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UNJUST COMPENSATION

The Case for Including Financing Costs and Increased Property Tax Assessments in the Fifth Amendment's Just Compensation Clause

ABSTRACT

This article examines whether increased mortgage interest costs and property tax assessments should be compensable under the Fifth Amendment's Just Compensation Clause. While courts have traditionally limited compensation in complete takings to market value, this article demonstrates that the constitutional principle of making property owners "whole" necessarily encompasses these substantial financial burdens. Property owners may often face tens of thousands of dollars in additional mortgage costs when forced to finance replacement properties at higher interest rates following condemnation. Similarly, in states with acquisition-value property tax systems, and those with capped annual property tax assessments, owners can experience dramatic tax increases when displaced due to eminent domain. Drawing on historical understandings of the Fifth Amendment from the founding era through contemporary jurisprudence, this article establishes that excluding these quantifiable financial impacts contradicts the foundational constitutional guarantee that owners be placed "in as good a position pecuniarily as if their property had not been taken." This analysis challenges prevailing interpretations of just compensation doctrine by revealing an incongruity between the Court's rhetorical commitment to complete indemnity and its application of the market value standard in ways that systematically undercompensate property owners. The article advances doctrinal and normative arguments for including financing costs within constitutional compensation

requirements, while also proposing comprehensive statutory frameworks to address the significant economic disparities created by eminent domain—disparities that impermissibly force individual property owners to bear public burdens that should rightfully be distributed across society.

I. Introduction

When the government exercises its power of eminent domain, the Fifth Amendment requires payment of "just compensation"¹ to the property owner. Courts have traditionally

¹ "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. IV.

interpreted this requirement to mean fair market value² of the property taken. However, this narrow interpretation fails to account for significant financial burdens that property owners incur when forced to relocate, particularly increased mortgage interest rates and higher property tax assessments on replacement properties. This article demonstrates that such costs are not merely incidental consequences of condemnation but direct economic losses attributable to government action that warrant constitutional protection.

The practical impact of the restrictive market value interpretation is substantial. For illustrative purposes, consider the following real-world example. A homeowner purchases a property in 2018 for \$350,000.00 with a thirty-year fixed-rate mortgage at 3.5%. The home is situated in Lyon Township, Michigan, and is subject to a 31.3 mil homestead property tax rate. If the government had condemned this property in 2024, when prevailing interest rates averaged 6.7%,³ the owner would have faced nearly \$250,000.00 in additional interest payments over the life of a comparable loan⁴—a massive financial burden created solely by government action. Similarly, a property owner in Michigan displaced by eminent domain might see their annual property taxes increase from \$5,400.00 to \$12,500.00 due to Proposal A's cap on annual property tax growth.⁵ Under this set of facts, the property owner described above would face an additional \$1274.00 per month in expenses⁶ just to replace the condemned property with a similarly valued home in the same municipality. These financial impacts represent a direct transfer of private resources to public use without compensation, precisely the outcome the Fifth Amendment was designed to prevent.

This article contributes to the scholarly discourse on just compensation by identifying a significant gap between the Supreme Court's rhetorical commitment to making owners "whole" and its application of the market value standard in ways that systematically undercompensate owners for the actual economic impact of condemnation. While scholars have extensively analyzed the inadequacy of market value compensation for business losses, goodwill, and subjective value, less attention has been paid to the concrete financial losses associated with financing disparities and tax assessments. This article fills that gap by demonstrating that financing costs and increased taxable values represent quantifiable, non-speculative economic impacts directly attributable to government action.

A. The Scholarly Context

Eminent domain scholarship has long recognized tensions between the Supreme Court's theoretical commitment to complete indemnity and its practical application of the market value standard. Scholars, including Matthew Ackerman, Nicole Garnett, Lee Anne Fennell, and James

² “[M]arket value is what a willing buyer would pay in cash to a willing seller.” U.S. v. Miller, 317 U.S. 369, at 374 (1943).

³ See <https://themortgagereports.com/61853/30-year-mortgage-rates-chart>.

⁴ Assuming the amount financed was \$350,000 and a 30-year term on both loans.

⁵ Dean Babb. Understanding Proposal A in the Market: 2022 Assessment Information. Cascade Twp.

⁶ Calculated by adding the increase in mortgage payment due to the prevailing interest rate to the higher tax basis on the replacement property assuming an \$800,000.00 market value. While the market value increase may, on its face seem drastic, this value is representative of actual market value increases observed in Lyon Township Mi. resulting from post covid market forces.

Krier, have analyzed various aspects of this disconnect, particularly regarding subjective value, business losses, personhood, and goodwill. Ackerman has noted that “[a] homeowner who is not actively selling his or her property is not a ‘willing seller’ and likely values it more than the open market... [thus] ignoring the owner’s subjective losses.”⁷ Fennell shares this sentiment and adds to it notions of extinguishing potential surpluses and destroying “autonomy of choosing for oneself when to sell.”⁸

However, existing scholarship has not adequately addressed the specific question of financing disparities and/or increased tax burdens. While Garnett has explored the “uncompensated subjective harms” of displacement, taking a position that such are overstated,⁹ and Krier and Serkin have examined the systemic under compensation of takings while distinguishing property rules from liability rules¹⁰ in eminent domain, the concrete financial impacts of lost favorable financing terms and uncapping of property taxes seemingly have received limited attention.

In this article, I address this scholarly gap by demonstrating that financing disparities and tax burdens represent a distinct category of economic loss that warrants constitutional protection, not as subjective harms or consequential damage, but as a direct economic impact attributable to government action. The analysis bridges theoretical accounts of property rights with practical financial realities facing displaced property owners.

B. The Empirical Context

The historical development of the market value standard reveals its origins not as a constitutional imperative but as a judicial shorthand for administrative convenience. Early Supreme Court cases emphasized that just compensation meant “a full and perfect equivalent”¹¹ for what was taken. Still, courts narrowed this principle to a market value rule with limited exceptions over time.¹² This evolution occurred primarily in the early to mid-20th century, without a clear constitutional justification for excluding financing impacts.

According to a 2008 article available from the CATO Institute, “[s]ome 3 to 4 million Americans. . . have been forcibly displaced from their homes as a result of urban renewal takings since World War II.” These takings have disparately “expel[led]. . . low-income. . . Americans from their homes in order to facilitate ‘urban renewal.’”¹³ It is with this backdrop that it becomes quite clear that burdens imposed by increased financing costs and property taxes are detrimental to those facing eminent domain. This is true because the economically disadvantaged often find themselves living paycheck to paycheck, at best; they face increasing pressures on their monthly

⁷ Matthew Ackerman, “The Pitfalls of Objectively Measured Just Compensation: When Market Value Isn’t Enough,” *The Practical Real Estate Lawyer*, September 2024.

⁸ Lee Anne Fennell, “Taking Eminent Domain Apart,” 2004 *Michigan State Law Review* 957 (2004).

⁹ Nicole S. Garnett, “The Neglected Political Economy of Eminent Domain,” 105 *Mich. L. Rev.* 101 (2006).

¹⁰ Krier, James E. “Public Ruses.” C. Serkin, co-author. *Mich. St. L. Rev.* 2004, no. 4 (2004): 859-75.

¹¹ *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893).

¹² *U.S. v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Ctys., Pa.*, 441 U.S. 506 (1979)

¹³ David T. Beito and Ilya Somin, “Battle over Eminent Domain is Another Civil Rights Issue.” April 27, 2008.

budgeting from inflation; they lack any degree of financial security sufficient to absorb these costs when forced to relocate.

This article proceeds in four parts. Part II develops the constitutional argument that just compensation requires including financing costs, drawing on historical understandings of the Fifth Amendment, economic analysis of forced relocation, and supportive case law. Part III addresses potential counterarguments, including doctrinal objections based on the market value standard and consequential damages rule, and practical concerns regarding administrative burden and windfall compensation. Part IV proposes comprehensive statutory remedies to address financing disparities even if courts continue to reject constitutional arguments. Part V concludes by arguing that whether through constitutional interpretation or statutory remedy, the fundamental promise of the Fifth Amendment requires accounting for the full economic impact of eminent domain on displaced property owners.

II. The Constitutional Argument: Just Compensation Requires Full Indemnity

A. The Foundational Principle: Owners Must Be Made Whole

The Supreme Court has consistently articulated that the purpose of the Just Compensation Clause is to make the owner whole. In *United States v. Miller*, the Court declared that the owner "is entitled to be put in as good a position pecuniarily as if his property had not been taken."¹⁴ Similarly, in *Olson v. United States*, the Court emphasized that just compensation means "the full and perfect equivalent in money of the property taken."¹⁵ This principle has often been reiterated throughout the Court's jurisprudence since as early as the 1890s in *Monongahela Navigation Co. v. United States*, where the Court first announced what was re-stated in *Olsen*.¹⁶

These statements reflect a fundamental principle deeply rooted in American constitutional jurisprudence: just compensation requires full indemnity. This principle has its origins in the founding-era understandings of property rights. James Madison, who drafted the Fifth Amendment, emphasized the importance of securing property rights against government intrusion. In his 1792 essay "Property," Madison wrote that "a government which provides no proper security for... private rights, is not a just government; and is not likely to ensure either liberty or property to its subjects."¹⁷ He further asserted that "that alone is a just government, which impartially secures to every man, whatever is his own."¹⁸

¹⁴ *United States v. Miller*, 317 U.S. 369, 373 (1943).

¹⁵ *Olson v. United States*, 292 U.S. 246, 255 (1934).

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

¹⁷ James Madison, "Property," *National Gazette* (March 29, 1792), reprinted in 14 *The Papers of James Madison* 266 (Robert A. Rutland et al. eds., 1983).

¹⁸ *Id.* at 267.

Similarly, William Blackstone, whose Commentaries on the Laws of England profoundly influenced early American legal thought, observed that when the legislature takes private property for public use, it gives the owner "full indemnification and equivalent for the injury thereby sustained."¹⁹ Furthermore, St. George Tucker, in his influential American edition of Blackstone's Commentaries, noted that the Fifth Amendment "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war."²⁰ This historical context suggests a broad understanding of the Just Compensation Clause as protecting individuals from bearing disproportionate economic burdens for public benefit.

Lastly, Chancellor Kent, whose influential Commentaries on American Law shaped early American jurisprudence, noted that the requirement to make just compensation for property taken for public use was "founded in natural equity" and designed to ensure the owner was made whole.²¹ Kent observed that the principle requiring "compensation to the owner for the forcible taking of private property for public use" was "laid down as a principle of universal law."²²

The Supreme Court's rhetoric about making owners "whole" stands in stark contrast to the narrow market value approach utilized that excludes financing impacts and tax increases. As Justice Holmes observed in *Boston Chamber of Commerce v. City of Boston*, "an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is, [w]hat has the owner lost? not, [w]hat has the taker gained."²³ This emphasizes that compensation must address the actual harm to the individuals, not merely abstract property valuation. When property owners face significantly higher mortgage interest rates or property tax assessments as a direct result of government-compelled relocation, they are not being made "whole" in any meaningful sense if these costs remain uncompensated and disallow them from obtaining a replacement property that is materially or substantially similar to the one taken.

This disconnect between constitutional principle and judicial application creates a situation where the government can technically comply with the just compensation requirement while leaving property owners substantially worse off economically. This outcome directly contradicts the Fifth Amendment's fundamental purpose of preventing individuals from bearing disproportionate burdens that should be shared by society as a whole. Such outcomes do not reflect a "just" compensation, but rather an unjust one by ignoring pertinent theoretical property frameworks.

B. Theoretical Foundations and Property Theory

The argument for including financing costs within constitutional compensation requirements can be strengthened by examining how different conceptions of property rights

¹⁹ William Blackstone, 1 Commentaries on the Laws of England *135 (1765).

²⁰ St. George Tucker, 1 Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia, app. at 305-06 (1803).

²¹ James Kent, 2 Commentaries on American Law at 339 (1827).

²² Id.

²³ *Boston Chamber of Com. v. City of Boston*, 217 U.S. 189 at 195 (1910).

inform our understanding of just compensation. Property theory has evolved from Blackstone's conception of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual"²⁴ to more nuanced understandings of property as a "bundle of rights" or as constitutive of personhood.

The "bundle of rights" approach to property, articulated by professors in all American law schools, conceptualizes property as comprising various rights, privileges, powers, and immunities. Under this framework, favorable financing terms and security in one's taxable basis represent concrete economic assets within the property owner's bundle of rights—not separate from property, but constitutive of it. When government action destroys these economic assets, compensation is required just as surely as if it had taken a physical portion of the property.

Additionally, Margaret Jane Radin's personhood theory of property offers additional insights. Radin argues that particular property is so bound up with personhood that its loss causes harm beyond market value. That property may have an important relationship to certain character traits that partly constitute a person. She articulates that:

[t]his view of personhood also gives us insight into why protecting people's 'expectations' of continuing control over objects seems so important. If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations.²⁵

While financing terms might not implicate personhood like a family home's subjective value, they directly affect an owner's ability to secure equivalent replacement property without substantial financial penalty. This connection to security and continuity of property ownership suggests financing terms and property taxes implicate important personhood interests that warrant constitutional protection.

Furthermore, Frank Michelman's influential economic analysis of just compensation provides another theoretical foundation. Michelman argues that compensation should be required when demoralization costs (including "the disutilities of uncertainty" and "the loss of confidence in social institutions") exceed settlement costs.²⁶ The substantial financial burden of increased mortgage payments or property taxes—potentially lasting decades—certainly creates significant demoralization costs that justify compensation under Michelman's framework.

Lastly, recent scholarship on the "New Private Law" by scholars like Henry Smith emphasizes the interconnection between property law and other private law systems, including contract and finance.²⁷ This perspective suggests that property rights necessarily encompass the financial arrangements intrinsically connected to property ownership. When government action

²⁴ William Blackstone, 2 Commentaries on the Laws of England at 2 (1766).

²⁵ Margaret Jane Radin, "Property and Personhood," 34 Stan. L. Rev. 957 (1982).

²⁶ Frank I. Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 Harv. L. Rev. 1165, 1214 (1967).

²⁷ Henry E. Smith, "Property as the Law of Things," 125 Harv. L. Rev. 1691 (2012).

impairs these financial interests, compensation is required to maintain the integrity of property as an institution.

These theoretical frameworks collectively reinforce the conclusion that financing impacts and increased tax burdens represent a direct taking of property interests that warrants constitutional protection—not as incidental consequences, but as intrinsic elements of property ownership in a modern capitalistic society.

C. The Economic Reality of Forced Relocation

Reconsider my example from above. A property owner who purchased a home in 2018 with a 3.5% fixed-rate mortgage. If this property is condemned in 2024 when interest rates were 6.7%, the owner faces a significant financial burden through no fault of their own. To illustrate this concretely:

- Original property financed amount: \$350,000 purchased with 30-year fixed mortgage at 3.5%
- Monthly principal and interest payment: \$1,571.66
- Total interest over loan term: \$215,797.60
- Replacement property financed amount: \$350,000 purchased with 30-year fixed mortgage at 6.7%
- Monthly principal and interest payment: \$2,258.47
- Total interest over loan term: \$463,049.20

This scenario creates a \$686.81 monthly payment increase and approximately \$250,000 in additional interest over the loan term—a direct financial impact caused solely by government action. For a middle-class homeowner, this represents a substantial portion of lifetime wealth, effectively transferring private resources to public use without compensation.

The potential implications on this property owner's taxes only exacerbate the harm

- Original taxable value and rate: \$175,000 at 31.3 mils
- Annual property tax obligation: \$5,477.50
- Replacement property taxable value and rate: \$400,000 at 31.3 mils
- Replacement property annual tax obligation: \$12,520.00
- Annual increase in property taxes: \$7,042.5
- Total increase over loan term: \$211,275.00²⁸

²⁸ Without accounting for any annual tax adjustments.

The additional tax burden adds an extra \$586.88 monthly payment increase resulting in approximately \$211,000.00 in additional expenditures over the 30-year term of the loan. In conjunction with additional financing costs, this property owner would spend, in total, an extra \$1,273.69 per month, resulting in the loss of over \$460,000.00 over 30 years—a perpetual financial burden resulting directly from the condemnation.

These increased costs are:

1. Direct financial consequences of the government's taking.
2. Quantifiable with reasonable certainty using standard financial calculations.
3. Not speculative or remote, but immediate and continuing.
4. Substantial enough to significantly impact the owner's lifetime economic position, and that of their future beneficiaries.
5. Often disproportionately affecting long-term homeowners, fixed-income seniors, and minorities.

The economic impacts are particularly severe during rising interest rates or regions experiencing rapid property value appreciation. The current economic climate, with inflation and interest rate volatility, makes this issue increasingly relevant. These financial burdens do not represent theoretical concerns but real economic harms that contradict the constitutional principle of making owners whole. While anecdotal, for sure, all the valuations and tax information portrayed above represent my actual circumstances, i.e. my property tax rate, value at time of purchase (construction) in 2018, and current market value. Should I face condemnation now, or anytime in the foreseeable future, there exists little doubt that I would have to replace my home with something significantly less that I am able to enjoy currently because the financing costs and taxes incurred on a similar property are absolutely outside of my financial means. If this is true for me, it is likely the case for many others as well.

D. Supportive Case Law

In *Alмота Farmers Elevator & Warehouse Co. v. United States*, the Supreme Court expanded compensable interests beyond strict market value, holding that when calculating compensation for a leasehold interest, the reasonable expectation of lease renewal should be considered even though it was not a legally enforceable right. The facts involved a grain elevator operator who had made significant improvements to leased property based on expectations of lease renewal. When the government condemned the property, it argued that compensation should be limited to the remaining lease term. The Court rejected this narrow approach, reasoning that just compensation required considering the economic reality of the situation.²⁹

The Court's reasoning in *Alмота* creates a conceptual framework for including financing impacts and property tax assessment increases within just compensation. Just as the Court recognized that market value failed to capture the economic reality of the grain elevator

²⁹ *Alмота Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, (1973).

operator's interest, so too does market value fail to capture the economic reality of an owner's favorable financing terms and capped taxable value. In both cases, government action destroys a concrete economic asset that would have continued to provide value absent the taking. As Justice Stewart wrote for the majority, "the constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law."³⁰ This principle applies with equal force to the notions I raise within this article, which represent concrete economic losses directly attributable to government action.

The Michigan Court of Appeals in *City of Detroit v. Michael's Prescriptions* acknowledged that some incidental costs of relocation might be compensable, and when relocation is not feasible, compensation based on going concern value is available, suggesting potential openness to broader compensation principles.³¹ The court recognized that the constitutional requirement of just compensation cannot be reduced to a formula or definite rule, indicating judicial willingness to adapt compensation standards to changing economic realities.

Similar to the pharmacy at issue in *Michael's Prescriptions*, property owners' favorable interest rates and tax assessments are unable to transfer to a replacement property.

In *United States v. Fuller*, the Supreme Court acknowledged that "just compensation" sometimes requires consideration of factors beyond market value.³² While the Court ultimately ruled against the property owner in that case, its analysis recognized that market value is not always the definitive measure, nor the "exclusive method of valuation"³³ for just compensation purposes. It asserted that "[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, as it does from technical concepts of property law."³⁴

Equitable principles would necessitate an evaluation into what is equitable in an instant case. If to be just requires compensation to be equitable, there is a strong argument that the property owner described in my hypothetical above would receive unjust compensation if the government failed to offset the massive financial burdens that would be incurred in seeking a materially similar replacement property.

In *United States v. Cors*, the Supreme Court rejects strict adherence to market value since such a fetish may not result in just compensation under the Fifth Amendment.³⁵ The Court recognized that the concept of fair market value may be inadequate in certain circumstances, particularly when market conditions are distorted. That "[a]t times some elements included in the criterion of market value have in fairness been excluded."³⁶ This recognition supports the argument that financing disparities represent a form of market distortion that requires compensation beyond traditional market value. And, if elements of market value may be

³⁰ *Id.* at 478.

³¹ *City of Detroit v. Michael's Prescriptions*, 143 Mich. App. 808 (Mich.App., 1985)

³² *U.S. v. Fuller*, 409 U.S. 488 (1973).

³³ *Id.* at 490.

³⁴ *Id.*

³⁵ *U.S. v. Cors*, 337 U.S. 325, 332 (1949)

³⁶ *Id.*

excluded for sake of “fairness,” would it not be only fair to compensate a property owner for every element of a taking that is sure to have a quantifiable adverse economic impact?

In *United States v. 564.54 Acres of Land*, the Court acknowledged that the market value standard "does not necessarily compensate for all values an owner may derive from his property."³⁷ While the Court ultimately rejected the substitute facilities doctrine for private owners, it recognized that market value might not always fulfill the constitutional requirement. Justice White's majority opinion acknowledged that "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,'" but emphasized that this was a "practical standard" rather than a constitutional imperative and that the "Court has refused to designate market value as the sole measure of just compensation. For there are situations where this standard is inappropriate."³⁸

Further holdings that support the notion that increased financing costs and property tax burdens should be incorporated into the Just Compensation Clause include *Redevelopment Auth. v. Lieberman*³⁹ and *State v. Hammer*.⁴⁰ In the former, the holder of a liquor license was compensated for the value of his license, while in the latter, a property owner was compensated for the value of lost profits and depreciation of bar equipment where the court asserted that just compensation requires “taking into account all facts and circumstances which *bear a reasonable relationship to the loss occasioned by the owner by the taking.* . . .”⁴¹ Each of these represent a departure from the market value approach and raise notions of compensability when damages can be ascertained with reasonable certainty.

Lastly, in *Rafaeli v. Oakland County*⁴², plaintiffs brought an inverse condemnation claim seeking surplus proceeds from the foreclosure sales of their properties. Rafaeli owed a mere \$8.41 in unpaid taxes, causing the foreclosure. While a takings claim was asserted, and successful, I reference this case not for its holding but rather for the sentiment expressed by the bench during oral arguments. During the proceeding, John Bursch, representing Oakland County, drew ire from the bench, especially from Justice Burnstein. The contention revolved around what is equitable, what is “just.” In this instance, Justice Burnstein, on numerous occasions, drew attention to the meager tax debt owed and made it known that he was skeptical about whether the foreclosure was equitable. Similarly, in a taking where a property owner faces non-speculative future economic burdens amounting to hundreds of thousands of dollars, notions of equitability must be taken into account. To leave such a burden to be borne upon a single individual for the benefit of the general public is not equitable, not just.

These cases, while not directly holding that financing costs or increased tax burdens are constitutionally required elements of just compensation, collectively support a more expansive

³⁷ *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979).

³⁸ *Id.* at 512.

³⁹ *Redevelopment Auth. v. Lieberman*, 336 A.2d 249, 254 (Pa. 1975).

⁴⁰ *State v. Hammer*, 550 P.2d 820, (Alaska 1976).

⁴¹ *Id.* at 826. (internal quotation omitted)(emphasis added).

⁴² *Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434 (Mich. 2020).

reading of the Just Compensation Clause that would encompass such costs even if only in extreme cases. They demonstrate a judicial recognition that economic reality sometimes requires looking beyond simplistic market value formulas to fulfill the constitutional requirement of making owners whole. This is true because the term “just,” preceding “compensation,” is not meant as a limit, but rather a demand that the judiciary broadly analyze the economic impacts result from a taking and compensate property owners fully; for only then is compensation just.

III. Counter Arguments and Responses

A. The Market Value Standard

Counterargument: Courts have consistently held that just compensation is measured by the property's market value at the time of taking, as stated in *United States v. 50 Acres of Land*. This established standard provides clear guidance and administrative simplicity. Expanding compensation to include financing costs would undermine this well-established doctrine.

Response: While market value provides a starting point, the Supreme Court has recognized that fair market value does not include the special value of property to the owner arising from its adaptability to his particular use. The financing terms of a property, particularly favorable interest rates or tax assessments, represent part of the property's value to the specific owner that is not captured by market value alone, yet is substantively and qualitatively different from value arising from adaptability or subjectiveness. The Court has never held that market value is the exclusive measure of just compensation in all circumstances.

Historical analysis reveals that the market value standard developed primarily as an administrative convenience rather than a constitutional imperative. Early eminent domain cases emphasized making owners whole without specifying market value as the exclusive measure. The evolution toward a market value standard occurred gradually through the late 19th and early 20th centuries as courts sought a standardized approach to valuation.

The market value standard represents a pragmatic compromise between the competing values of efficiency and fairness. The fair market value standard is best understood as a rough political compromise, providing just enough compensation to avoid the demoralization costs that would be created by no compensation, but avoiding the high settlement costs that would be required if we tried to compensate for all subjective and consequential losses. This pragmatic origin suggests room for doctrinal evolution when the market value standard systematically fails to fulfill the constitutional principle of making owners whole, such as in climates where the real estate market experiences heavy volatility in property values and/or mortgage rates.

The Supreme Court has already recognized numerous exceptions to strict market value, including:

1. Special purpose properties without readily available markets.
2. Properties with unique characteristics or location advantages.
3. Properties where market conditions are distorted.
4. Business losses in certain circumstances.
5. Replacement housing costs under limited circumstances.

As the Court noted in *United States v. Cors*, the “Court in its construction of the constitutional provision has been careful not to reduce the concept of ‘just compensation’ to a formula.”⁴³ This acknowledgment that market value is not synonymous with just compensation and leaves room for including financing impacts when necessary to make owners whole.

Moreover, favorable financing terms are intrinsic to property value, not separate from it. When a property owner has secured below-market financing, this advantage constitutes part of the property's economic value to that owner. Condemnation effectively destroys this value when the owner must obtain new financing at higher rates—a loss directly attributable to government action that should be compensable under the Fifth Amendment. Furthermore, concerning a mortgage rate, this is an interest that a borrower may transfer to a subsequent buyer thereby generating more interest or a higher selling price.

Finally, administrative convenience cannot justify denying constitutional rights. As the Court has recognized in other contexts, constitutional protections cannot be curtailed merely because providing full protection might be burdensome or complex. As Justice Stevens observed in *Dolan v. City of Tigard*, “The Fifth Amendment's guarantee... was designed to bar [g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁴⁴ This fundamental purpose of the Just Compensation Clause—ensuring that individuals do not bear disproportionate public burdens—must take precedence over administrative simplicity.

B. The Consequential Damages Rule

Counterargument: In *United States v. Petty Motor Co.*, the Court held that consequential damages resulting from condemnation are not compensable under the Fifth Amendment.⁴⁵ Increased financing costs represent classic consequential damages—indirect effects that flow from the taking rather than direct value of the property itself. Allowing compensation for such costs would contradict long-established precedent limiting recovery to direct losses.

Response: Increased financing costs and tax burdens are not truly “consequential” in the sense of being remote or speculative. They are direct, immediate, and quantifiable economic impacts of the taking itself. The distinction between “direct” and “consequential” damages is ultimately artificial when examining the economic reality of forced relocation.

⁴³ *United States v. Cors*, 337 U.S. 325, 332 (1949).

⁴⁴ *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

⁴⁵ *United States v. Petty Motor Co.*, 327 U.S. 372, 377-78 (1946).

The consequential damages doctrine originated in the 19th century when financial markets were less sophisticated, and financing impacts were more difficult to quantify. Modern finance theory recognizes that financing terms represent a concrete economic asset with measurable value. When a condemnation destroys this asset, the loss is direct and immediate—not remote or consequential. The theoretical distinction between "direct" and "consequential" damages is worthy of criticism. The line between compensable direct losses and non-compensable consequential losses is theoretically unsound and practically unworkable if the goal of just compensation is to be realized. Similarly, the distinction between physical takings and consequential damages is formalistic and out of touch with modern property theory. These critiques suggest that courts should focus on the economic substance of the loss rather than formalistic categorizations and make a true effort to place property owners in the same economic position that they enjoyed prior to condemnation.

Courts have found exceptions to the consequential damages rule when necessary to fulfill the constitutional requirement of just compensation. In *Kimball Laundry Co. v. United States*, the Supreme Court allowed compensation for going-concern value despite it traditionally being considered consequential.⁴⁶ The Court recognized that temporary takings might destroy business goodwill, making compensation necessary to fulfill the Fifth Amendment's guarantee. Similarly, the destruction of favorable financing terms and the failure to offset drastic property tax increases represents a direct economic loss that should be compensable.

As the Court noted in *Armstrong v. United States*, the Just Compensation Clause is "designed to bar [g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁴⁷ Forcing property owners to absorb significant financing disparities violates this principle by compelling individuals to subsidize public projects through higher mortgage payments or tax assessments.

The characterization of financing costs as "consequential" reflects a formalistic approach to property rights that ignores economic reality. When a property owner with a 3.5% mortgage is forced to obtain new financing at 6.7% and faces increased tax obligations that exceed six figures, just to place themselves in a similar home, the economic loss is as real and direct as if the government had simply taken a portion of the property's physical area. The fact that this loss manifests through future payments does not make it any less attributable to government action.

C. Administrative Burden

Counterargument: Including financing costs would significantly complicate valuation and increase litigation in condemnation proceedings. Courts would need to evaluate individual financing arrangements, determine appropriate replacement terms, calculate present value of differentials, and monitor compliance—creating administrative complexity that would delay proceedings and increase costs for all parties.

⁴⁶ *Kimball Laundry Co. v. United States*, 338 U.S. 1, 11-12 (1949).

⁴⁷ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978).

Response: Courts routinely handle complex economic calculations in various contexts, including pension valuation, business income projection, and intellectual property damages. Modern financial tools make calculating mortgage interest differentials straightforward using standard present value formulas. Any additional administrative burden is justified by the fundamental constitutional principle of making property owners whole and placing them in as good a position pecuniarily as if their property had not been taken.

The concern about administrative complexity should be evaluated in context. Courts already engage in various complex valuations in condemnation proceedings, including:

1. Valuing partial takings that require complex severance damage calculations.
2. Assessing special purpose properties with limited markets.
3. Calculating business losses in certain jurisdictions.
4. Determining relocation benefits under statutory frameworks.
5. Valuing mineral rights, air rights, and other complex property interests.

Adding financing impact calculations would not fundamentally alter the nature of these proceedings. As such, the additional administrative burden of calculating financing impacts would be incremental rather than transformative.

Furthermore, specific calculation methodologies already exist that courts could readily adopt:

1. Mortgage Interest Differential: Calculate the present value of the difference between payments under the owner's existing mortgage and payments on a comparable loan at current market rates, considering:

- Remaining term of the existing mortgage
- Principal balance at time of taking
- Current market interest rates for similar loans
- Property owner's credit profile
- Standard discount rate for present value calculation

2. Property Tax Differential: Calculate the present value of increased tax liability over a reasonable ownership period (typically 15-30 years), considering:

- Current assessment under acquisition-value system
- Projected assessment for equivalent replacement property
- Applicable tax rates
- Standard discount rate for present value calculation

- Statistical data on average ownership duration

Technological advances in financial modeling have significantly simplified these calculations since the consequential damages doctrine was established. Software can now likely instantly calculate present value differentials based on standard inputs, reducing administrative complexity. Furthermore, clear judicial guidelines could streamline implementation and reduce litigation by:

- Establishing standardized calculation methodologies
- Providing presumptive interest rate benchmarks
- Creating simplified valuation tables
- Establishing dispute resolution mechanisms
- Implementing standard qualification criteria

Most importantly, administrative concerns cannot override constitutional rights. As the Supreme Court has recognized in other contexts, "the Constitution recognizes higher values than speed and efficiency."⁴⁸ Again, the fundamental purpose of the Just Compensation Clause—ensuring property owners are made whole—must take precedence over administrative convenience.

D. Windfall Considerations

Counterargument: Compensating for increased financing costs could provide windfalls to property owners who receive both market value and subsidization of future financing decisions. Property owners might receive compensation for theoretical financing disparities but then make different financing choices, resulting in overcompensation. Additionally, market fluctuations might eventually make the compensation unnecessary if interest rates decline or property values adjust.

Response: Properly calculated compensation would not create windfalls but would simply maintain the status quo for the property owner. Compensation should be limited to the present value of the difference between the owner's existing financing terms and comparable terms available in the current market for an equivalent replacement property. Similarly, tax offsets can be applied to the replacement property to set the initial assessed value equal to the assessed value of the home that was taken and adjust up or down accordingly if the replacement property is not comparable to the one taken.

The windfall concern mischaracterizes the nature of the loss. Compensation for financing disparities does not provide a benefit to the property owner, but merely prevents a loss that would not have occurred absent government action. This distinction is crucial for understanding why such compensation represents indemnification rather than enrichment.

⁴⁸ Stanley v. Illinois, 405 U.S. 645, 656 (1972).

Several safeguards could prevent potential windfalls:

1. Actual Replacement Requirement: Compensation could be conditioned on the owner purchasing a replacement property within a reasonable timeframe.

2. Comparable Financing Limitation: Compensation could be limited to the differential costs of obtaining comparable financing (similar loan-to-value ratio, term, and structure) rather than covering any financing the owner might choose.

3. Reasonable Certainty Standard: Courts could require demonstration of financing impacts with reasonable certainty, similar to other economic damages in contract and tort law.

4. Mitigation Consideration: Compensation could account for reasonable mitigation opportunities, such as available government lending programs or interest rate buy-downs.

Importantly, the risk of potential windfall must be weighed against the certainty of undercompensating given the current approach. Noted above, the foundational principles underpinning the Just Compensation Clause sometimes requires adjustments to the market value standard to account for special circumstances. A property owner being forced into a position to have to lose hundreds of thousands of dollars as a result of government taking is certainly in a special circumstance where notions of equity and justice demand expanding upon the market value approach.

Courts already have experience addressing potential windfalls in other areas of eminent domain law. For example, in calculating compensation for business losses in jurisdictions that allow such recovery, courts have developed methodologies to ensure compensation without overcompensation. These approaches could be adapted to address financing impacts.

Finally, reasonable limitations could be placed on financing impact claims to address legitimate concerns:

1. Materiality Threshold: Requiring that financing differentials exceed a minimum threshold (e.g., 1 percentage point) before becoming compensable.

2. Time Limitations: Restricting compensation to a reasonable period rather than indefinite future financing impacts (requiring that the replacement be purchased within x months of the taking).

3. Reasonableness Requirements: Limiting compensation to financing arrangements that were reasonable when originally obtained.

4. Proportionality Considerations: Ensuring that financing impact compensation remains proportional to the property's market value.

These safeguards would address legitimate windfall concerns while fulfilling the constitutional requirement of making property owners whole.

IV. Statutory Remedies: An Alternative Approach

Even if courts continue to reject constitutional arguments for including financing costs and increased tax assessments in just compensation, statutory remedies could address this significant gap in current law. Comprehensive statutory frameworks at federal and state levels could provide for financing impact compensation and property tax offsets while incorporating appropriate safeguards against potential windfalls.

A. Existing Statutory Frameworks

The federal Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA) provides a partial model for addressing financing impacts. The URA currently includes provisions for mortgage interest differential payments for residential owner-occupants, but these benefits are:

1. Limited to residential owner-occupants
2. Capped at relatively low levels
3. Subject to restrictive eligibility requirements
4. Treated as relocation assistance rather than compensation
5. Not available for business properties or investment properties

The URA's mortgage interest differential payment (MIDP) provision demonstrates the feasibility of calculating and providing such compensation but its scope remains too limited to address the full economic impact of financing disparities.⁴⁹

Several states have enacted enhanced compensation statutes that go beyond federal baseline requirements. For example:

1. Minnesota's "Minimum Compensation Statute" (Minn. Stat. § 117.187) requires payment of "minimum compensation" defined as "sufficient to purchase a comparable property in the community," which courts may interpret to include consideration of financing disparities.

2. Michigan's "Uniform Condemnation Procedures Act" (MCL 213.51-213.75) provides for "additional payments" to ensure that residential owners can obtain comparable replacement housing, potentially addressing some property financing impacts.⁵⁰ Further, MCL 213.55(6) acts to offset some property tax burden incurred.⁵¹

⁴⁹ 42 U.S.C. § 4622-24 (2018).

⁵⁰ Mich. Comp. Laws Ann. § 213.54 (West 2018).

⁵¹ If the property being taken is a principal residence for which an exemption from certain local taxation is granted under section 7cc of the general property tax act, 1893 PA 206, MCL 211.7cc, the agency is obligated to pay an additional amount to the owner or owners, which shall be deposited along with the amount estimated to be just compensation as provided in subsection (5). The additional amount shall be determined by subtracting the taxable value from the state equalized value, multiplying that amount by the total property tax millage rate applicable to the property taken, and multiplying that result by the number of years the owner or owners have owned the principal residence, but not more than 5 years.

3. California's Article XIII A, “enacted through the adoption of Proposition 13, provide[s] broadscale property tax relief. . . Proposition 3 amended Article XIII A to provide that property acquired to replace property taken by eminent domain does not constitute a change in ownership that permits base year value reassessment.”⁵²

4. Oregon's "Expense, Loss and Displacement Compensation" statute (ORS 35.510) allows payment of "reasonable costs, disbursements and expenses" including a broader range of financing-related impacts than federal law.⁵³

These existing frameworks provide useful models but remain insufficient to fully address the economic impact of lost favorable financing and tax assessments that should be protected by the Federal Constitution.

B. Comprehensive Statutory Solution

A comprehensive statutory solution would require several key elements:

1. Expanded Eligibility: Coverage for all property types (residential, commercial, investment) and all ownership structures (individual, corporate, partnership).

2. Mortgage Interest Differential: Compensation for the present value of increased interest costs when owners must replace below-market financing with current market rates, or, subsidized loans provided through states’ departments of treasury with terms matching those applicable to the property taken.

3. Property Tax Impact Compensation: Provisions specifically addressing increased tax burdens in acquisition-value property tax jurisdictions and those where annually property tax increases are capped. California’s Proposition 13 is a great model for this.

4. Calculation Methodology: Clear statutory guidelines for calculating compensation, including standardized formulas, benchmark interest rates, and present value methodologies.

5. Reasonable Limitations: Appropriate safeguards including materiality thresholds, time limitations, reasonableness requirements, and proportionality considerations.

6. Administrative Process: Streamlined administrative procedures for calculating and providing compensation without requiring extensive litigation.

7. Funding Mechanism: Dedicated funding sources for financing impact compensation, potentially including set-asides from project budgets or dedicated state/federal funds.

This statutory approach may offer several advantages over constitutional litigation, including:

1. Greater Flexibility: Legislation can be tailored to specific contexts and adjusted based on experience.

⁵² Olive Lane Indus. Park, LLC v. Cnty. of San Diego, 174 Cal. Rptr. 3d 577, 579 (Cal. App. 4th Dist. 2014).

⁵³ Or. Rev. Stat. § 35.510 (2017).

2. Clearer Guidelines: Statutory frameworks can provide explicit calculation methodologies and eligibility criteria.

3. Administrative Efficiency: Dedicated administrative processes can resolve claims more efficiently and expediently than litigation.

4. Broader Coverage: Legislation can address categories of impact that courts might hesitate to include under constitutional interpretation.

5. Political Accountability: Legislative solutions subject compensation policies to democratic processes.

Statutory remedies may ultimately provide more comprehensive and nuanced solutions to the problem of systemic under-compensation than constitutional litigation because legislative bodies may be better positioned than courts to develop comprehensive compensation frameworks that address the full economic impacts of eminent domain relative to state specific contexts, needs, and considerations.

C. Political and Practical Considerations

While statutory remedies offer promising alternatives to constitutional litigation, their implementation faces several challenges:

1. Fiscal Impact Concerns: Expanded compensation requirements would increase project costs for acquiring agencies, potentially delaying or deterring needed public projects.

2. Administrative Complexity: Implementing comprehensive compensation systems requires administrative capacity and expertise.

3. Political Resistance: Government entities may resist expanded compensation requirements due to budget constraints.

4. Equity Considerations: Carefully designing statutory remedies to avoid regressive distributional effects that might favor wealthy property owners.

5. Federalism Concerns: Balancing federal baseline requirements with state and local implementation.

While challenges exist, the potential benefits of comprehensive statutory remedies—including increased public trust in eminent domain processes, reduced litigation costs, and more efficient property acquisition—may ultimately outweigh implementation challenges and produce outcomes far more just and equitable than the market value approach.

V. Conclusion

The evolution of eminent domain doctrine demonstrates that constitutional interpretation can adapt to changing economic realities while remaining faithful to fundamental principles. Just as the Court has recognized exceptions to the market value standard for special purpose properties, distorted markets, and unique circumstances, it should recognize that favorable

financing terms and capped property tax assessments represent concrete economic assets destroyed by condemnation that warrant constitutional protection.

Whether through constitutional interpretation or statutory remedy, the fundamental principle of the Fifth Amendment requires making property owners whole when their property is taken for public use. The current market value standard systematically fails to fulfill this constitutional promise when it ignores the substantial financial impacts of lost favorable financing terms and capped property tax assessments. Furthermore, the constitutional requirement of compensation is designed to distribute certain costs of public improvements among the public writ large rather than upon those who happen to lie in the path of a project. This principle is fundamentally violated when property owners face tens or hundreds of thousands of dollars in additional economic costs due to government-mandated relocation. Therefore, the time has come for courts and legislatures to recognize that financing impacts and increased tax burdens represent a direct taking of property interests that warrants constitutional protection since the Constitution, after all, deals with persons, not with tracts of land.