where nobody is paying attention. This is not because of malice or a desire to produce inefficient outcomes, but because jurisprudence naturally “trend[s] . . . to disorder”⁷ without constant energy.⁸

This jurisprudential disorder is best illustrated by the long-standing and dominant interpretation of the Takings Clause’s requirement to pay “just compensation”⁹ as a requirement to provide landowners with the “fair market val-

¹ See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting) (“Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court’s takings jurisprudence.”).

² Bethany R. Berger, *The Illusion of Fiscal Illusion in Regulatory Takings*, 66 AM. U. L. REV. 1, 8 (2016).

³ See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

⁴ Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 678 (2005) (“For all the disagreement and uncertainty in the rest of takings jurisprudence, compensation is considered straightforward; it is measured by the fair market value of the property taken.”).

⁵ Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 COLUM. L. REV. 215, 223 (2021).

⁶ Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 IOWA L. REV. 1847, 1862–63 (2017). For example, an empirical survey of *Lucas* claims across 1,700 federal and state cases suggests that they are highly unlikely to be successful. *Id.*

⁷ *Entropy*, MERRIAM-WEBSTER’S DICTIONARY, <https://www.merriam-webster.com/dictionary/entropy> [<https://perma.cc/4S5E-PM2V>].

⁸ See *Harper v. Va. Dep’t of Tax’n*, 509 U.S. 86, 114 (1993) (O’Connor, J., dissenting) (discussing the idea of jurisprudential entropy).

⁹ U.S. CONST. amend. V. Each state also has its own takings clause, thirty-eight of which also guarantee “just compensation,” in the event property is condemned. See ALA. CONST. art. I, § 23; *id.* art. XII, § 235; ALASKA CONST. art. I, § 18; ARIZ. CONST. art. II, § 17; ARK. CONST. art. II, § 22; CAL. CONST. art. I, § 19; COLO. CONST. art. II, § 14, 15; CONN. CONST. art. I, § 11; DEL. CONST. art. I, § 8; FLA. CONST. art. X, § 2; GA. CONST. art. I, § 3, para. I; HAW. CONST. art. I, § 20; IDAHO CONST. art. I, § 14; ILL. CONST. art. I, § 15; IND. CONST. art. I, § 21; IOWA CONST. art. I, § 18; KAN. CONST. art. XII, § 4; KY. CONST. § 13, 242; LA. CONST. art. I, § 4; ME. CONST. art. I, § 21; MD. CONST. art. III, § 40; MASS. CONST. art. X, pt. I; *id.* art. LI, XCVII; MICH. CONST. art. X, § 2; MINN. CONST. art. I, § 13; MISS. CONST. art. III, § 17; MO. CONST. art. I, § 26; MONT. CONST. art. II, § 29;

ue” of the property taken from them,¹⁰ as well as the limited number of approaches that courts allow to determine what “fair market value” actually means in a given case.¹¹

Most federal circuit courts,¹² state supreme courts,¹³ and the Supreme Court of the United States¹⁴ limit the kinds of evidence condemnees may present to the factfinder when demonstrating the fair market value of the property taken from them.¹⁵ Typically, an expert appraiser must testify to this evidence,¹⁶ and the

NEB. CONST. art. I, § 21; NEV. CONST. art. I, § 8 (3), 22; N.H. CONST. pt. I, art. XII; N.J. CONST. art. I, para. 20; *id.* art. IV, § 6, para. 3; N.M. CONST. art. II, § 20; N.Y. CONST. art. I, § 7; N.C. CONST. art. I, § 19; N.D. CONST. art. I, § 16; OHIO CONST. art. I, § 19; OKLA. CONST. art. II, § 23, 24; OR. CONST. art. I, § 18 (1924); *id.* art. XI, § 4; PA. CONST. art. I, § 10; *id.* art. X, § 4; R.I. CONST. art. I, § 16; S.C. CONST. art. I, § 13; S.D. CONST. art. VI, § 13; *id.* art. XVII, § 18; TENN. CONST. art. I, § 21; TEX. CONST. art. I, § 17; UTAH CONST. art. I, § 22; VT. CONST. ch. I, art. II; VA. CONST. art. I, § 6, 11; WASH. CONST. art. I, § 16; W. VA. CONST. art. III, § 9; WIS. CONST. art. I, § 13; WYO. CONST. art. I, § 32, 33; *see also* Maureen Brady, *Property’s Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1168 (2016) (noting the ubiquity of takings clauses in state constitutions).

¹⁰ *See* *United States v. 50 Acres of Land*, 469 U.S. 24, 25–26 (1984) (“The Fifth Amendment requires that the United States pay ‘just compensation’—normally measured by fair market value—whenever it takes private property for public use.” (footnote omitted)); *see also* JULIUS L. SACKMAN, 4 NICHOLS ON EMINENT DOMAIN § 12.02 (3d ed. 2023) (holding that it “is well settled that when a parcel of land is taken for public use by the exercise of the power of eminent domain, the measure of compensation is the fair market value of the land”).

¹¹ Most jurisdictions only recognize three different approaches for determining fair market value. *See, e.g.*, *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 871 (Tex. 2009) (“Texas recognizes three approaches to determining the market value of condemned property: *the comparable sales method, the cost method, and the income method.* The comparable sales method is the favored approach, but when comparable sales figures are not available, courts will accept testimony based on the other two methods. The cost approach looks to the cost of replacing the condemned property minus depreciation. The income approach is appropriate when the property would be priced according to the rental income it generates. All three methods are designed to approximate the amount a willing buyer would pay a willing seller for the property.” (emphasis added) (citations omitted)); Warren H. De-deaux, Note, *Treading on Water: Public Utilities, Eminent Domain, and Just Compensation—Valuing the Plant*, 82 MISS. L.J. 1375, 1385–87 (2013) (describing the income approach, cost approach, and comparable sales approach to property valuation).

¹² *See, e.g.*, *United States v. 100 Acres of Land*, 468 F.2d 1261, 1265 (9th Cir. 1972) (“The three generally recognized approaches in ascertaining ‘fair market value’ are: (1) [c]omparable sales; (2) the income or capitalization of income; and (3) the reproduction cost at the time of taking, less depreciation.”).

¹³ *See, e.g.*, *Crawford v. State Highway Bd.*, 285 A.2d 760, 764 (Vt. 1971) (“Three basic methods, or combinations of them, have been generally used in appraising the fair market value of real property. These are the cost approach, the income approach, and the market data approach.” (citations omitted)).

¹⁴ *See, e.g.*, *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402–03 (1949) (referencing three different approaches to valuing property: the “cost” approach, the “earnings” or income approach, and the comparable “sales” approach).

¹⁵ *See, e.g.*, *Dep’t of Transp. v. Bentleyville Garden Inn, Inc.*, 264 A.3d 415, 424 (Pa. Commw. Ct. 2021) (“A qualified valuation expert may, on direct or cross-examination, testify in detail as to the

evidence must conform to one of the following three accepted approaches¹⁷ for determining fair market value by the appraisal community: “the comparable sales method, the cost method, and the income method.”¹⁸ Although these valuation approaches can help factfinders and the Court satisfy the Just Compensation Clause mandate,¹⁹ they are often unable to address the full range of damages a government taking generates.²⁰ This, in turn, causes serious and long-lasting negative consequences for landowners across the country.²¹

The Constitution’s Framers carefully chose the words of the Just Compensation Clause to serve as an important limitation on the government’s right to take, and to protect the rights eminent domain disputes implicate.²² Even the choice of the word “just,” for example, was a deliberate decision to “intensif[y] the meaning of the word compensation, to convey the idea that the equivalent to be rendered for property taken must be real, substantial, full, and ample that no legislature can diminish by one jot the rotund expression of the constitution.”²³

Yet, such a diminishment is exactly what occurs in many condemnation cases where the narrow interpretation of fair market value is the only interpretation applied. The Framers intended the Just Compensation Clause to encompass the broadest range of returns possible for affected landowners, precisely because important constitutional concerns are at stake if landowners are not

valuation of the property on a comparable market value, reproduction cost or capitalization basis.” (quoting 26 PA. CONS. STAT. § 1105(2)(iii) (2006)).

¹⁶ See *id.* (“A qualified valuation expert may, on direct or cross-examination, testify in detail”) (emphasis added).

¹⁷ These accepted approaches come from the Uniform Standards of Professional Appraisal Practice (“USPAP”), which some states have enshrined into law. See *What Are the Appraisal Standards?*, APPRAISAL FOUND., https://www.appraisalfoundation.org/imis/taf/standards/q_as/taf/qas.aspx [<https://perma.cc/R6P4-LUFG>] (describing the uniform standards); e.g., *In re Johnson Cnty. Appraiser*, 283 P.3d 823, 827 (Kan. 2012) (discussing the USPAP’s incorporation into Kansas law).

¹⁸ *Dallas County v. Crestview Corners Car Wash*, 370 S.W.3d 25, 36 n.4 (Tex. App. 2012); see also SACKMAN, *supra* note 10, §12B.01 (demonstrating the kinds of evidence classically understood to be relevant in assessing a property’s fair market value).

¹⁹ *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325–26 (1893) (quoting U.S. CONST. amend. V) (“Nor shall private property be taken for public use without just compensation.”).

²⁰ See *infra* note 40 and accompanying text.

²¹ See *infra* note 41 and accompanying text.

²² See *Monongahela Navigation*, 148 U.S. at 337 (“[W]hile the power of Congress to take this property is unquestionable, . . . the power to take is subject to the constitutional limitation of just compensation.”); see also *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 305 (1923) (holding that “[a] necessary condition of the taking [of property] is the ascertainment and payment of just compensation”); William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708 (1985) (explaining that James Madison, the Fifth Amendment’s author, “meant it to have broad moral implications as a statement of national commitment to the preservation of property rights”).

²³ 3 SACKMAN, *supra* note 10, § 8.06.

made whole after a government taking.²⁴ But state and federal case law has systemically narrowed this expansive constitutional right over time in favor of the Just Compensation Clause's broadly popular and more easily ascertainable interpretation, which reads the clause as merely a requirement to pay landowners "fair market value"²⁵—the definition of which has also been substantially narrowed.²⁶

Hardly trivial, this has had serious negative impacts on the victims of eminent domain.²⁷ Particularly because it deprives landowners an adequate remedy for the unique and ongoing harms that befall those affected by condemnation. This occurs because condemnations can force affected landowners to live close to—or sometimes even with—the public project which took their property.²⁸ In many kinds of condemnation cases, for instance, it is common for a governmental authority to take only part of a landowner's property.²⁹ This means that condemnees often live side by side with the newly constructed public use that was the original justification for the condemnation of their land.³⁰ Depending on what this new use is, it can damage the affected landowner's property, and only some of this damage can be remedied if the Just Compensation Clause is interpreted coextensively with a requirement to pay fair market

²⁴ See *United States v. Miller*, 317 U.S. 369, 373–74 (1943) ("It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose.").

²⁵ See *id.* (suggesting that there should not be a "general formula" for determining the value of condemned property, preferring a holistic inquiry); *Horne v. Dep't of Agric.*, 576 U.S. 350, 368–69 (2015) ("The clear and administrable rule is that 'just compensation normally is to be measured by 'the market value of the property at the time of the taking.'") (quoting *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984)).

²⁶ See *State ex rel. Dep't of Highways v. O'Neal*, 150 So. 2d 608, 609 (La. Ct. App. 1963), for an example of the limited way the phrase fair market value has been interpreted. "Generally, three approaches to market value are utilized, (a) the market data approach based on comparable sales, (b) the reproduction cost approach, and (c) the capitalization or income approach." *Id.* (quoting Comment, *Expropriation—A Survey of Louisiana Law*, 18 LA. L. REV. 509, 547 (1958)).

²⁷ For an insightful discussion of the categories of landowners that are often the subjects of eminent domain action, see generally Josh Blackman, *Equal Protection from Eminent Domain: Protecting the Home of Olech's Class of One*, 55 LOY. L. REV. 697, 701 (2009).

²⁸ For a discussion of the ongoing effects condemnations may have on landowners, see generally Emilio R. Longoria, *Tunnel Could Bore Through Landowners' Rights*, SAN ANTONIO EXPRESS-NEWS (May 13, 2022), <https://www.expressnews.com/opinion/commentary/article/Commentary-Tunnel-could-bore-through-17171778.php> [<https://perma.cc/JFN6-YN6Z>].

²⁹ See *United States v. Causby*, 328 U.S. 256, 267 (1946) (discussing a taking of an aerial easement to operate airplanes over a landowner's property); *c.f.* *Berman v. Parker*, 348 U.S. 26, 31 (1954) (where the entirety of a landowner's property interest was taken).

³⁰ See *Causby*, 328 U.S. at 267; see also *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 217 (Tex. 2001) (holding that a property containing a building ninety-six feet away from a frontage road prior to a condemnation became a property containing a building only 22.5 feet from the frontage road following a condemnation).

value, and fair market value is interpreted narrowly to encompass only three approaches for ascertaining fair market value.³¹

This phenomenon occurs because fair market value, as it is currently interpreted, is a necessarily limited remedy.³² When condemnations cause discrete and discoverable damages, like increased insurance premiums,³³ increased proximity to a roadway,³⁴ reduction in the remainder property's available uses,³⁵ impaired drainage,³⁶ or impaired visibility,³⁷ fair market value is a sufficient measure for the amount of compensation owed because ample market evidence illustrates how these kinds of damages might affect property prices. Moreover, these types of harms are typically easier to quantify³⁸ because of how a paired sales analysis can isolate them.³⁹

³¹ See, e.g., *Brooks Res. Corp. v. Dep't of Revenue*, 595 P.2d 1358, 1360 (Or. 1979) ("We have observed in previous cases of this kind that there are three standard approaches to valuation: the market data approach, the income approach, and the cost approach.").

³² See STEWART E. STERK, EDUARDO M. PEÑALVER, & SARA C. BRONIN, *LAND USE REGULATION* 10 (3d ed. 2020) ("Today's market value measures the price private actors are willing to pay for land developed in a particular way. But land use decisions may have a very long lifespan, and today's market value may not accurately reflect future value, even though it is undoubtedly true that the price buyers are willing to pay today is determined in part by the price they expect to receive in the future.").

³³ See generally *20 Factors That Affect Your Home Insurance Rates*, ROGERS INS., LTD. (Jan. 24, 2020), <https://www.rogersinsurance.ca/blog/20-factors-that-affect-your-home-insurance-rates/> [<https://perma.cc/9TUL-6VVY>] (illustrating that proximity to risks can affect homeowner's insurance rates).

³⁴ See *Interstate Northborough P'ship*, 66 S.W.3d at 217 ("We conclude that, under the facts in this case, damages due to increased proximity to the roadway are special damages and thus compensable and that the trial court properly admitted evidence about these damages.").

³⁵ See *State v. Dawmar Partners, Ltd.*, 267 S.W.3d 875, 878 (Tex. 2008) ("We have long held that a change in a property's use due to condemnation is relevant to the fair market value of the property, but that does not mean all diminished value is compensable."); see also *United States v. 2.6433 Acres*, No. 7:08-cv-00302, 2021 U.S. Dist. LEXIS 197424, at *4 (S.D. Tex. July 19, 2021) (holding that "[i]n determining the market value, this Court must look not only at the present use of the property, but also at the highest and best use for which the property is adaptable and needed" (quoting *United States v. 8.41 Acres of Land*, 680 F.2d 388, 394 (5th Cir. 1982))).

³⁶ Condemnations can often increase the amount of impervious cover on land, thereby increasing its risk of flooding, which could reduce the property's value. See generally *Unravelling Perceptions of Flood Risk: Examining Changes in Home Prices in Harris County, Texas in the Aftermath of Hurricane Harvey*, FREDDIE MAC (Sept. 10, 2020), <https://www.freddiemac.com/research/insight/20200910-unravelling-perceptions-of-flood-risk> [<https://perma.cc/2UDZ-BTBR>] (discussing how homebuyers often underestimate the flood risk of coastal properties, but noting that these misperceptions are often rectified in the aftermath of large flooding events).

³⁷ Losing your view due to condemnation can diminish the property's value. See *How Much Value Does a Good View Add to your Home?*, THE DAY, Dec. 5, 2014, at 1, 18 <https://www.theday.com/article/20141205/BIZ04/312059990> [<https://perma.cc/4K62-STEC>] (discussing the financial premium that a scenic view can provide to sellers of desirable properties).

³⁸ See *id.* at 18 (noting that medium elevation can raise property value 6–8%, and higher elevation can raise property value 9–12%).

³⁹ See *Sabal Trail Transmission, LLC v. 0.589 Acres of Land*, No. 3:16-cv-277-J-34JBT, 2018 U.S. Dist. LEXIS 129709, at *13 n.3 (M.D. Fla. Aug. 2, 2018) (describing a "paired sales analysis,"

But when condemnations produce ongoing and conditional damages, fair market value no longer compensates landowners for the harms they experience. Unfortunately, many condemnation projects present these concerns because projects can be intensified post-condemnation.⁴⁰ Land taken for pipeline projects or highways, for example, is often taken in fee simple absolute or in expandable permanent easements.⁴¹ This means that their project impact can be increased or expanded without initiating a new condemnation, and this can expose landowners to greater harm or devalue their property without any additional right to a new condemnation proceeding—even if one may be warranted.⁴² For this reason, an assessment of “fair market value” as courts currently interpret it can be misleading as adequately compensatory for the risks inherent in certain kinds of condemnation projects.⁴³

which “is a method that appraisers use to measure severance damages”). “The goal of a paired sales analysis is to isolate the effect that a certain feature, such as a natural gas pipeline, has on a property’s market value. ‘In a paired sales analysis, the appraiser identifies pairs of sales that are as similar as possible for all but one factor. When the sales are compared, the difference in price is best explained by that particular feature that distinguishes the properties.’” *Id.* (quoting McCann Holdings, Ltd. v. United States, 111 Fed. Cl. 608, 626 (2013)).

⁴⁰ See *Sw. Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 690 (Tex. 2020) (finding the right to intensify the use of a generally worded easement held by a condemnor following an acquisition); see, e.g., *Voges v. Lower Colo. River Auth.*, NO. 03-97-00561-CV, 1999 Tex. App. LEXIS 857, at *19–20 (Tex. App. Feb. 11, 1999) (quoting *Knox v. Pioneer Nat. Gas Co.*, 321 S.W.2d 596, 600 (Tex. Civ. App. 1959)) (demonstrating that Texas courts have held that the condemnation of a pipeline easement can include the right to upgrade that line later, regardless of the imposition that may have on the subject property).

⁴¹ See *Bowers v. Tex. E. Transmission Corp.*, 611 A.2d 1350, 1351 (Pa. Commw. Ct. 1992) (providing an example of the broad easements that condemnors typically take); see also *Weaver v. Nat. Gas Pipeline Co.*, 188 N.E.2d 18, 20 (Ill. 1963) (affirming that a pipeline can be replaced with a more intense version of the same without the right to any additional compensation); Final Judgment at 1, *West Harris Cnty. Reg’l Water Auth. v. Guhn Inv. Grp., LLC*, No. 1142782, (Harris Cnty. Civ. Ct. Apr. 9, 2021) (“Plaintiff filed this condemnation action seeking to amend its Original Easement and acquire a permanent and perpetual easement and right-of-way (the ‘Easement’) across, along, under, over, upon, through, and within the 0.4656-acre tract of land described by metes and bounds and shown on the attached Exhibit A (the ‘Easement Tract’), for the purpose of laying, locating, establishing, constructing, installing, maintaining, using, testing, restoring, renewing, reconstructing, substituting, changing, converting, repairing, relocating, replacing, upgrading, changing the size of, placing, inspecting, protecting, cathodically protecting, altering, operating, assigning, and removing, now or in the future, in whole or in part, one (1) underground water line which shall not exceed one hundred eight inches.”).

⁴² See also *Weaver*, 188 N.E.2d at 20 (affirming lower court decision that pipeline can be replaced with a more intense version of the same without the right to any additional compensation); Final Judgment at 1, *Guhn Inv. Grp.*, No. 1142782 (providing an example of a recent expandable easement that was condiment by a governmental entity); see also *Sw. Elec. Power Co.*, 595 S.W.3d at 690 (upholding the right to intensify the use of a generally worded easement held by a condemnor following an acquisition).

⁴³ See also *Weaver*, 188 N.E.2d at 20 (affirming that a pipeline can be replaced with a more intense version of the same without the right to any additional compensation).

Considering the range of reasonable alternatives available to ensure adequate compensation for landowners, it is especially frustrating that the current formulation of fair market value fails to achieve the Just Compensation Clause mandate. For example, there are several examples of land valuation techniques that exist in private market transactions that should be included in a fair market value formulation of the Just Compensation Clause.⁴⁴ But these alternatives have historically not been included in the process of assessing fair market value in condemnation cases, and the reasons for that are unclear.⁴⁵

At its core, the fair market value formulation of the Just Compensation Clause is intended to approximate “the amount of money which a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obliged, to sell it, taking into consideration all uses for which the land was suited and might be applied.”⁴⁶ To that end, when courts interrogate this formulation of the Just Compensation Clause, they should consider all evidence of market valuation produced from arms-length commercial transactions that would be “given weight in negotiations.”⁴⁷ Only then could we actually ascertain a given property’s “True Fair Market Value.”

But that is not what happens in most jurisdictions. Perhaps surprisingly, most jurisdictions prohibit evidence of market value unless it strictly conforms to one of the three “accepted” approaches for assessing fair market value as determined by USPAP.⁴⁸ This has led to the exclusion of relevant market data, which would assist factfinders in ascertaining True Fair Market Value in many condemnation cases where it not excluded.⁴⁹

⁴⁴ See *infra* notes 53–55 and accompanying text (discussing, for example, compensation for land use via royalties that value real estate on a production basis).

⁴⁵ See *infra* notes 55 & 60 and accompanying text (discussing alternative land valuation techniques).

⁴⁶ SACKMAN, *supra* note 10, § 12.02.

⁴⁷ *Gleghorn v. City of Wichita Falls*, 545 S.W.2d 446, 447 (Tex. 1976) (“In applying the willing-seller willing-buyer test of market value, those factors which would reasonably be given weight in negotiations between a seller and a buyer are to be considered.”).

⁴⁸ Many jurisdictions formally foreclose evidence of market value which does not conform with the comparable sales, cost, or income approaches. See, e.g., *Crocker v. Miss. State Highway Comm’n*, 534 So. 2d 549, 553 (Miss. 1988) (“We regard it as settled dogma within the appraisal profession that fair market value is established by reference to what has come to be known as the appraisal process. That process mandates careful consideration of not just one but three separate and distinct approaches to value; the income approach, the cost approach and the market data or sales comparison approach.”); see also *What Is USPAP?*, APPRAISAL FOUND., https://www.appraisalfoundation.org/imis/TAF/Standards/Appraisal_Standards/Uniform_Standards_of_Professional_Appraisal_Practice/TAF/USPAP.aspx?hkey=a6420a67-dbf4-41b3-9878-fac35923d2af [<https://perma.cc/M25A-77GD>] (explaining the USPAP).

⁴⁹ See *infra* note 62 and accompanying text.

Property is often bought and sold based on commercially relevant information accounted for during negotiations,⁵⁰ but which does not neatly fall into the cost, income, or comparable sales approach methodologies. This kind of probative information is particularly compelling in circumstances where private entities condemn land;⁵¹ because of the significant impact a broader (and proper) formulation of the Just Compensation Clause would have on the amount of compensation that victims of condemnation would ultimately receive.⁵²

For instance, in both the energy⁵³ and transportation⁵⁴ markets, real estate and its subsequent use are often valued on a production basis and compensated by a royalty⁵⁵ as opposed to a single lump sum purchase price. This is often considered fairer because the mineral extraction process can subject a specific piece of property to ongoing and unpredictable use.⁵⁶ This is well illustrated by

⁵⁰ See *Gleghorn*, 545 S.W.2d at 447 (“In applying the willing-seller willing-buyer test of market value, those factors which would reasonably be given weight in negotiations between a seller and a buyer are to be considered.”).

⁵¹ For an example of a private company utilizing the power of eminent domain on behalf of the Federal government, see *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2251 (2021) (“Specifically, we are asked to decide whether the Federal Government can constitutionally confer on pipeline companies the authority to condemn necessary rights-of-way in which a State has an interest. We hold that it can.”).

⁵² See *supra* notes 60–64 and accompanying text (describing how property is often valued on a per rod basis during real estate transactions for pipeline easements, however, courts do not typically admit this information as probative of fair market value in condemnation cases).

⁵³ See, e.g., Kit Norton, *U.S. Oil Companies Begin to Bid on Federal Land Leases as Pressure on Biden Grows*, INV.’S BUS. DAILY (June 16, 2022), <https://www.investors.com/news/oil-companies-prepare-as-federal-land-lease-auction-set-to-begin/> [<https://perma.cc/36BG-LPPS>] (showing this phenomenon in the oil and gas industry generally); Judon Fambrough, *Minerals, Surface Rights and Royalty Payments*, TEX. A&M UNIV. REAL EST. CTR. (2009), <https://assets.recenter.tamu.edu/documents/articles/840.pdf> [<https://perma.cc/SM2D-KX24>] (discussing the oil and gas lease and royalty payment system generally).

⁵⁴ See generally Kristin Mosbrucker, *Making Way for Bullet Trains, SA Startup’s Strategy to Use Royalties not Eminent Domain*, SAN ANTONIO BUS. J., <https://www.bizjournals.com/sanantonio/news/2016/07/13/exclusive-making-way-for-bullet-trains-sa-startups.html> [<https://perma.cc/5HPS-MAXK>] (July 14, 2016) (discussing the idea of royalty payments for the right to operate train lines over private property); *British Company Still Gets Royalty for Shakuntala Railway*, INDIA TV, <https://www.indiatvnews.com/news/india/british-company-still-gets-royalty-for-shakuntala-railway-9881.html> [<https://perma.cc/FR8H-GZEP>] (Aug. 15, 2011) (providing an example of a royalty paid for the acquisition of a train line).

⁵⁵ See *Mich. United Conserv. Club v. Dep’t of Treasury*, 608 N.W.2d 141, 147 (Mich. Ct. App. 1999) (“[A] royalty has the following elements or characteristics: (1) it is a payment, (2) in the form of either the product itself or proceeds from the sale of the product, and (3) made in consideration for the use of the property.”), *aff’d*, 625 N.W.2d 783 (Mich. 2001).

⁵⁶ See Robert W. Gilmer, Raúl Hernandez & Keith R. Phillips, *Oil Boom in Eagle Ford Shale Brings New Wealth to South Texas*, FED. RESRV. BANK DALL., SW. ECON., SECOND QUARTER 2012, at 3, 3 (2012), <https://www.dallasfed.org/-/media/documents/research/swe/2012/swe1202b.pdf> [<https://perma.cc/QSM2-KJXK>] (“[M]ature and declining fields” had been operating “for more than [forty] years” when “the largest discovery of new oil reserves in the United States since Prudhoe Bay, Alaska, in 1968,” took place, which let to “[r]apid oilfield development” at a “scale and speed of develop-

the sudden and unpredicted intensification of mineral extraction in South Texas after the discovery of the Eagle Ford Shale.⁵⁷ Yet, condemnees are not permitted to submit evidence of just compensation or fair market value for real estate based on a production compensation model, unless the presence of mineral deposits can be proven.⁵⁸ This means that real estate without mineral reserves cannot avail itself of the same opportunities to admit evidence into the record in condemnation proceedings, even though it is equally susceptible to rapid intensifications of use by condemnors. This reality is especially frustrating in light of the fact that reliable methods exist by which experts can accurately measure the proportional burden imposed on condemned real estate by a public utility.⁵⁹

Likewise, public utilities have established their own valuation systems for the acquisition and development of the infrastructure necessary to carrying out their transmission goals. These valuation methods can be widely pervasive and bespoke to industry conditions, such as the “per rod” trading value rubric for oil and gas pipelines in the United States.⁶⁰ Nevertheless, few jurisdictions allow parties to submit evidence of such metrics to the factfinder in a condemnation case,⁶¹ because they purportedly “fail to consider many important attributes which insure proper valuation of land.”⁶² Yet, this valuation method is often utilized to assess fair market value outside of the condemnation setting

ment [that] proved so robust that they quickly overwhelmed previous efforts to comprehensively measure the economic impact.”).

⁵⁷ See *id.* at 5 (“Once production is established on a lease, it remains in effect as long as the property produces oil and gas. The mineral rights owner is paid a royalty, or share (20 to 25[%] is common in Texas) of the value of the hydrocarbons produced. In our [twenty-three]-county area—using Railroad Commission production records and applying market prices—oil, natural gas and condensate revenues grew from \$5.3 billion in 2007 to \$8.2 billion in 2011. Based on a 20[%] royalty, local payments increased by \$584 million in the 2007–11 period.” (emphasis added)).

⁵⁸ There is a long history of courts admitting evidence of fair market value in condemnation cases based on a royalty valuation, but only if substantial evidence of mineral interests exists. See, e.g., *State ex rel. Dep’t of Highways v. Ponder*, 345 So. 2d 106, 110, 112 (La. Ct. App. 1977) (partially reversing a verdict because there was not adequate evidence of mineral interests to support a royalty valuation); cf. *Leesona Corp. v. United States*, 599 F.2d 958, 968 (Ct. Cl. 1979) (showing that royalty valuation is also permitted in the condemnation of patents, but the analogy to the condemnation of real estate is less clear in that circumstance).

⁵⁹ For an example of services (and the companies that provide them) which are currently offered to track the number of hydrocarbons transported via pipeline, see *PipePatrol Batch Tracking*, PIPELINE MGMT, <https://pipeline-management.com/batch-tracking/> [<https://perma.cc/5FAP-6LTD>]. For an example of similar electrical transmission monitoring systems in the State of Texas, see *Current System Conditions*, ERCOT, <https://www.ercot.com/gridinfo/csc> [<https://perma.cc/XZ7B-9P4T>].

⁶⁰ See, e.g., *Exxon Pipeline Co. v. Hill*, 788 So. 2d 1154, 1163–64 (La. 2001) (discussing generally the rod method of valuation).

⁶¹ See, e.g., *Hlavinka v. HSC Pipeline P’ship*, 650 S.W.3d 483, 497 (Tex. 2022) (overturning the exclusion of evidence based on a “per rod” calculation of value).

⁶² *Hill*, 788 So. 2d at 1164–65 (La. 2001) (noting that utilizing the per rod method would contravene the Louisiana constitution).

and thus given weight in the negotiation of a pipeline easement⁶³ because of its appreciation for relevant and unique commercial information that would influence market negotiations such as supply and demand.⁶⁴

Lastly, we have long accepted that real estate is inherently unique.⁶⁵ This is not just because of the infinite number of physical characteristics that are distinct to a particular piece of land,⁶⁶ but also because of the many overlapping regulatory frameworks which may govern any one piece of property,⁶⁷ and the ways in which we grant exceptions to some of those rules based on a property's age or use.⁶⁸ For this very reason, courts have measured just compensation for certain takings by the cost of a substitute facility to the landowner rather than the fair market value of the land taken.⁶⁹

Yet, condemnees may only submit evidence of this measure of compensation to a factfinder if they are able to meet the high bar of proving that the fair market value of a property is "[un]ascertainable."⁷⁰ In practice, this has made it

⁶³ See *id.* at 1164 (showing how this method is factored in).

⁶⁴ See *id.* ("[A] landowner may be compensated \$100 per rod for his property because his servitude was the last remaining parcel needed by a company. By contrast, the same landowner may only be paid \$15 per rod because his is the first parcel purchased.").

⁶⁵ See *Beyer v. State*, 280 N.E.2d 604, 607 (Ind. 1972) ("Obviously, no two properties can be exactly alike" (quoting 5 NICHOLS ON EMINENT DOMAIN 21.54–56 (3d ed. 1971))).

⁶⁶ See *Dan's Mountain Wind Force, LLC v. Allegany Cnty. Bd. of Zoning Appeals*, 182 A.3d 252, 259 (Md. Ct. Spec. App. 2018) ("Every property is similar to every other property in some respects (for example, 'there are some living things on this property'). And every property can be distinguished from every other property in some other respect (for example, 'this property contains exactly x number of trees and y number of woodrats').").

⁶⁷ John R. Nolon, *Comprehensive Land Use Planning: Learning How and Where to Grow*, 13 PACE L. REV. 351, 353–55 (1993) (describing of the multi-layered land use regulation system in the United States).

⁶⁸ See *Key Ads, Inc. v. City of Dayton Bd. of Zoning Appeals*, 23 N.E.3d 266, 273 (Ohio Ct. App. 2014) (explaining nonconforming use exceptions, one of the most popular types of exceptions to a land use regulation). "A non-conforming use is a term 'employed to designate a use of property which was lawful prior to the enactment of a zoning ordinance and which use may be continued after the effective date of the ordinance even though it does not comply with the applicable use restrictions.'" *Id.* (quoting *C.D.S., Inc. v. Vill. Gates Mills*, 497 N.E.2d 295, 297 (Ohio 1986)). "It is well established that 'the right to continue a non-conforming use is based upon the concept that one should not be deprived of a substantial investment which existed prior to the enactment of the zoning ordinance.'" *Id.* (quoting *Kettering v. Lamar Outdoor Advert., Inc.*, 525 N.E.2d 836 (Ohio Ct. App. 1987)).

⁶⁹ See *United States v. 564.54 Acres of Land*, 441 U.S. 506, 508 (1979) (discussing valuation based on cost of providing substitute facilities). The condemnee argued that valuation based on the cost of providing substitute facilities was necessary "because the new facilities would be subject to financially burdensome regulations from which existing facilities were exempt under grandfather provisions." *Id.*

⁷⁰ See *United States v. 50 Acres of Land*, 469 U.S. 24, 26 (1984) (describing the substitute facilities doctrine but holding that it is an inappropriate measure of just compensation "when the [fair] market value of the condemned property is ascertainable"); see also 3 SACKMAN, *supra* note 10, § 8.22 (suggesting that compensation in kind "may also be of use in compensating owners for losses

almost impossible for landowners to avail themselves of the substitute facilities doctrine, because all property necessarily has some ascertainable value.⁷¹ But that value differs drastically based on the property's envisioned optimal use.⁷² Thus, evidence of the cost of substitute facilities is rarely admitted, which further aggravates the divide between how courts and market participants assess fair market value.⁷³

In reality, for instance, market participants can, and often do, value real estate transactions in kind, as opposed to in cash values. This is a common practice, for example, in the oil and gas market where real estate transactions are sometimes compensated in kind, as opposed to with cash.⁷⁴ This suggests that condemnees should have the ability to submit evidence of substitute facilities or compensation in kind as a part of the True Fair Market Value inquiry.

Hardly trivial, the range of harms caused by the historically narrow interpretation of both the Just Compensation Clause and its fair market value formulation has had serious and permanent repercussions for landowners throughout the country. The denial of these landowners' constitutional right to just compensation is the most important of these.

The Bill of Rights originally enshrined the right to just compensation "to quiet the apprehension of many" that the government would "trespass upon those rights of persons and property which by the Declaration of Independence

which were formerly noncompensable" and explaining that "[u]nder this technique, substitute property is furnished to an owner for lands taken where conventional methods of compensation would be totally inadequate").

⁷¹ Even in *Lucas v. South Carolina Coastal Council*, where the Court determined that the condemned property "had lost all economic value," the condemnee still had the right to do many things with his land that still bestowed "economic value" like "picnic, swim, camp in a tent, or live on the property in a movable trailer." 505 U.S. 1003, 1043–44 (1992) (Blackmun, J., dissenting); see also Lynn E. Blais, *The Total Takings Myth*, 86 *FORDHAM L. REV.* 47, 73 n.167 (2017) (discussing this phenomenon more thoroughly).

⁷² See *Olson v. United States*, 292 U.S. 246, 255 (1934) ("The highest and most profitable use for which [a] property is adaptable and needed or likely to be needed in the reasonably near future is to be considered [in assessing the property's value]."); see also Alexander B. Lutzky, *In Pursuit of Just Compensation in Texas: Assessing Damages in Takings Cases Using the Property's Tax-Appraised Value*, 46 *ST. MARY'S L.J.* 105, 110–11 (2014) (noting that "[t]he highest and best use of a condemned property" is often the focus of litigation in condemnation cases because it impacts the compensation awarded). "As the evidence presented by both parties disputing the most profitable use of a property is fact intensive and requires in-depth knowledge of local land use and development surrounding the property, both parties must usually present expert witness testimony to support their argument." Lutzky, *supra*, at 111.

⁷³ See *50 Acres of Land*, 469 U.S. at 26 ("We hold that this measure of compensation is not required when the market value of the condemned property is ascertainable.").

⁷⁴ See, e.g., David Wethe, *Land Swaps Let Permian Drillers Expand Shale Wells on the Cheap*, *RIGZONE* (Mar. 29, 2017), https://www.rigzone.com/news/oil_gas/a/149023/Land_Swaps_Let_Permian_Drillers_Expand_Shale_Wells_on_the_Cheap [<https://perma.cc/7WL3-VFP5>] (showing the common practice of payment in kind in the oil and gas industry).

were affirmed to be unalienable[.]”⁷⁵ And jurists have long regarded the protection of this right as “one of the most certain tests of the character and value of the government.”⁷⁶

Indeed, Alexander Hamilton once pointed to the “security of property” as “one of the great objects of Government.”⁷⁷ Not just because property is and historically has been essential to our daily routines,⁷⁸ but because property influences our “community, economic opportunity, and identity.”⁷⁹ Property often “communicates” intimate messages about its owners’ “importance, social position, and worth to others,”⁸⁰ which makes its unconstitutional confiscation that much more devastating to the victim and therefore renders it so important to protect.⁸¹ This is especially true when you consider that the most vulnerable populations are statistically more likely to be targeted by eminent domain actions.⁸²

Simply put, the Fifth Amendment to the U.S. Constitution’s “just compensation”⁸³ requirement was never intended to be so narrowly construed.⁸⁴ But because of the historical difficulty in ascertaining what exactly “just”

⁷⁵ *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1893).

⁷⁶ *Id.*

⁷⁷ Emilio R. Longoria, *Lech’s Mess with the Tenth Circuit: Why Governmental Entities Are Not Exempt from Paying Just Compensation When They Destroy Property Pursuant to Their Police Powers*, 11 WAKE FOREST J.L. & POL’Y 297, 302 (2021) (quoting *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O’Connor, J., dissenting)).

⁷⁸ See Paul J. Larkin, Jr., *The Original Understanding of “Property” in the Constitution*, 100 MARQ. L. REV. 1, 75 (2016) (“The Colonists and new Americans certainly believed that property was essential to life, liberty, and the pursuit of happiness.”).

⁷⁹ Emilio R. Longoria, *Biden Needs to Stop Building the Border Wall*, SAN ANTONIO EXPRESS-NEWS (Oct. 20, 2021), <https://www.expressnews.com/opinion/commentary/article/Commentary-Biden-needs-to-stop-building-the-16549382.php#photo-21606988> [<https://perma.cc/9WEY-VECF>].

⁸⁰ Miranda Oshige McGowan, *Property’s Portrait of a Lady*, 85 MINN. L. REV. 1037, 1065 (2001).

⁸¹ See, e.g., HANNAH ARENDT, *ON REVOLUTION* 244 (Penguins Books 2006) (1963). Political theorists have long suggested, for example, that “[t]he age old remedy against” government corruption is “respect for private property” rights, “that is, the framing of a system of laws through which the rights of privacy were publicly guaranteed and the dividing line between public and private legally protected.” *Id.*

⁸² See Blackman, *supra* note 27, at 707 (“Specifically, 58% of the homeowners living in areas targeted by eminent domain are minorities, as compared with only 45% minorities in surrounding communities.”); see also Michael Karlis, *Hole to Nowhere: Why the Wheels Are Likely to Come Off of Elon Musk’s San Antonio Tunnel Scheme*, SAN ANTONIO CURRENT (May 4, 2022), <https://www.sacurrent.com/news/hole-to-nowhere-why-the-wheels-are-likely-to-come-off-of-elon-musks-san-antonio-tunnel-scheme-28801558> [<https://perma.cc/42W9-ZJFZ>] (suggesting that the government has a tendency to acquire property for condemnation projects in places “where the land is cheaper, the people are poor and the facilities [are] not great”).

⁸³ See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”) (emphasis added to signify popularly disputed clauses).

⁸⁴ See *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949) (“Perhaps no warning has been more repeated than that the determination of value [in condemnation cases] cannot be reduced to inexorable rules.”).

compensation is,⁸⁵ early courts often defaulted to the concept of “fair market value” in trying to determine the Just Compensation Clause’s parameters.⁸⁶ And over time, this formulation of the Just Compensation Clause predominated over all others.⁸⁷ Although this approach to determining just compensation is not inherently flawed, the definition of “fair market value” has also been unnecessarily narrowed,⁸⁸ making it inadequate as a measure of just compensation in many condemnation cases. This is particularly salient in those cases that are susceptible to intensification post condemnation.⁸⁹

When effectuated constitutionally, takings can meaningfully enhance our lives and positively impact our happiness. In fact, there are many examples of condemnations serving an important role in providing and protecting necessary goods and resources to communities.⁹⁰ But if the Just Compensation Clause is meant to meaningfully deter government overreach, the current interpretation of the fair market value formulation of the Just Compensation Clause must be broadened to include any evidence of commercially relevant information that

⁸⁵ See Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721, 723 (1993) (discussing the historical difficulty in ascertaining what “just compensation” actually means).

⁸⁶ See *United States v. Miller*, 317 U.S. 369, 373–74 (1943) (“It is conceivable that [just compensation] should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value.”).

⁸⁷ The number of courts that have adopted a fair market value formulation of the Just Compensation Clause mandate abound. See, e.g., *Speir v. United States*, 485 F.2d 643, 648 (Ct. Cl. 1973) (“Just compensation is the value of the interest taken; and the term ‘value’ is ordinarily used in the sense of ‘market value’ or ‘fair market value,’ i.e., ‘market value fairly determined.’”); *United States v. 50.8 Acres of Land*, 149 F. Supp. 749, 751 (E.D.N.Y. 1957) (“Just compensation and fair market value are usually synonymous in eminent domain cases.”), *aff’d sub nom. United States v. Meadow Brook Club*, 259 F.2d 41 (2d Cir. 1958).

⁸⁸ See *Tech. Coll. of the Low Country v. United States*, 145 Fed. Cl. 408, 426–27 (2019) (“In determining the value of the property interests taken in a [condemnation] case, courts generally examine evidence provided by expert appraisers. The approach that government appraisers must follow in opining on the value of land taken by the federal government is found in the Uniform Appraisal Standards for Federal Land Acquisitions An appraiser may form such an estimate using the cost approach, sales comparison approach, or income capitalization approach.”).

⁸⁹ See, e.g., *Bowers v. Tex. E. Transmission Corp.*, 611 A.2d 1350, 1351 (Pa. Commw. Ct. 1992) (describing a broad easement taken by a gas pipeline company); see also *Weaver v. Nat. Gas Pipeline Co.*, 188 N.E.2d 18, 20 (Ill. 1963) (affirming that a pipeline can be replaced with a more intense version of the same without the right to any additional compensation).

⁹⁰ See Robert H. Levin, *When Forever Proves Fleeting: The Condemnation and Conversion of Conservation Land*, 9 N.Y.U. ENV’T L.J. 592, 599 (2001). In the most developed areas, for example, “conversion and condemnation restrictions will be critical to ensuring that the amount of protected conservation land does not gradually erode.” *Id.*; see also *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (upholding the use of eminent domain “to attack certain perceived evils of concentrated property ownership in Hawaii”).

would be given weight in negotiation⁹¹—thereby reflecting True Fair Market Value. Without this change, courts will continue to force landowners to forego the “full and perfect equivalent” that is constitutionally owed to them for what has been taken⁹²—the deprivation of which is currently being borne by our poorest and most disadvantaged.⁹³

This Article proceeds in three parts. Part I begins by providing the historical background of the Just Compensation Clause’s inception and its current formulation.⁹⁴ Part II moves on to discuss the deficiencies inherent in the dominant fair market value formulation of the Just Compensation Clause and the ways that these deficiencies harm those whose property is condemned.⁹⁵ Finally, Part III proposes alternative approaches to determining just compensation that would more fairly compensate condemnees.⁹⁶

I. UNDERSTANDING THE STATUS QUO

The Fifth Amendment to the U.S. Constitution prohibits state and federal governments (or their proxies)⁹⁷ from taking private property for public use without “just compensation.”⁹⁸ A strong limitation on the government’s right to take, the Just Compensation Clause is a “condition precedent” to any lawful exercise of the eminent domain power,⁹⁹ and it prevents the government “from

⁹¹ *Gleghorn v. City of Wichita Falls*, 545 S.W.2d 446, 447 (Tex. 1976) (“In applying the willing-seller willing-buyer test of market value, those factors which would reasonably be given weight in negotiations between a seller and a buyer are to be considered.”).

⁹² *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 152 (1978) (Rehnquist, J., dissenting); *see also Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (holding that application of constitutional guaranties “must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation”).

⁹³ *See Blackman, supra* note 27, at 707 (noting that 58% of homeowners residing in communities subject to eminent domain are minorities, in contrast to only 45% minorities in neighboring areas”); *see also Karlis, supra* note 82 (noting that the government targets areas where “the land is cheaper, the people are poor and the facilities [are] not great” as part of its strategic use of eminent domain).

⁹⁴ *See infra* notes 97–149 and accompanying text.

⁹⁵ *See infra* notes 150–166 and accompanying text.

⁹⁶ *See infra* notes 167–194 and accompanying text.

⁹⁷ *See PennEast Pipeline Co., v. New Jersey*, 141 S. Ct. 2244, 2251 (2021) (discussing when proxies can exercise eminent domain on behalf of the government). “Specifically, we are asked to decide whether the Federal Government can constitutionally confer on pipeline companies the authority to condemn necessary rights-of-way in which a State has an interest. We hold that it can.” *Id.*

⁹⁸ *See United States v. Miller*, 317 U.S. 369, 373 (1943) (“The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation.”).

⁹⁹ *W. Union Tel. Co. v. Pa. R.R. Co.*, 195 U.S. 540, 570 (1904). “It can only be taken by the exercise of the powers of eminent domain[,] and a condition precedent to the exercise of such power is . . . that the statute conferring it make provision for reasonable compensation to the owner of the property taken.” *Id.*

forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁰⁰

Viewed early on as one of the most essential clauses in our constitutional framework, the Just Compensation Clause’s robust protection reflected the economic and social importance of property rights in early English and American society.¹⁰¹ Moreover, as former Supreme Court Justice William Paterson¹⁰² once wrote, the Clause underscored the codependency between democracy and the protection of property rights generally:

[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: [p]roperty is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact, and, by the last Constitution of *Pennsylvania*, was made a fundamental law. Every Person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompence in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large.¹⁰³

Indeed, thirty-eight of the fifty states deemed the Just Compensation Clause’s objective and word choice sufficiently important to include “just compensation” in their own constitutions as the measure of return owed prior to a lawful exercise of eminent domain.¹⁰⁴ This occurred even though the Fifth Amend-

¹⁰⁰ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

¹⁰¹ See *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (“[T]he Parliament, with all their boasted omnipotence, never committed such an outrage on private property; and if they had, it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power and not of right.”). “The English history does not furnish an instance of” private property being taken without just compensation. *Id.*

¹⁰² See generally Richard C. Haskett, *William Paterson, Attorney General of New Jersey: Public Office and Private Profit in the American Revolution*, 7 WM. & MARY Q. 26 (1950) (providing a short history of Justice William Paterson and his pivotal role in our constitutional history).

¹⁰³ *Vanhorne’s Lessee*, 2 U.S. (2 Dall.) at 310.

¹⁰⁴ Every state constitution provides that “just compensation” must be paid after a government taking except for Delaware, Florida, Kansas, Massachusetts, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Texas, Vermont, and Wyoming. See ALA. CONST. art. I, § 23; *id.* art. XII, § 235; ALASKA CONST. art. I, § 18; ARIZ. CONST. art. II, § 17; ARK. CONST. art. II, § 22; CAL. CONST. art. I, § 19; COLO. CONST. art. II, § 14, 15; CONN. CONST. art. I, § 11; DEL. CONST. art.

ment "is made applicable to the States through the Fourteenth Amendment," which means that states must provide just compensation after they exercise eminent domain—even if their state constitution does not explicitly state so.¹⁰⁵

But despite its strategic importance and broad applicability, the Just Compensation Clause had one glaring flaw: Namely, that it was not entirely clear what it required governments to give.¹⁰⁶ Although courts broadly agreed that "just" was "used evidently to intensify the meaning of the word 'compensation;' to convey the idea that the equivalent to be rendered for property taken shall be real, substantial, full, ample;"¹⁰⁷ it was also well accepted that "an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose."¹⁰⁸ Courts and legislatures therefore struggled at the inception of the Just Compensation Clause to understand what exactly it required, or perhaps more importantly, what it prohibited governments from doing.¹⁰⁹

I, § 8; FLA. CONST. art. X, § 2; GA. CONST. art. I, § 3, para. I; HAW. CONST. art. I, § 20; IDAHO CONST. art. I, § 14; ILL. CONST. art. I, § 15; IND. CONST. art. I, § 21; IOWA CONST. art. I, § 18; KAN. CONST. art. XII, § 4; KY. CONST. § 13, 242; LA. CONST. art. I, § 4; ME. CONST. art. I, § 21; MD. CONST. art. III, § 40; MASS. CONST. art. X, pt. I; *id.* art. LI, XCII; MICH. CONST. art. X, § 2; MINN. CONST. art. I, § 13; MISS. CONST. art. III, § 17; MO. CONST. art. I, § 26; MONT. CONST. art. II, § 29; NEB. CONST. art. I, § 21; NEV. CONST. art. I, § 8 (3), 22; N.H. CONST. pt. I, art. XII; N.J. CONST. art. I, para. 20; *id.* art. IV, § 6, para. 3; N.M. CONST. art. II, § 20; N.Y. CONST. art. I, § 7; N.C. CONST. art. I, § 19; N.D. CONST. art. I, § 16; OHIO CONST. art. I, § 19; OKLA. CONST. art. II, § 23, 24; OR. CONST. art. I, § 18 (1924); *id.* art. XI, § 4; PA. CONST. art. I, § 10; *id.* art. X, § 4; R.I. CONST. art. I, § 16; S.C. CONST. art. I, § 13; S.D. CONST. art. VI, § 13; *id.* art. XVII, § 18; TENN. CONST. art. I, § 21; TEX. CONST. art. I, § 17; UTAH CONST. art. I, § 22; VT. CONST. ch. I, art. II; VA. CONST. art. I, § 6, 11; WASH. CONST. art. I, § 16; W. VA. CONST. art. III, § 9; WIS. CONST. art. I, § 13; WYO. CONST. art. I, § 32, 33.

¹⁰⁵ Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978) (explaining that the owner of Grand Central Terminal challenged a state land use regulation under "the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment").

¹⁰⁶ See *Maricopa County v. Barkley*, 812 P.2d 1052, 1058–60 (Ariz. Ct. App. 1990) ("Just compensation has never been reduced to a single formula; rather than a general formula, various ways of valuing property are appropriate depending on the circumstances.").

¹⁰⁷ *Va. & Truckee R.R. Co. v. Henry*, 8 Nev. 165, 171–72 (1873).

¹⁰⁸ *United States v. Miller*, 317 U.S. 369, 373–74 (1943).

¹⁰⁹ See *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 315 (C.C.D. Pa. 1795) (discussing the obligations required by the Just Compensation Clause). This is an example of the Supreme Court striking down an early attempt to make compensation in kind under the Just Compensation Clause:

No just compensation can be made except in money. Money is a common standard, by comparison with which the value of any thing may be ascertained. It is not only a sign which represents the respective values of commodities, but is an universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompence in value, a *quid pro quo*, and must be in money. True it is, that land or any thing else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him. His consent will legalize the act, and make it valid; nothing short of it will have the effect. It is obvious, that if a jury pass upon the subject, or value of the property, their verdict must be in money.

In an effort to articulate a usable standard for adjudicating the Just Compensation Clause's mandate, "the courts early adopted, and have retained, the concept of market value."¹¹⁰ In fact, the phrase "market value" appeared for the first time at the U.S. Supreme Court level as a measure for just compensation in eminent domain in 1878 in *Boom Co. v. Patterson*.¹¹¹ There, the Court had to determine what "amount of compensation the owner of" a Mississippi river front property "was entitled to receive" after its land was condemned by a boom construction company in Minnesota.¹¹² In discussing how to "value land appropriated for public purposes," the Court explained that the "same considerations are to be regarded as in a sale of property between private parties."¹¹³ Specifically, factfinders charged with ascertaining the Just Compensation Clause's requirements should ask "what is the property worth in the *market*, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses."¹¹⁴

Perhaps because "market value is an objective concept,"¹¹⁵ which is more easily expressed in dollars and cents, the market value formulation (which is used interchangeably with the phrase "fair market value")¹¹⁶ quickly became popular among state and federal courts. Now, it is the dominant formulation of the Just Compensation Clause requirement.¹¹⁷ In fact, the market value formu-

Id.

¹¹⁰ *Miller*, 317 U.S. at 374.

¹¹¹ See *Boom Co. v. Patterson*, 98 U.S. 403, 407–08 (1878) (including the first use of the phrase "market value" in a Supreme Court case); see also *In re William & Anthony Sts.*, 19 Wend. 678, 690 (N.Y. Sup. Ct. 1838) (including first mention of market value in the context of eminent domain).

¹¹² See *Boom Co.*, 98 U.S. at 405–06.

¹¹³ *Id.* at 407–08.

¹¹⁴ *Id.* at 408 (emphasis added).

¹¹⁵ *Morasch v. Hood*, 222 P.3d 1125, 1131 (Or. Ct. App. 2009) (quoting Jim Bernard for Clackamas Cnty. Comm'n. v. Elections Div., 211 P.3d 321, 324 (Or. Ct. App. 2009)).

¹¹⁶ See *Barlow Ranch, Ltd. P'ship v. Greencore Pipeline Co.*, 301 P.3d 75, 85 (Wyo. 2013) ("Although the terminology varies (the measure is sometimes stated as 'fair market value,' 'cash market value,' 'fair cash market value,' or 'reasonable market value'), market value appears to be the most frequently used standard for measuring just compensation, regardless of the label.").

¹¹⁷ For a snapshot over time of the prevalence of the market value formulation of the Just Compensation Clause requirement among different jurisdictions, see *Ill. Cent. R.R. Co. v. Village of Lostant*, 47 N.E. 62, 64 (Ill. 1897).

When the property of a private individual is taken for public use, he may undoubtedly prove its value for any and all purposes, whether he contemplates devoting it to such purposes or not, because the measure of his just compensation is the market value of his land, which can only be determined by taking into consideration all the uses to which it is adapted.

Id.; see also *Puget Sound Power & Light Co. v. City of Puyallup*, 51 F.2d 688, 690 (9th Cir. 1931) (noting that "just compensation" is the "market value of the property taken"); *Greene v. Burns*, 607

lation of the Just Compensation Clause has become so prevalent that some courts now use the phrase “fair market value” interchangeably with just compensation¹¹⁸—sometimes even mistakenly identifying “the ascertainment of fair market value” as the “objective” of condemnation proceedings—as opposed to ascertaining what “just compensation” may be.

But despite its popularity and widespread use, confusion persisted in ascertaining what exactly fair market value meant because although the fair market value formulation of the Just Compensation Clause appeared more objective on its face, it too needed defining due to the way that market value can differ drastically depending upon the perspective from which value is assessed¹¹⁹ and at what point value is assessed.¹²⁰

Thus emerged the “willing buyer, and willing seller” description of fair market value, which first appeared at the U.S. Supreme Court in 1937¹²¹ but was popularized by state courts and treatises well before then.¹²² With this description, the courts explained that fair market value is properly understood as

A.2d 402, 407 (Conn. 1992) (contending that “[t]he amount that constitutes just compensation is the market value of the condemned property when put to its highest and best use at the time of the taking”).

¹¹⁸ For an example of a court identifying the ascertainment of “fair market value” as the primary objective in a condemnation case, when both the state and federal constitutions actually require “just compensation” to be ascertained, see *L.A. Cnty. Flood Control Dist. v. Mindlin*, 165 Cal. Rptr. 233, 241 (App. 1980). “It is patently clear that, in a condemnation proceeding which has as its objective the ascertainment of fair market value, the ‘highest and best use’ of the property is relevant in making that determination.” *Id.*; cf. CAL. CONST. art. I, § 19 (“Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.”); U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”) (emphasis added).

¹¹⁹ For an example of how parties can come to drastically different assessments of the same property’s fair market value, see *Palmer Ranch Holdings Ltd. v. Comm’r of Internal Revenue Serv.*, 812 F.3d 982, 986 (11th Cir. 2016). In *Palmer*, the landowner “valued [the property] at \$25,200,000 on the assumption that [the property’s] highest and best use was residential development, with development of 360 dwelling units being reasonably probable,” whereas the “IRS countered with a maximum highest and best use of 100 units and a corresponding valuation of \$7,750,000.” *Id.*

¹²⁰ For an example of how property values can differ drastically depending on when exactly the factfinder is required to assess fair market value, see *City of Fort Worth v. Corbin*, 504 S.W.2d 828, 830 (Tex. 1974) (explaining that the condemning authority agreed that property would be worth much more after it was publicly announced that an airport was proposed to be constructed on the condemned site).

¹²¹ See *Elmhurst Cemetery Co. v. Comm’r of Internal Revenue*, 300 U.S. 37, 39 (1937) (including the first instance of this phrase in a Supreme Court opinion).

¹²² See *Martinet v. Maczkewicz*, 35 A. 662, 663 (N.J. 1896) (“When a willing seller and a willing buyer agree and fix the price of an article, it is obvious that it is reasonable to infer that such estimation approximates closely to the real value of such article.”); see also *Sloss-Sheffield Steel & Iron Co. v. City of Birmingham*, 78 So. 896, 896 (Ala. 1918) (asking how much a “particular public improvement added to the fair market value of the property, as between a willing seller and a willing buyer, with reference to all the uses to which it is reasonably adapted and for which it is plainly available, prospective as well as present, by strangers as well as by the owner”).

“the amount of money which a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obliged, to sell it, taking into consideration all uses for which the land was suited and might be applied.”¹²³

Purposefully broad and intended to convey that “market value is not a universal test, and cases often arise where resort must be made to some other mode of ascertaining value,” the willing buyer, willing seller formulation gained widespread popularity among state and federal courts.¹²⁴ Yet for some, this description of fair market value uncovered an uncomfortable reality. Specifically, that willing buyers and willing sellers are likely to consider a wide range of commercially relevant information in determining whether to acquire a property,¹²⁵ which could substantially increase a given property’s value.¹²⁶ And although condemnees typically welcome increases in fair market value, condemning authorities often strongly oppose them because these authorities ultimately have to cut the check to acquire a given property.¹²⁷

Eminent domain scholars and practitioners often ignore the potentially high cost of acquiring property through condemnation both because of how condemnation costs can be passed on to consumers¹²⁸ and because the Just Compensation Clause’s return is classically measured “from the point of view of the owner and not of the condemnor.”¹²⁹ Even so, condemnors raised concerns that excessive costs would ensue if potential evidence of fair market value was not limited under the willing buyer, willing seller formulation. This is because condemnors feared that unbridled admission of evidence under this

¹²³ SACKMAN, *supra* note 10, § 12.02 (explaining fair market value).

¹²⁴ *Id.*; see also *United States v. 711.57 Acres of Land*, 51 F. Supp. 30, 31 (N.D. Cal. 1943) (noting that market value constitutes “what a willing buyer would pay in cash to a willing seller” (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)); *Prop. Rsrv., Inc. v. Superior Ct.*, 375 P.3d 887, 906 (Cal. 2016) (same).

¹²⁵ SACKMAN, *supra* note 10, at § 12.02 (“[F]actors which reasonably would be considered in negotiations between a seller and buyer may be taken into account in ascertaining market value.”).

¹²⁶ See, e.g., *Exxon Pipeline Co. v. Hill*, 788 So. 2d 1154, 1157 (La. 2001) (explaining that if the “per rod” valuation method were utilized to ascertain the fair market value of the subject property its fair market value would increase from \$17,172 to \$251,505).

¹²⁷ See *id.* (showing the condemning authority opposing the admission of evidence that would be given weight in a negotiation). It is common, for example, for condemning authorities to give “low-ball” offers to purchase properties that might be used to construct a public project. See *Lowball Watch—Indiana*, GIDEON’S TRUMPET (May 24, 2019), <https://gideonstrumpet.info/?s=low+ball+watch> [<https://perma.cc/5W2Q-DTCT>] (“A Superior Court judge in Kokomo affirmed a jury verdict for \$305,000 brought in in spite of the city’s claim that compensation should have been only \$100,000. What divided the parties was the city’s contention that it was required to pay only for the part taken, whereas the owners also claimed compensation for severance damages caused . . .”).

¹²⁸ See, e.g., *Popowsky v. Pa. Pub. Util. Comm’n*, 615 A.2d 857, 861 (Pa. Commw. Ct. 1992) (showing that Pennsylvania law allows “the full acquisition cost” of necessary property to “be added to rate base” for utility companies, thus allowing them to pass on the cost).

¹²⁹ 3 SACKMAN, *supra* note 10, § 8.07.

formulation of fair market value could lead to “landowners [receiving] more than the full extent of [their] loss.”¹³⁰

And admittedly, this makes some sense. Public projects, which justify the use of eminent domain, often have tight budgets, and those public projects might never come to fruition if coffers are too low and if the expense of condemnation is too high.¹³¹ Moreover, logic presupposes that there has to be some limit to what evidence courts may consider in a condemnation case.¹³² Otherwise, the condemnation award may not actually reflect the fair market value of the property being taken.¹³³ As Justice Oliver Wendell Holmes, Jr. once wrote,

[T]he constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; . . . property rights may be taken for public purposes without pay if you do not take too much [and] some play must be allowed to the joints if the machine is to work.¹³⁴

Perhaps for these reasons, then, state and federal jurisdictions began to limit the kinds of evidence that factfinders could use¹³⁵ in eminent domain disputes to ascertain fair market value.¹³⁶ Specifically, courts looked to professional appraising standards and practices in undertaking this endeavor, treating these standards as guidance to determine what evidence is probative to ascertaining

¹³⁰ See *Hill*, 788 So. 2d at 1165 (disapproving of an alternative method of determining the value of condemned land).

¹³¹ See, e.g., Bart Jansen, *Coronavirus Cuts Transportation Funding, Puts Major Road and Bridge Projects on Hold*, USA TODAY (May 4, 2020), <https://www.usatoday.com/story/news/politics/2020/05/04/coronavirus-transportation-officials-urge-federal-aid-roads-bridges/3005467001/> [<https://perma.cc/3977-PR73>] (discussing how funding cuts affect project building).

¹³² See, e.g., *Doug Garber Constr., Inc. v. King*, 388 P.3d 78, 82 (Kan. 2017) (“The Project Influence Rule excludes certain factors from the fair market value calculation in an eminent domain proceeding. Generally stated, the ‘enhancement or depressing of value due to anticipated improvements by the project for which condemnation is sought is excluded in determining fair market value.’” (quoting *Hudson v. City of Shawnee*, 790 P.2d 933, 942 (Kan. 1990))). Otherwise, the condemnation award would not represent the true value of the property at the time it was taken. See *id.* (suggesting that allowing evidence of a condemned parcel’s proposed use would distort its actual value).

¹³³ See *id.* (supporting the importance of correctly assessing fair market value).

¹³⁴ *Tyson & Bro.-United Theatre Ticket Offs., Inc. v. Banton*, 273 U.S. 418, 445–46 (1927) (Holmes J., dissenting).

¹³⁵ Depending on the jurisdiction, the factfinder in an eminent domain dispute may change. See, e.g., *Pinnacle Gas Treating, Inc. v. Read*, 160 S.W.3d 564, 567 n.4 (Tex. 2005) (noting that in Texas, the “parties are always entitled to a jury trial if they feel they need one”); *United States v. Keller*, 142 F.3d 718, 721 (4th Cir. 1998) (stating that in federal court, “[i]t is clear that [the Federal Rules of Civil Procedure do] not provide an ‘absolute right’ to a jury trial”).

¹³⁶ See, e.g., *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 871 (Tex. 2009) (stating that Texas limits evidence admitted to “three approaches to determining the market value of condemned property: the comparable sales method, the cost method, and the income method”).

fair market value and what should be excluded.¹³⁷ The result was that courts began to exclude potential evidence of fair market value that did not comport with one of the three approaches to ascertaining fair market value developed by the appraisal industry: “the cost approach, the income capitalization approach, and the market-data or comparative sales approach.”¹³⁸ In practice, this created a functional equivalency between the phrase “fair market value,” as it was originally understood as a measure of just compensation,¹³⁹ and the appraisal industry’s definition of the same concept.¹⁴⁰ Just look to the fact that the cost, income, and comparable sales approach are the exact same valuation methods that professional appraisers are required to utilize under the USPAP,¹⁴¹ as well as *The Appraisal of Real Estate*,¹⁴² which is the seminal text

¹³⁷ In Texas, for example, condemnees are limited to submitting evidence of fair market value which comports with at least one of the “three approaches to determining the market value of condemned property: the comparable sales method, the cost method, and the income method.” *See id.* These are the same valuation methods that all appraisers are required to employ under the USPAP. *See* APPRAISAL FOUND., UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE 18 (2020–21 ed.) (requiring the evaluation of the cost approach, income approach, and comparable sales approach in every appraisal).

¹³⁸ *Dedeaux Util. Co. v. City of Gulfport*, 63 So. 3d 514, 524 (Miss. 2011) (quoting *Rebelwood, Ltd. v. Hinds County*, 544 So. 2d 1356, 1360 (Miss. 1989)). For a brief summary of the comparable sales, cost, and income approach, see APPRAISAL INST., *THE APPRAISAL OF REAL ESTATE* 29 (15th ed.).

1. In the cost approach, value is indicated by the current cost of reproducing or replacing the improvements (including indirect costs and entrepreneurial incentive), less depreciation, plus land value.
2. In the sales comparison approach, value is indicated by analysis of sales of comparable properties appropriately adjusted for differences from the subject property.
3. In the income capitalization approach, value is indicated by the present value of a property’s earning power, based on the capitalization of income.

Id.

¹³⁹ *See* *United States v. Miller*, 317 U.S. 369, 373–74 (1943) (supporting the idea that market value was merely one of the many appropriate formulations of the Just Compensation Clause).

¹⁴⁰ *See* APPRAISAL INST., *supra* note 138, at 36. The appraisal practice profession is designed to give an “opinion of value” at a set period in time (also sometimes referred to as a “date of value”), which is often unrepresentative of value in eminent domain cases because of the way that condemnors can intensify a subject property’s use in the future. *Id.* at 41.

¹⁴¹ “USPAP is the regulatory standard of care for real estate appraisal in the United States,” which was created by the Appraisal Foundation. SACKMAN, *supra* note 10, § 13.01; *see also* APPRAISAL FOUND., *supra* note 137, at 18 (stating that “an appraiser must collect, verify, and analyze all information necessary for credible assignment results,” such as “a sales comparison approach[,] . . . a cost approach[,] . . . [and] an income approach” when appraising real property).

¹⁴² *See* APPRAISAL INST., *supra* note 138, at 29 (illustrating that to successfully “develop an opinion of market value,” an appraiser implements the cost, sales comparison, and income capitalization “approaches to value”).

addressing “the substance of the real estate appraisal process”¹⁴³ published by the Appraisal Institute.¹⁴⁴

The practice of excluding evidence of fair market value, which does not comport with the appraisal industry’s three methods for assessing property value in the real estate transactions market is highly prevalent among American jurisdictions. As of now, for instance, forty-three states,¹⁴⁵ ten federal circuit courts,¹⁴⁶ and the Supreme Court¹⁴⁷ either require or imply that just compensation evidence must comport with one of these three valuation methods to be submitted to the factfinder in an eminent domain case.¹⁴⁸ If it does not, the non-complaint evidence will likely be excluded from the record, and thus will not be considered in determining the measure of just compensation owed for a condemnation.¹⁴⁹

¹⁴³ SACKMAN, *supra* note 10, § 13.01.

¹⁴⁴ For clarification, the Appraisal Foundation “is a private, nonprofit entity created by industry participants” to coordinate “real estate appraisal regulatory activity between the federal government, state regulatory boards and trade associations representing practitioners.” SACKMAN, *supra* note 10, § 13.31. The Appraisal Foundation “was designated by Congress to administer the two boards created by Congress to regulate real estate appraisers,” the Appraisal Standards Board and the Appraiser Qualifications Board. *Id.* The Appraisal Foundation is different, however, from the Appraisal Institute, which is the nation’s largest professional association of real estate appraisers.

¹⁴⁵ Idaho, Iowa, Michigan, New Mexico, South Carolina, South Dakota, and Wyoming do not limit evidence in eminent domain proceedings in this way. All other states do, however. *See, e.g.,* City of Harlingen v. Estate of Sharboneau, 48 S.W.3d 177, 182 (Tex. 2001) (providing that the three methods for “determining market value are the comparable sales method, the cost method, and the income method”); State Dep’t of Transp. v. Powell, 721 So. 2d 795, 798 (Fl. Dist. Ct. App. 1998) (same); Samuelson v. Salamanca Urban Renewal Agency, 311 N.Y.S.2d 558, 560 (App. Div. 1970) (same). *See generally* 50 STATE SURVEY: THE LAW OF EMINENT DOMAIN (AM. BAR ASSOC. 2012) (providing a more in-depth discussion of each state’s laws surrounding eminent domain).

¹⁴⁶ *See, e.g.,* United States v. Certain Prop., 403 F.2d 800, 802 (2d Cir. 1968) (listing the three methods for determining a property’s valuation as the comparable sales method, the income method, and the cost method); United States v. 100 Acres, 468 F.2d 1261, 1265 (9th Cir. 1972) (same); Sill Corp. v. United States, 343 F.2d 411, 416 (10th Cir. 1965) (same); United States v. 0.376 Acres of Land, 838 F.2d 819, 827 (6th Cir. 1988) (Krupansky, J., concurring) (same).

¹⁴⁷ *See, e.g.,* United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 402–403 (1949) (referencing only three different approaches to valuing property: the “cost” approach, the “earnings” or income approach, and the comparable “sales” approach).

¹⁴⁸ Many states provide an exception to this rule, which allows a landowner to testify to the value of its own property. *See, e.g.,* Nat. Gas Pipeline Co. of Am. v. Justiss, 397 S.W.3d 150, 155 (Tex. 2012) (“A property owner may testify to the value of his property.”); *see also* Town of Paradise Valley v. Laughlin, 851 P.2d 109, 111 (Ariz. Ct. App. 1992) (stating a property owner can always testify about the value of his property even if he is not qualified as an expert). But that testimony is also limited and will be struck if it fails to adhere to proper appraisal methodologies. *See, e.g.,* Manhattan Ice & Cold Storage, Inc. v. City of Manhattan, 274 P.3d 609, 621 (Kan. 2012) (where a landowner’s testimony was struck because it exceeded the bounds of his competency and performed an improper comparable sales analysis).

¹⁴⁹ *See* Texas Fruit Palace, Inc. v. City of Palestine, 842 S.W.2d 319, 323 (Tex. Ct. App. 1992) (“The testimony of a witness who uses an unauthorized and improper valuation method should be excluded.”).

II. WHY IS THIS A PROBLEM?

Both the popularity of the fair market value formulation¹⁵⁰ and the judicial practice of only admitting a narrow range of evidence on this issue¹⁵¹ have had serious and long-lasting consequences for the victims of eminent domain. That is because these practices deprive landowners of an adequate remedy for the unique and conditional harms that can occur after condemnation, which are sometimes unidentifiable at the time just compensation is litigated, and therefore ignored in the status quo approach to ascertaining fair market value.¹⁵²

Unlike other real estate transactions, for example, condemnation can often force affected landowners to live close to—or sometimes even with—the public project that took their property.¹⁵³ In those circumstances, the condemnation project can affect the use and value of the residual property that the affected landowner retains.¹⁵⁴ This is why the Just Compensation Clause requires condemning authorities to pay for “any resulting damage to the remainder” property, in addition to “adequate compensation . . . for . . . the part taken.”¹⁵⁵

In many circumstances, this “remainder damage” is clearly identifiable at the time of taking and can be accounted for under the appraisal methodologies courts currently approve to ascertain fair market value. An example of this phenomenon is the damage caused by the deprivation of safe access¹⁵⁶ or “required modifications . . . as a result of the condemnation.”¹⁵⁷ But that is not

¹⁵⁰ See *L.A. Cnty. Flood Control Dist. v. Mindlin*, 165 Cal. Rptr. 233, 241 (Ct. App. 1980) (mistakenly identifying the ascertainment of “fair market value” as the primary objective in a condemnation case). “It is patently clear that, in a condemnation proceeding which has as its objective the ascertainment of fair market value, the ‘highest and best use’ of the property is relevant in making that determination.” *Id.*

¹⁵¹ See, e.g., *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 871 (Tex. 2009) (showing that Texas only “recognizes three approaches to determining the market value of condemned property: *the comparable sales method, the cost method, and the income method*” (emphasis added)).

¹⁵² See APPRAISAL FOUND., *supra* note 138, at 1, 41 (Professional appraisals are designed to give an “opinion of value” at a set period in time (also sometimes referred to as a “date of value”), which is often unrepresentative of value in eminent domain cases because of the way that condemnors can intensify a subject property’s use in the future post acquisition.).

¹⁵³ See *Enbridge G & P (E. Tex.) L.P. v. Samford*, 470 S.W.3d 848, 853 (Tex. Ct. App. 2015) (discussing pipeline condemnations where the pipeline obtained an easement from landowners which the landowner would then host on or under its property in perpetuity). For a discussion of the ongoing effects condemnations may have on remaining landowners, see Longoria, *supra* note 28.

¹⁵⁴ This phenomenon is often described in short as “damages to the remainder.” SACKMAN, *supra* note 10, § 14A.02.

¹⁵⁵ *County of Bexar v. Santikos*, 144 S.W.3d 455, 459 (Tex. 2004).

¹⁵⁶ See *Interstate Northborough P’ship v. State*, 66 S.W.3d 213, 224 (Tex. 2001) (noting condemnnee’s “unsafe access and cost to cure evidence reflects specific damages,” which were properly admitted in to evidence).

¹⁵⁷ *State v. Centennial Mortg. Corp.*, 867 S.W.2d 783, 784 (Tex. 1993) (“Damages due to required modifications to the remainder, as a result of the condemnation, or damages due to a loss of

always the case. Sometimes, remainder damages are caused by a later legal intensification in use of a condemned easement that the parties did not foresee when the courts originally determined the just compensation award.¹⁵⁸ Because those damages were not readily identifiable at the time the property was taken, courts do not consider them when calculating what just compensation should be because they are “deemed too contingent, speculative, or remote as to affect present market value.”¹⁵⁹

This unjust phenomenon occurs because the courts and appraisal industry currently define fair market value through a necessarily limited inquiry only concerned with creating an “opinion of value” at a set period in time referred to as the “date of value,” also referred to as the “date of taking.”¹⁶⁰ Yet, it is common for damages to occur in condemnation cases long after just compensation has been litigated because of the broad manner in which condemnors take easements.¹⁶¹ Thus, the fair market value formulation precludes condemnees from asserting relevant evidence of damages that are legally possible but unlikely.¹⁶² But because condemnees are only allowed one bite at the just compensation apple,¹⁶³ they are also prevented from later recovering the dam-

improvements on the remainder because of the condemnation may, on a proper showing, be compensable.”).

¹⁵⁸ See, e.g., *Sw. Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 680, 681 (Tex. 2020) (explaining that a transmission line operator purchased a thirty-foot wide easement in 1949 and was not required to provide additional compensation to the landowners when it increased the width of that easement to one hundred feet in 2014, despite the greater burden on the subject property); see also SACKMAN, *supra* note 10, § 14A.02 (noting that in the event an easement provisions expansion, “this future interference would [not] constitute a subsequent de facto appropriation”).

¹⁵⁹ 4A SACKMAN, *supra* note 10, § 14A.02.

¹⁶⁰ See APPRAISAL INST., *supra* note 138, at 41 (noting professional appraisals are designed to give an “opinion of value” at a set period in time referred to as a “date of value,” and noting that the date of value “refers to the point in time as of which the analyses and conclusions [of the appraisal report] are relevant”).

¹⁶¹ See *Andrews v. Cox*, 17 A.2d 507, 509 (Conn. 1941) (“When land is taken for a highway” in Connecticut for example, the highway authority acquires “the right to make any changes in the highway which the changing needs of traffic may thereafter render necessary, without compensation to the owner of the fee; thus it may alter its grade or the location of the traveled portion or it may subject it to new and more burdensome uses, and may do any act necessary to accomplish these purposes.” (quoting *Tyler v. Town of Darien*, 162 A. 837, 838 (Conn. 1932))).

¹⁶² See *id.* at 511 (reversing damage award in takings case because it was not reasonably likely from the facts that the complained damage would actually occur, even though the condemnor had the legal right to perform said acts).

¹⁶³ See *Ioppolo v. Port of Seattle*, No. C15-0358-JCC, 2015 U.S. Dist. LEXIS 121497, at *12–13 (W.D. Wash. Sept. 11, 2015) (“[T]he previous use of eminent domain and a paying of just compensation preclude later actions for inverse condemnation of the very same property.”); see also *United States v. Land*, 213 F.3d 830, 837 (5th Cir. 2000) (noting that granting “property owners an unlimited right to litigate (or re-litigate) any claims that the government previously interfered with their property rights would also run aground of the rule that a property owner’s right to receive just compensation is

ages that arise from an intensification of use from a previously condemned easement because said damages may have been reasonably foreseeable from the easement language that condemners original pled.¹⁶⁴

Condemnees thus find themselves in an unwinnable position: “[c]laims of damage that are remote in time, uncertain, inaccurate, or unfounded in fact, will not be the basis of recovery,”¹⁶⁵ but condemners are free to later intensify easements that have previously been condemned at no additional expense to them.¹⁶⁶

III. POTENTIAL SOLUTIONS

This catch-22 is particularly frustrating in light of the range of commercially reasonable evidence that more accurately approximates the unique and conditional damages condemnation projects pose to landowners—but are not currently admissible under the current Just Compensation Clause formulation.¹⁶⁷ This part explores potential alternative ways of determining just compensation that would more fairly compensate condemnees.

For example, the rapid and seemingly unpredictable intensification of property use is a common phenomenon in the energy¹⁶⁸ and transportation markets.¹⁶⁹ For that reason market participants in these industries often acquire and value property on a production basis as opposed to a single cash sum.¹⁷⁰ This allows the burdens and benefits of property use to be adjusted based on

not absolute, but depends on his compliance with the law’s unambiguous procedures for obtaining such compensation”).

¹⁶⁴ See, e.g., *Sw. Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 681, 690 (Tex. 2020) (denying a claim for additional damages due to the intensification of an easement because that easement was in general terms and “landowners are charged with notice of easements that may encumber their property, including easements that do not contain a specific width but instead include general language”).

¹⁶⁵ 4A SACKMAN, *supra* note 10, § 14A.02.

¹⁶⁶ See, e.g., *Lynch*, 595 S.W.3d at 681 (showing a condemner increasing its easement width at no additional cost).

¹⁶⁷ See *supra* note 56 and accompanying text (suggesting that royalties better capture the value of mineral wealth deposits than one-time payments); see also *supra* notes 59 & 68 and accompanying text (noting other alternatives for land valuation).

¹⁶⁸ See Robert Rapier, *U.S. Oil Companies Have Increased Drilling by 60% in One Year*, FORBES (Mar. 27, 2022), <https://www.forbes.com/sites/rrapier/2022/03/27/oil-companies-have-increased-drilling-by-60-in-one-year/?sh=43386dfd1556> [<https://perma.cc/LPV7-PB84>] (discussing the rapid expansion of oil drilling in the United States following a rise in oil prices).

¹⁶⁹ David Shepardson, *U.S. Passenger Railroad Amtrak to Increase Trains as Demand Returns*, REUTERS (May 9, 2022), <https://www.reuters.com/world/us/us-passenger-railroad-amtrak-increase-train-frequencies-demand-returns-2022-05-09/> [<https://perma.cc/57PM-LGVB>] (noting that factors such as high gasoline prices for consumers significantly increased demand for Amtrak train services).

¹⁷⁰ Karl K. Kindig, *Drafting Royalty Provisions for Solid Mineral Leases: The Impact of Changes in Real Mineral Prices*, 33 ROCKY MTN. MINERAL L. INST. 22 (1988) (stating that royalties are designed to be sensitive to the “economics of extraction, processing, and sale of the commodity” so that compensation is proportional to intensity of use); see also Mosbrucker, *supra* note 53 (discussing the idea of royalty payments to acquire train lines over private property).

production.¹⁷¹ If property use intensifies, and a property is subjected to additional stress, the landowners' payment, or royalty, increases proportionally.¹⁷² But if production decreases, so does the company's obligation to compensate.¹⁷³

Despite the fact that condemnors, like public utilities, both can and do track their infrastructure's intensity of use—also called their “throughput”¹⁷⁴—production-based evidence of compensation like royalties is inadmissible unless the condemnee proves the existence of minerals on the subject property.¹⁷⁵ This functionally precludes the use of this evidence in eminent domain proceedings, even though it would likely resolve the constitutional deprivations landowners experience due to the latent harms condemnation projects can cause.¹⁷⁶ This result persists, notwithstanding the reality that condemning authorities already do value their infrastructure based on its proportional throughput.¹⁷⁷

Alternatively, factfinders could utilize the in-house valuation systems that condemnors have established for their land acquisition needs, such as the “per rod”¹⁷⁸ trading value measurement for oil and gas pipelines in the United States.¹⁷⁹ This property valuation metric is well known and pervasive in the

¹⁷¹ See Gilmer et al., *supra* note 56, at 5 (“Once production is established on a lease, it remains in effect as long as the property produces oil and gas. The mineral rights owner is paid a royalty, or share (20-25% is common in Texas) of the value of the hydrocarbons produced. In our [twenty-three]-county area—using Railroad Commission production records and applying market prices—oil, natural gas and condensate revenues grew from \$5.3 billion in 2007 to \$8.2 billion in 2011. Based on a 20[%] royalty, local payments increased by \$584 million in the 2007–11 period.” (emphasis added)).

¹⁷² See *id.* (noting the proportional increase in compensation that accompanies production increase).

¹⁷³ See *id.*

¹⁷⁴ *Throughput*, MERRIAM-WEBSTER'S DICTIONARY, <https://www.merriam-webster.com/dictionary/throughput> [<https://perma.cc/P8T9-PY4Q>] (defining throughput as “the amount of something (such as material, data, etc.) that passes through something (such as a machine or system)”).

¹⁷⁵ See, e.g., *State ex rel. Dep't of Highways v. Ponder*, 345 So. 2d 106, 110–11 (La. Ct. App. 1977) (partially reversing a verdict because there was not adequate evidence of mineral interests to support a royalty valuation).

¹⁷⁶ If landowner compensation fluctuated in proportion to the burden that was placed on its property, then logically, the compensation amount would more closely align with the degree of harm experienced. See *supra* notes 40–43 and accompanying text (describing the ability condemnors have to intensify the use of a condemned piece of land post condemnation, which could be resolved by using throughput calculations to readjust just compensation as a property's use is intensified).

¹⁷⁷ See *BP Pipelines (Alaska) Inc. v. State*, 325 P.3d 478, 491 (Alaska 2014) (noting that the owners of a pipeline considered the throughput of the pipeline in estimating its valuation).

¹⁷⁸ *Rod*, BRITANNICA, <https://www.britannica.com/science/rod-measurement> [<https://perma.cc/WVU2-CXDC>] (defining a rod as an “old English measure of distance equal to 16.5 feet (5.029 metres)”).

¹⁷⁹ See, e.g., *Exxon Pipeline Co. v. Hill*, 788 So. 2d 1154, 1164 (La. 2001) (discussing generally the rod method of valuation).

American pipeline industry, and it adjusts in real time¹⁸⁰ based on the “unique geographic characteristics” of an area as well as competing demand.¹⁸¹ When used, the “per rod” valuation method often leads to a higher just compensation figure¹⁸² because it evaluates the subject property’s value as if its “highest and best use” were as a pipeline corridor, as opposed to a use outside of the oil and gas industry.¹⁸³ Admitting evidence of valuation metrics like the “per rod” method would more accurately compensate landowners for the future harms they are likely to experience due to post-acquisition intensification, but most jurisdictions currently exclude this method, too.¹⁸⁴

Lastly, fact finders could hear evidence of just compensation measured by the cost of providing an equal or substitute facility for what was condemned. Real estate is inherently unique.¹⁸⁵ Both because of the infinite number of physical characteristics that are distinct to a particular piece of land¹⁸⁶ and the many overlapping regulatory frameworks which may govern any one piece of property.¹⁸⁷ Both a blessing and a curse, this unique characteristic of property often leads us to create meaningful relationships with property but it also dooms condemnees from being made whole because of the diverse ways in which a taking can interfere with a property’s prior use.

When an easement’s use is intensified following an acquisition, for example, the subject property can fall out of compliance with regulations, which

¹⁸⁰ See *Enbridge G & P (E. Tex.) L.P. v. Samford*, 470 S.W.3d 848, 853 (Tex. Ct. App. 2015) (stating that in East Texas in 2015, the “per rod” value of pipelines was \$850); cf. *Barlow Ranch, Ltd. P’ship v. Greencore Pipeline Co.*, 301 P.3d 75, 100–01 (Wyo. 2013) (stating that in Wyoming in 2013, per rod values could be \$50).

¹⁸¹ See *Hlavinka v. HSC Pipeline P’ship*, 650 S.W.3d 483, 497 (Tex. 2022) (including the full scope of characteristics that influence a pipeline’s trading value).

¹⁸² See *Samford*, 470 S.W.3d at 854 (demonstrating that compensation was three to four times higher when per rod valuation evidence was included).

¹⁸³ See *Hlavinka*, 650 S.W.3d at 497 (“Arms’ length sales to the other pipeline companies that were voluntary, contemporary, local, and involve land with similar characteristics are some evidence demonstrating that the highest and best use of the property was as a pipeline easement.”).

¹⁸⁴ See *Hill*, 788 So. 2d at 1164–65 (“While this court recognizes the concern posed by the landowners and Judge Shortess regarding the per rod valuation, we find that the use of the per rod method would be in derogation of the Louisiana Constitution.”); see also *Questar S. Trails Pipeline Co. v. 3.47 Acres, No. CIV 02-10 BB/LFG*, 2003 U.S. Dist. LEXIS 30212, at *5 (D.N.M. July 31, 2003) (affirming the exclusion of per rod evidence of a condemned property’s value).

¹⁸⁵ See *Beyer v. State*, 280 N.E.2d 604, 607 (Ind. 1972) (“Obviously, no two properties can be exactly alike.” (quoting 5 NICHOLS ON EMINENT DOMAIN 21.54–56 (3d ed. 1971))).

¹⁸⁶ *Dan’s Mountain Wind Force, LLC v. Allegany Cnty. Bd. of Zoning Appeals*, 182 A.3d 252, 259 (Md. Ct. Spec. App. 2018) (“Every property is similar to every other property in some respects (for example, ‘there are some living things on this property’). And every property can be distinguished from every other property in some other respect (for example, ‘this property contains exactly x number of trees and y number of woodrats’).”).

¹⁸⁷ *Nolon*, *supra* note 67, at 353–55 (describing the multi-layered land use regulation system in the United States).

could affect its value and potential uses.¹⁸⁸ Hardly trivial, these new burdens can affect a landowner's livelihood and identity.¹⁸⁹ These are problems that compensation alone, as currently determined, sometimes cannot ameliorate.¹⁹⁰ In these circumstances, evidence of the cost of a substitute facility may be the only way to ensure that a landowner is made whole.¹⁹¹ However, the current just compensation law prohibits admission of evidence demonstrating the cost of equivalent substitute facilities unless the fair market value of a property is "[un]ascertainable."¹⁹² That is to say, equivalent substitute facility value may only be used when a property's fair market value cannot be accurately assessed under one of the three approaches approved by the appraisal industry for determining fair market value: the comparable sales method, the cost method, and the income method.¹⁹³

This is an impossible standard to achieve because all property necessarily has some ascertainable value under the current formulations of fair market value approved by the appraisal industry.¹⁹⁴ These appraised values, however, may not be adequately representative of the property interests taken from the condemnee.

¹⁸⁸ See *United States v. 564.54 Acres of Land*, 441 U.S. 506, 508 (1979) (arguing that valuation based on the cost of providing substitute facilities was necessary, "because the new facilities would be subject to financially burdensome regulations from which existing facilities were exempt under grandfather provisions").

¹⁸⁹ For a more robust discussion of this phenomenon, see Donald J. Kochan, *Pride & Property: An Interdisciplinary Analysis of Their Symbiotic Relationship*, 27 S. CAL. INTERDISC. L.J. 255, 255–57 (2018). "Private property (both real and personal) and the way owners treat it are imbued with pride-related attachments and identity-enhancing characteristics." *Id.* at 257.

¹⁹⁰ See *564.54 Acres of Land*, 441 U.S. at 508 (including an example of where compensation for the property, as proposed by the condemnor, would not make the condemnee whole because it did not account for the regulatory violations triggered by the condemnation).

¹⁹¹ See *id.* (supporting the use of evidence of substitute facility value).

¹⁹² See *United States v. 50 Acres of Land*, 469 U.S. 24, 26 (1984) (describing the substitute facilities doctrine, but holding that it is an inappropriate measure of just compensation "when the [fair] market value of the condemned property is ascertainable"); see also 3 SACKMAN, *supra* note 10, § 8.22 (noting that compensation in kind "may also be of use in compensating owners for losses which were formerly noncompensable" and that "substitute property is furnished to an owner for lands taken where conventional methods of compensation would be totally inadequate").

¹⁹³ See APPRAISAL FOUND., *supra* note 138, at 29 (discussing modern and widely-accepted methods for determining fair market value); see also *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 871 (Tex. 2009) (noting that Texas prefers the comparable sales method but will accept the use of the cost and income methods when comparable sales is not readily available).

¹⁹⁴ Even in instances where the Court has determined that the condemned property "had lost all economic value," the condemnee still had the right to do many things with his land that still bestowed "economic value" like "picnic, swim, camp in a tent, or live on the property in a movable trailer." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1043–44 (1992) (Blackmun, J., dissenting); see also Blais, *supra* note 71, at 73 & n.167 (discussing how many courts have found total takings when economically useful activities remain possible on land subject to a takings claim).

CONCLUSION

Simply put, courts must broaden the range of evidence that is currently admissible to ascertain just compensation in order to achieve their constitutional mandate. But that does not mean that the fair market value is a wholly inappropriate measure of just compensation,¹⁹⁵ or that the courts' evidentiary standards relating to just compensation are the only deficiencies in this area of law.¹⁹⁶ They are not. Indeed, there are many changes that should rightly be made to our takings jurisprudence.¹⁹⁷ But the throughline among nearly all suggested reforms is that the status quo is too rigid and narrow in its approach.¹⁹⁸ The Fifth Amendment to the U.S. Constitution's "just compensation"¹⁹⁹ requirement was never intended to be so narrowly construed.²⁰⁰ Indeed, the Supreme Court has written at length about the perils of reducing "the

¹⁹⁵ In fact, the current formulation of the Just Compensation Clause might be most appropriate in total takings cases, where the government takes a landowner's entire fee simple tract, thus avoiding complications caused by the post-acquisition intensification of property uses. See Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 755 (1999) ("In some cases, fair market value may well measure the utility lost by the landowner due to the public action at hand."); see also *Lucas*, 505 U.S. at 1009 (providing an example of where the current formulation of the Just Compensation Clause was an accurate means by which to measure what was owed to the landowner after a total taking).

¹⁹⁶ Robert H. Thomas, *Evaluating Emergency Takings: Flattening the Economic Curve*, 29 WM. & MARY BILL RTS. J. 1145, 1196 (2021) (suggesting that just compensation should be provided to landowners when governments respond to emergencies unless the government can prove that the "emergency is genuine, the taking responds to the emergency, and the action is as narrow as possible"); Lunney, *supra* note 85, at 762 (advocating, per a section heading, that "Courts Should Compensate for the Value of the Taken Property Reflecting a Revocable License"); Kevin J. Lynch, *A Fracking Mess: Just Compensation for Regulatory Takings of Oil and Gas Property Rights*, 43 COLUM. J. ENV'T L. 335, 414–15 (2018) (suggesting that "just compensation" should "differ from state to state based on its view of oil and gas as property" and that courts should alter current "fair market value and rental value" rules in certain takings "claims in order to avoid unfair or inefficient compensation").

¹⁹⁷ See Lynch, *supra* note 196, at 414–15 (including examples of how we should alter takings jurisprudence).

¹⁹⁸ Serkin, *supra* note 4, at 680 (advocating for "more nuanced resolutions to" the just compensation issue in takings cases "that often seem to require a broader range of options than paying 'all' or paying 'nothing'"); Laura H. Burney, *Just Compensation and the Condemnation of Future Interests: Empirical Evidence of the Failure of Fair Market Value*, 1989 BYU L. REV. 789, 789 ("Yet in answering the just compensation question, courts are plagued by the tendency to consciously sacrifice fairness and indemnity for objective standards in the name of procedural simplicity.").

¹⁹⁹ See U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.") (emphasis added).

²⁰⁰ See *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949) ("Perhaps no warning has been more repeated than that the determination of value [in condemnation cases] cannot be reduced to inexorable rules."); see also *Silver Creek Drain Dist. v. Extrusions Div., Inc.*, 663 N.W.2d 436, 442 (Mich. 2003) (noting that "[t]he determination of value is not a matter of formulas or artificial rules, but of sound judgment and discretion based upon a consideration of all the relevant facts in a particular case" (quoting *In re Gratiot Ave.*, 293 N.W. 755, 757 (Mich. 1940))).

concept of just compensation to a formula.”²⁰¹ This is precisely because doing so would prevent “the best measure of value” from being achieved “in some cases.”²⁰²

But despite our best efforts, this is exactly what has occurred.²⁰³ Our case law has made a “fetish . . . of market value” in the face of overwhelming guidance not to.²⁰⁴ And now, fair market value is presumptively accepted as the measure of Just Compensation in condemnation cases, and this presumption can only be overturned in rare circumstances where “market value [is] too difficult to find, or when its application would result in manifest injustice to [an] owner or [the] public.”²⁰⁵ This standard, which is nearly impossible to satisfy because “all property has some value,”²⁰⁶ has been complicated by the unnecessary limitations that our case law places on the types of evidence that can be admitted as evidence of fair market value.²⁰⁷

To make matters worse, we know with clarity who is being forced to bear this burden of constitutionally inadequate compensation. As Justices Sandra Day O’Connor, Clarence Thomas, William Rehnquist, and Antonin Scalia correctly predicted, eminent domain projects “fall disproportionately” on “poor,” “nonwhite,” and “elderly” communities.²⁰⁸ For instance, recent empirical studies suggest that

²⁰¹ See *United States v. Cors*, 337 U.S. 325, 332 (1949) (discussing the dangers of narrowly construing just compensation).

²⁰² See *id.* (explaining that narrowly interpreting just compensation sometimes runs counter to discerning value optimally).

²⁰³ Serkin, *supra* note 4, at 683 (“Courts all agree that takings are to be compensated by the fair market value of the property taken.”); see also *supra* notes 110–114 and accompanying text (explaining that fair market value has become the overwhelmingly dominant formulation of the Just Compensation Clause requirement over the last one hundred fifty years).

²⁰⁴ See *Cors*, 337 U.S. at 332 (cautioning against a formulaic approach to takings valuations); *United States v. Miller*, 317 U.S. 369, 374 (1943) (suggesting that determining fair value ought to be a circumstantial inquiry); *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. at 402 (discussing the difficulties of adequately determining market value for some assets).

²⁰⁵ See *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (internal quotations omitted) (“The Court has repeatedly held that just compensation normally is to be measured by the market value of the property at the time of the taking contemporaneously paid in money. . . . Considerations that may not reasonably be held to affect market value are excluded.” (internal quotations and citations omitted)).

²⁰⁶ *Day v. Steversen*, 145 S.W. 1062, 1063 (Tex. Civ. App. 1912) (“Land is universally recognized in this country as property, and all property has some value.”); see also *Mayor of Baltimore v. Hurlock*, 78 A. 558, 560 (Md. 1910) (noting that “[a]ll property has some value”).

²⁰⁷ See *supra* notes 148–149 and accompanying text (showing that most jurisdictions exclude evidence of fair market value if it does not comport with one of the three appraisal industry approaches).

²⁰⁸ *Kelo v. City of New London*, 545 U.S. 469, 521–22 (2005) (Thomas, J., dissenting); see also Dick M. Carpenter & John K. Ross, *Testing O’Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, 46 URB. STUD. 2447, 2449 (2009) (finding that “eminent domain disproportionately affects those who are poor and minority”).

[e]minent domain project areas include a significantly greater percentage of minority residents (58%) compared to their surrounding communities (45%). Median incomes in project areas are significantly less (\$18,935.71) than the surrounding communities (\$23,113.46), and a significantly greater percentage of those in project areas (25%) live at or below poverty levels compared to surrounding cities (16%).²⁰⁹

This makes sense. “Victimizing the vulnerable”²¹⁰ is often an easier path for condemnors because “[t]hose communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.”²¹¹

But the solution is clear, and it would not require courts to completely overhaul our Just Compensation Clause jurisprudence. That is because fair market value, properly construed as “the price at which . . . property would change hands between a willing buyer and a willing seller,”²¹² is a nimble enough standard to address the compensation inefficiencies that pervade our system. A proper expression of the willing buyer and willing seller test would correctly embrace any evidence of market value that would be given “weight in negotiations”²¹³—eschewing set formulas and instead allowing the factfinder to see all potential evidence of value and make its own assessments as to its credibility.²¹⁴ This strategy would at least ensure that the full range of damages present in condemnation are assessed.²¹⁵

²⁰⁹ DICK M. CARPENTER II & JOHN K. ROSS, INST. FOR JUSTICE, VICTIMIZING THE VULNERABLE 6 (2007), https://ij.org/wp-content/uploads/2015/03/Victimizing_the_Vulnerable.pdf [<https://perma.cc/AC3C-5N3P>].

²¹⁰ *Id.* at title page.

²¹¹ *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting).

²¹² See *Kolom v. Comm’r of Internal Revenue*, 454 U.S. 1011, 1013 (1981) (Powell, J., dissenting) (quoting *United States v. Cartwright*, 411 U.S. 546, 551 (1973)).

²¹³ SACKMAN, *supra* note 10, § 12.02; see *Gleghorn v. City of Wichita Falls*, 545 S.W.2d 446, 447 (Tex. 1976) (“In applying the willing-seller willing-buyer test of market value, those factors which would reasonably be given weight in negotiations between a seller and a buyer are to be considered.”).

²¹⁴ See, e.g., *Iowa Dev. Co. v. Iowa State Highway Comm’n*, 122 N.W.2d 323, 327 (Iowa 1963) (“The rule as to competency of value witnesses is to be liberally construed in favor of admissibility and if there is evidence of knowledge of values the extent of the witness qualifications ordinarily goes to the weight of the evidence rather than to its admissibility.”); see also *City of Santa Fe v. Gonzales*, 456 P.2d 875, 877 (N.M. 1969) (discussing same).

²¹⁵ This of course may still result in condemnation damages going uncompensated, but it would at least ensure that said result was achieved in the “the constitutional way.” See Emilio R. Longoria, *The Case for the Rodeo: An Analysis of the Houston Livestock Show and Rodeo’s Inverse Condemnation Case Against the City of Houston*, 52 ST. MARY’S L.J. 125, 151 (2020) (quoting *Pa. Coal. Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

Property is undeniably important in our lives because of the ways in which it determines status and shapes our identity. For this very reason, we must address the reoccurring inefficiencies of the current construction of our Just Compensation Clause jurisprudence. If we do not, we will keep failing to ensure that each person is “equally safe . . . under the shield of our constitutions,” and that the government does not “interfere with the private rights of the highest or the lowest in the land.”²¹⁶

²¹⁶ See *Salt Co. v. Brown*, 7 W. Va. 191, 200–01 (1874) (“An eminent statesman of England, referring to the security of the subject under the Aegis of English law, once said: There stands the poor man’s cottage; the rains of summer and the snows of winter may enter its crevices, but the King of England with all his forces, dare not enter that poor man’s cottage.”) (internal quotations omitted).