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"Just Compensation" For Lessor and Less

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The increase in large-scale federal and state programs utilizing the power of eminent domain have made evident the lack of eminent domain concepts and procedures which will facilitate the completion of these programs without undue delay, while concurrently providing adequate compensation for the damage inflicted upon individual property owners. In focusing upon the measure of compensation payable when the interests of lessors and lessees are taken, Professor Johnston questions the validity of two generally accepted concepts of existing doctrine, the market value approach to compensation and the unit valuation approach to apportionment. He points out that, although a judicial reassessment of the unit valuation approach is already underway, the ultimate responsibility for developing more adequate approaches to compensation rests with the legislatures.

I. INTRODUCTION

The past two decades have witnessed the introduction of large-scale federal and state programs utilizing the power of eminent domain.[1] Other activities at all levels of government have multiplied the varieties of public interference with the free choice of private owners regarding the use and development of land, adding complex new factual and policy variations to the venerable confusion over the precise point at which "regulation" merges into "taking".[2] These

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1. The two most extensive programs, urban renewal and the interstate highway system, are co-operative ventures between federal and state or local government. The federal role includes the establishment of policies and standards as well as the provision of the major portion of the financing, while implementation is the responsibility of state and local agencies to which the power of eminent domain has been delegated by the states. *See* 42 U.S.C. §§ 1453, 1460 (1964); Supp. I, 1965; Supp. II, 1965-66); 23 U.S.C. §§ 103, 108 (1964; Supp. II, 1965-66). In the highway program, exercise of the federal power of eminent domain is authorized in cases where a state is "unable to acquire necessary lands or interests in lands, or is unable to acquire such lands or interests in lands with sufficient promptness." 23 U.S.C. § 107(a)(1) (1964).

Where the taking is an exercise of the states' power of eminent domain, state law governs all aspects of the proceeding. State v. George F. Lang Co., 191 A.2d 322 (Del. 1963). The threat of withholding federal funds can be used to compel payment of compensation under circumstances where, according to state law, it would not otherwise be required. *See* 23 U.S.C. § 131 (Supp. I, 1965; Supp. II, 1965-66); 42 OP. ATT'Y GEN. 26 (1966).

2. For example, airport zoning, control of highway access, historical and landmark zoning, outdoor advertising control, and subdivision control exactions. These, and other related local

programs and activities are part of a political effort to restrain the excesses of an unruly technology and direct its enormous energies toward improvement of the physical and social environment. Implementation of programs that require acquisition of privately owned land presents a formidable legal challenge: to adapt eminent domain concepts and procedures so as to facilitate the completion of these programs without undue delay, while concurrently providing adequate compensation for the damage inevitably inflicted upon individual property owners.[3]

This article evaluates one aspect of the response to that challenge, tracing the development of compensation law applicable to those troublesome cases involving condemnation of land that is held in divided ownership.[4] It will focus particularly upon the measure of compensation payable when the interests of lessors and lessees are taken.

II. THE VALUATION APPROACH: MARKET VALUE V. INDEMNITY

Commentary on compensation in eminent domain sometimes commences with the observation that there are three possible approaches in determining the amount of a condemnee's recovery for the taking of his land: (1) its value to the condemnee, (2) its value to the condemnor, or (3) its value as determined by an intermediate, "objective" test.[5] With virtual unanimity, American courts and

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government controls, are not accompanied by physical appropriation of land. They are not, therefore, classic "public use" takings; they are police power regulations. It is well established, however, that such regulations can so seriously affect the owner's ability to use and enjoy his land as to amount to a taking; unless compensation is provided, the purported regulation is invalid. *See, e.g.*, Nectow v. City of Cambridge, 277 U.S. 183 (1928). Judicial opinions concerning the validity of modern land use control devices have aroused lively discussion in recent years. The most perceptive general treatment of the subject is Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

3. Michelman, *supra* note 2, exposed the conceptual inadequacy of many decisions holding that landowners are not entitled to compensation for financial detriment unaccompanied by physical appropriation for public use. Even where compensation is clearly payable, however, negotiation and settlement procedures can result in gross and indefensible underpayment of condemnees. *See* Berger & Rohan, *The Nassau County Study: An Empirical Look Into The Practices of Condemnation*, 67 COLUM. L. REV. 430 (1967).

4. "Divided ownership" includes situations in which title to real property is held by two or more persons, each of whom holds an interest lower than a fee simple absolute; for example mortgagor-mortgagee, life estate-remainderman, lessor-lessee, and base fee subject to an easement. It does not include concurrent ownership in fee simple, such as tenancy in common, joint tenancy, or tenancy by the entirety.

5. *E.g.*, A. JAHR, EMINENT DOMAIN § 67 (1953) [hereinafter cited as JAHR]; L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 12 (2d ed. 1953) [hereinafter cited as

legislatures have opted for the objective approach, accepting the "market value" test.[6] "By fair market value is meant 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 to which the land was adapted and might in reason be applied."[7]

The requirement that the condemnee receive "just compensation" is, of course, constitutional.[8] Elsewhere, in the law of damages, the term "compensation" connotes *indemnity*.[9] Had this connotation been placed upon "just compensation" as the measure of damages in eminent domain proceedings, ascertainment of the actual pecuniary loss suffered by the condemnee would seem to be the proper approach. Justification for selection of the intermediate, "objective" approach is founded upon policy considerations, however, rather than logical consistency. Since, as we shall see, the market value standard omits

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ORGEL]; 4 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 12.1[5] (3d ed. 1962; Supp. 1968) [hereinafter cited as NICHOLS]. *But cf.* Hale, *Value to the Taker in Condemnation Cases*, 31 COLUM. L. REV. 1 (1931).

6. JAHR §§ 68-70; NICHOLS §§ 12.2-.22; 1 ORGEL §§ 13-15. This approach is sometimes referred to as fair market value, but it has been observed that "the term 'fair' hardly adds anything to the phrase 'market value' . . . ." United States v. Miller, 317 U.S. 369, 374 (1943) (Roberts, J.).

7. 4 NICHOLS § 12.2[1]. The most popular methods for ascertaining market value are comparable sales and capitalization of income. Where these methods cannot be applied, replacement cost minus depreciation is frequently accepted as the best alternative method. *See id.* §§ 12.311[3], 12.3122, 12.32; Comment, *Real Estate Valuation in Condemnation Cases—The Place for the Expert*, 43 NEB. L. REV. 137 (1964). For discussion of comparable sales and income capitalization, see Boyer & Wilcox, *An Economic Appraisal of Leasehold Valuation in Condemnation Proceedings*, 17 U. MIAMI L. REV. 245, 252-55 (1963); Sengstock & McAuliffe, *What is the Price of Eminent Domain?*, 44 J. URBAN L. 185 (1966).

8. "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V. Every state except North Carolina has a comparable provision. See 1 NICHOLS § 1.3. North Carolina has held that the duty to pay just compensation arises from the due process, or "law of the land," provision in its constitution. Yancy v. State Highway Comm'n, 222 N.C. 106, 22 S.E.2d 256 (1942); Johnston v. Rankin, 70 N.C. 550 (1874); See N.C. CONST. art. 1, § 17.

9. "In a case of tort . . . the general purpose of compensation is to give a sum of money to the person wronged which as nearly as possible, will restore him to the position he would be in if the wrong had not been committed. In the case of a breach of contract, the goal of compensation is . . . to place the plaintiff in the position he would be in if the contract had been fulfilled." C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 560-61 (1935). "Nevertheless, in most situations the law finds it convenient to measure compensation for property or services by use of the standard or analogy of 'market value.' " *Id.* at 166. "If indemnification is what the framers of the Constitution had in mind in limiting eminent domain by requiring compensation, it conclusively follows that loss to the owner is the most cogent inquiry in determining value in condemnation. In practice, it is not." Sengstock & McAuliffe, *What Is the Price of Eminent Domain?*, 44 J. URBAN L. 185, 190 (1966). *See also* Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 619-20 (1954).

compensation for several categories of out-of-pocket expense actually incurred by condemnees as a direct consequence of the taking, the policy of cost minimization appears to conflict most directly with full indemnity. The extent to which this policy comports with the constitutional guarantee of just compensation is thus a crucial issue, frequently presented for judicial determination.[10]

If this analysis is accurate, it follows that utilization of the market value standard, rather than indemnity, has the effect of shifting part of the total cost of public improvements from the benefiting taxpayers to the condemnees. One possible consequence is the loss of resources invested by entrepreneurs in justifiable[11] expectation of a subsequent economic return. In a policy sense, this frustration of their reasonable expectations is pure confiscation.[12] Departure from the indemnity standard is therefore ethically questionable.[13]

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10. Not surprisingly, courts almost never articulate this cost minimization factor or verbalize their evaluation of its significance in individual cases. They have generally referred only to the "practicality" or "convenience" of the fair market value approach. For example, "It is conceivable that an owner's idemnity 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." United States v. Miller, 317 U.S. 369, 373-74 (1943).

For a refreshingly candid discussion of this usually unmentioned policy conflict, see the dissenting opinion of Justice Traynor in Bacich v. Board of Control, 23 Cal. 2d 343, 366, 144 P.2d 818, 832 (1944). *See also* Note, *Discovery of Expert Opinion in Land Condemnation Proceedings*, 41 IND. L.J. 506, 517-19 (1966).

11. The term "justifiable" is used in the sense that their enterprises violate no law or public policy, and are therefore entitled to protection against private interference, harassment, or confiscation.

12. "In the solution of any problem, the selection of persons to receive compensation, and of the elements of loss or injury to be taken into consideration in assessing damages, is a measure of the extent of property." Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 248 (1931).

"Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing we are said to possess, in consequence of the relation in which we stand toward it." J. BENTHAM, THEORY OF LEGISLATION (6th ed. 1890).

Professor Michelman says that Bentham's analysis supplies "the germ of a theoretically satisfying approach to compensation questions," which he states in a nutshell as: "An imposition is compensable if not to compensate would be critically demoralizing; otherwise not." Michelman, *supra* note 2, at 1211-13.

The condemnee's reasonable expectations were recognized and protected in United States v. Certain Property Located in the Borough of Manhattan, 344 F.2d 142, 145 (2d Cir. 1965) (Friendly, J.), and Levin v. State, 13 N.Y.2d 87, 192 N.E.2d 155 (1963); they were ignored in Ballantyne Co. v. City of Omaha, 173 Neb. 229, 113 N.W.2d 486 (1962), and City of Durham v. Eastern Realty Co., 270 N.C. 631, 155 SE.2d 231 (1967).

13. Professor Michelman counsels "resolute sophistication in the face of occasional insistence that compensation payments must be limited lest society find itself unable to afford

Judges can ameliorate the harshness which results from the utilization of the market value standard through evidentiary rulings and jury instructions which encourage awards in an amount greater than the strictest application of this formula would permit.[14] Of course, the converse situation may also be encountered—especially when the court is dubious about the desirability of the proposed public improvement.[15] In this posture, the intermediate, "objective" approach becomes an invitation to unsystematic, even capricious, allocation of the costs of eminent domain between condemnees and the public.

The indemnity approach, on the other hand, would permit an award to the condemnee sufficient to restore him to substantially the same position he occupied before the taking.[16] Recoverable damages would probably include: (1) the cost of comparable substitute facilities, (2) relocation costs, including losses and expenses incurred in moving equipment and inventory, and (3) other expenses necessarily and actually incurred as a result of the taking, as well as other losses that may reasonably be attributed to it. The first two categories present routine problems of proof. The third category includes issues of more uncertain resolution, including loss of anticipated profits. It may be well to note, however, that these issues are not materially different from those which are routinely resolved by the judicial system in tort and contract cases.[17] By comparison the market value test, as usually applied, permits direct consideration of none of these factors. The usual determinants of market value are comparable sales or income capitalization. Replacement cost, or the cost of substitute facilities, is rarely admissible.[18] In general, moving costs and business

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beneficial plans and improvements. What society cannot, indeed, afford is to impoverish itself." Michelman, *supra* note 2, at 1181. *See* Interstate Finance Corp. v. Iowa City, 149 N.W.2d 308 (Iowa 1967).

14. See text accompanying note 19 *infra*.

15. This ability to influence the jury's attitude extends also to permitting "pocketbook appeals" in closing arguments of counsel, Frost v. State, 284 S.W.2d 232 (Tex. Civ. App. 1955), and to suggestive instructions before verdict, Welsbach Street Lighting Co. of America v. City of Philadelphia, 318 Pa. 166, 178 A. 126 (1935). *But see* Annot., 21 A.L.R.3d 936 (1968).

16. Sometimes courts state the right to compensation in terms of indemnity, even though they actually apply the market value approach. See text accompanying notes 20-29 *infra*.

17. Acceptable methods of proving prospective profits are discussed in 5 A. CORBIN, CONTRACTS § 1023 (1964); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §§ 25, 30 (1935); 5 S. WILLISTON, CONTRACTS § 1346A, (1937; Supp. 1968).

18. JAHR § 82; 4 NICHOLS § 12.32; 2 ORGEL § 189. The Housing and Urban Development Act of 1968 provides, however, for payment to home owners displaced by urban renewal of "an amount [not to exceed $5,000] which, when added to the acquisition payment, equals the average price required for a decent, safe, and sanitary dwelling of modest standards . . . ." Pub. L. No. 90-448, § 516 (Aug. 1, 1968).

interruption losses are not recoverable as separate items of damage under the market value test, although some courts admit such evidence for its bearing on the price a willing seller would accept for the condemnee's interest.[19]

Phraseology connoting support for the indemnity approach may be found in several Supreme Court opinions. One of the earliest was *Monongahela Navigation Co. v. United States*,[20] where part of an Act of Congress[21] authorizing the taking of a dam and lock on the Monongahela River was invalidated. The lock was constructed and owned by the condemnee corporation which was deriving income from toll charges under a franchise granted by the State of Pennsylvania. The Act specified that, in determining the compensation payable to the condemnee, "the franchise of said corporation to collect tolls shall not be considered or estimated . . . ." The Court held that this portion of the statute was in conflict with the fifth amendment. The opinion asserts that, in order to comport with constitutional standards, compensation must be a "full and perfect equivalent for the property taken," or, as it was expressed later in the same paragraph, a "full and *exact* equivalent."[22]

A similar exposition of the constitutional standard for compensation in eminent domain proceedings is this statement from *Bauman v. Ross*:[23]

> The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.[24]

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19. JAHR §§ 112-15; 4 NICHOLS §§ 13.3-.33, 14.2471-72; 1 ORGEL §§ 68-77. It is often asserted that such losses are not compensable because the condemnor takes only the land, not the owner's business. *See, e.g.*, Mitchell v. United States, 267 U.S. 341 (1925). This begs the question. It also conflicts with the utilitarian analysis. See note 12 *supra*. There are also difficult problems of proof: "There is no practical way of isolating the actual productivity which is directly attributable to land separately from the other elements of production." Boyer & Wilcox, *An Economic Appraisal of Leasehold Valuation in Condemnation Proceedings*, 17 U. MIAMI L. REV. 245, 266 (1963).

For an excellent analysis of the problems, with suggestions for more adequate awards, see Comment, *Eminent Domain Valuations in An Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957).

20. 148 U.S. 312 (1893).

21. Act of Aug. 11, 1888, ch. 860, 25 Stat. 400.

22. 148 U.S. at 326 (emphasis added).

23. 167 U.S. 548 (1897).

24. *Id.* at 574. The condemnee attacked the practice of determining compensation in cases of partial taking by offsetting special benefits accruing to the condemnee's remaining land against

Other decisions have made it clear, however, that the Court had no intention of reading the indemnity approach into the Constitution. As Mr. Justice Holmes stated it, condemnees are entitled to receive "the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact."[25] In *Mitchell v. United States*,[26] the condemnee's business was destroyed as a consequence of the taking, but this loss was not compensable as a separate item of damage.[27] Finally, *United States v. Miller*[28] attempted to integrate the two approaches, but merely confirmed the Court's preference for the market value test:

> The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.
>
> 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. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value . . . . The term . . . denotes . . . "market value fairly determined."[29]

In a situation such as the *Mitchell* case, or one in which the condemnor will demolish structures or fixtures formerly used to produce income, the taking visits a financial loss upon the condemnee, perhaps completely destroying his business. The condemnor, however, has reaped no corresponding gain.[30] In fact, the improvements may

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the value of the portion actually appropriated. The court held that this offset was consistent with the constitutional guarantee of just compensation.

25. City of New York v. Sage, 239 U.S. 57, 61 (1915).

26. 267 U.S. 341 (1925).

27. The evidence showed that the condemnee's land was especially suited to the growing of a special grade of corn. It was impossible for the condemnee to replace the land, and consequently, he was forced to remove himself from the business of raising and canning corn. While the condemnee was entitled to consideration of the land's "special value . . . due to its adaptability for use in a particular business," *Id.* at 344, loss of the business as such was not compensable. *Contra*, Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

28. 317 U.S. 369 (1943).

29. *Id.* at 373-74.

30. In Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893), where the condemnor was in a position to collect tolls as the condemnee had done, the franchise was compensable; in Mitchell v. United States, 267 U.S. 341 (1925), a business destroyed incident to a taking for other purposes was not compensable. These cases would suggest the application of a "value to the taker" test. In Kimball Laundry Co. v. United States, 338 U.S. 1 (1949), the loss of laundry routes was held compensable despite the fact that the condemnor had no intention of using them. The apparent inconsistency with Mitchell v. United States may be explained by the fact that *Kimball Laundry* involved only a temporary taking; more lenient standards of compensability are sometimes applied in such cases. *See* United States v. General Motors Corp., 323 U.S. 373 thereafter made available for sale and redevelopment. 42 U.S.C. § 1460(f) (1964).

serve only to impede preparation of the land for its intended use.[31] In such a case, there is considerable disparity between the land's value to the former owner and its value to the condemnor. Between these extremes stands the market value approach, with its apparent impartiality. If, however, it presupposes a willing, knowledgeable buyer and seller, neither of whom is under any compulsion, it cannot realistically be applied to our case. In the absence of compulsion, no rational person in the condemnee's position would accept less than full indemnity (plus, perhaps, an additional sum for the inconvenience of dispossession); absent compulsion, no prudent buyer would offer to purchase unnecessary fixtures or pay for the seller's business losses.[32] In short, our hypothetical "willing buyer and seller" could not be expected voluntarily to come to terms. And yet, a jury or commission is solemnly instructed in eminent domain proceedings that the fair market value approach provides a standard which, when applied even to the facts of these cases, will provide a fair award.

It is common knowledge, of course, that compensation proceedings often degenerate into a battle of sharply conflicting opinions as to valuation,[33] some of which purport to be "expert." So long as the final award is within the range of this testimony, reversal on grounds of inadequacy or excessiveness of the award is remote indeed.[34] As compared with the indemnity approach, then, market

31. Urban renewal furnishes an excellent example of the "takedown cost" principle. The basis on which federal grants are computed is "net project cost," the difference between (1) the total cost of acquisition, demolition, and site preparation and (2) the value of the vacant land thereafter made available for sale and redevelopment. 42 U.S.C. § 1460(f) (1964).

32. *See* J. BONBRIGHT, THE VALUATION OF PROPERTY 59-61 (1965), especially the author's conclusion that "the willing-buyer, willing-seller incantation is a great bar to clear thinking in the law . . . ." *Id.* at 61.

In Canada, it is customary to award a 10% "compulsory taking allowance" in addition to the market value of the land, to compensate for "contingent losses and inconvenience." The King v. Hunting, Barrow & Bell, 32 D.L.R. 331 (1916); Pawson v. City of Sudbury [1953] Ont. 988. This was formerly also the English practice, until superseded by the Acquisition of Land Act, 1919, 9 & 10 Geo. V, c. 57, § 2.

33. "It is the unfortunate tendency of the condemnee's witnesses to stretch high while the condemnor's equally competent experts stoop low as they state their opinions of market value." Boyer & Wilcox, *supra* note 19, at 253. In one recent case, the valuation evidence concerning a leasehold ranged from $5,200 to $29,412, Estell v. State Highway Comm'n, 254 Iowa 1238, 119 N.W.2d 900 (1963); in another, a jury found the value of a leasehold to be $18,139, which contrasted sharply with a Board of Viewers' finding of zero damages, Profit-Sharing Blue Stamp Co. v. Urban Redev. Auth., 429 Pa. 396, 241 A.2d 116 (1968); testimony as to the value of a fee simple ranged between $7,500 and $58,000 in Frontage, Inc. v. Allegheny County, 413 Pa. 31, 195 A.2d 515 (1963).

The socioeconomic status of the condemnee may also affect the ultimate award. Fuller, *Practical Aspects of Trying an Eminent Domain Case*, 13 S.D. L. REV. 81 (1968).

34. 6 NICHOLS § 26.731. These comments are typical: "Finally, it is difficult to see that clear error exists, for the evidence of value was highly conflicting and the compensation award is

value is less predictable in application. It does, however, virtually assure a lower final award.

The contrast between indemnity and market value approaches is nowhere more starkly illustrated than in divided ownership situations. In one infamous case,[35] application of the market value approach resulted in an award that was not even sufficient to pay the outstanding mortgage on the land. "Just compensation"[36] consisted of wiping out the condemnee's equity while a balance of approximately 1,900 dollars remained unpaid on her mortgage.[37]

It may be possible to dismiss such cases as atypical fact situations to which the application of the market value approach produced harsh results. Arguably, these aberrational cases offer insufficient cause to question the general utility of the approach. Commercial leaseholds, however, offer a much broader base for criticism. The loss of profits, goodwill, and fixtures are the usual, not the exceptional, result of a taking of such interests.[38] In addition, without compensation for out-of-pocket moving and relocation expenses, the lessee often suffers a net cash loss of sizeable proportions as a result of the taking.[39] If, as some commentators have

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within the range of the evidence." United States v. Certain Lands, 183 F.2d 320, 322 (3d Cir. 1950). "This court cannot substitute its judgment for that of the trial court as to the amount of the damage." State v. Olsen, 76 Nev. 176, 184, 351 P.2d 186, 190 (1960).

35. Riley v. Redevelopment Land Agency, 246 F.2d 641 (D.C. Cir. 1957).

36. The difficulty arose out of the fact that a purchase money mortage loan represented a large proportion of the initial purchase price. The condemnor's appraisers testified that the original purchase price was unreasonably high and that no buyer for cash would pay such a price. The prevailing market value approach contemplates a price based on a cash transaction, or terms essentially equivalent to cash. Kerr v. South Park Comm'rs, 117 U.S. 379 (1886).

37. A divided court of appeals reversed, following a hearing en banc. The majority, however, experienced considerable difficulty in formulating an acceptable rationale. The trial judge was ordered to instruct the jury more favorably to the condemnee upon remand, although the original instruction was adjudged proper for use in other cases. Two dissenting judges saw this as "a reversal without an appellate holding that any error occurred at the trial." 246 F.2d at 649.

The "cash price" doctrine seems justified, in light of the usual requirement that the condemnor pay in cash or its equivalent. 3 NICHOLS § 8.2. Rigid adherence to it in a case like *Riley* would be unconscionable. Nevertheless the district court and two members of the court of appeals felt bound to follow it. Their attitude contrasts sharply with the view stated by the text writers, that compensation rules are applied flexibly in view of the diverse factual situations presented by eminent domain cases. *See* JAHR § 71; 4 NICHOLS § 12.1, at 7-9; 1 ORGEL § 18.

38. *E.g.*, Ballantyne v. City of Omaha, 173 Neb. 229, 113 N.W.2d 486 (1962); City of Durham v. Eastern Realty Co., 270 N.C. 631, 155 S.E.2d 231 (1967). *See* Polasky, *The Condemnation of Leasehold Interests*, 48 VA. L. REV. 477, 521-34 (1962); Comment, *Eminent Domain: Compensation for Leasehold Interests Where No Provision in Lease*, 48 MARQ. L. REV. 90 (1964). *See generally* Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957).

39. The urban renewal program provides additional payments to displaced businesses to reimburse "reasonable and necessary moving expenses and any actual direct losses of property

said,[40] the law of compensation in eminent domain is developing in the direction of an indemnity approach, the commercial leasehold cases invite re-examination.

It appears that a reappraisal is already under way, as a result of which the compensation payable to lessors and lessees should more closely approximate their actual losses. The legal issue is not framed in terms of indemnity for the condemnees; rather, it is whether or not they are entitled to independent valuation of their respective leasehold and reversionary interests when the condemnor acquires the entire fee simple estate. Superficially, this is a procedural question, but the manner of its resolution profoundly affects the adequacy of the final award. This thesis can be demonstrated through an examination of the widely accepted "unit valuation" rules.

III. COMPENSATION IN LEASEHOLD-REVERSION CASES: UNIT VALUATION

A. The Method

In the vast majority of American jurisdictions, when a condemnor acquires a fee simple estate in land consisting of a base fee subject to a leasehold interest, the compensation award is computed in two steps. First, the value of an unencumbered fee simple estate in the land taken is determined. Second, this amount is apportioned between the lessee and the reversioner.[41] The process has been described as follows:

> In the majority of states as well as under the federal rules of procedure, eminent domain is procedurally an in rem action. That is to say, the land itself is taken rather than the separate interests of the individuals claiming rights in

except goodwill or profit," subject to prescribed ceilings. 42 U.S.C. § 1465(b) (1964). Such payments are, of course, a matter of legislative grace rather than constitutional requirement. Federal and state programs do not customarily include such provisions. Their inclusion in the urban renewal program possibly reflects a conviction that more leniency is desirable since the takings ultimately "redound to the direct benefit of profit-making corporations." Comment, *supra* note 38, at 96. The nature of the ultimate land use appears to be an inadequate justification for discriminatory treatment in awarding compensation to condemnees. In 1965, Congress extended these benefits to six other programs. See 42 U.S.C. § 3074 (Supp. I, 1965).

40. At least three commentators have reported an observation that compensation doctrine is evolving in the direction of indemnity. Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 599-601 (1954); Polasky, *The Condemnation of Leasehold Interests*, 48 VA. L. REV. 477, 487 (1962). For exposition of contrary analyses, see Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596, 607-15, 638 (1942); Comment, *supra* note 38, at 66-71.

41. JAHR §§ 122, 130-31; 2 J. LEWIS, EMINENT DOMAIN § 716 (3d ed. 1909); 1 ORGEL §§ 109, 113.

relation to the land. The condemnor therefore pays only for the value of the land unenhanced by the separate estates or interests.

Under this concept of eminent domain, the constitutional requirement [of just compensation] . . . is met when the value of the unencumbered land is ultimately determined and the monetary equivalent of its worth deposited with the court. Since condemnation extinguishes all rights existing in relation to the land, the estates or interests of the various owners are then in theory transferred to the eminent domain award.

The tenant and all others claiming an interest in the land are then entitled to share proportionately in the distribution of the awards according to the nature of their compensable interests.[42]

In a typical case, landlord and tenant apparently have a joint concern for achievement of the highest possible award in step one, but at step two, each can maximize his award only at the expense of the other. The condemnor, on the other hand, is concerned only with step one. Upon final determination of its total liability, it has no further interest in the proceedings, since it simply pays the prescribed sum into the court and leaves the condemnees to settle the apportionment question between themselves.[43] In step one, the market value test is usually applied. At step two, lease provisions respecting allocation of the recovery, if any, are usually controlling.[44] In the absence of such

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42. Baker, *Condemnation: Concepts and Consequences of Public Intervention in the Landlord-Tenant Relationship*, 9 U. KAN. L. REV. 399, 401-02 (1961).

43. "[T]he allocation of compensation between lessor and lessee is of no concern to the State. It was not necessary for the jury to consider or determine the lessees' damages separately." State v. Lenox, 237 N.E.2d 248, 254 (Ind. 1968). "Neither the condemnor nor the jury is concerned with the rights of individual claimants, but only with the amount of just compensation to be awarded for the property taken." State v. Flick, 427 S.W.2d 469, 470 (Mo. 1968).

Typically, title passes to the condemnor when compensation has been finally determined and paid into court. 3 NICHOLS §§ 8.711, 8.713. The United States may, however, proceed under its "quick-taking" statute, 40 U.S.C. § 258a (1964), to acquire the title prior to final judgment. It is required to file a declaration of taking in federal court and to deposit into court its estimate of the required compensation; title thereupon vests in the United States. The amount of the final award to the condemnee is the only issue to be litigated.

A number of states have comparable procedures which occasionally encounter judicial resistance. *E.g.*, Yellowstone Pipe Line Co. v. Drummond, 77 Idaho 36, 287 P.2d 288 (1955); Department of Pub. Works v. Gorbe, 409 Ill. 211, 98 N.E.2d 730 (1951). A modified version of the Illinois statute was approved in Department of Pub. Works v. Butler Co., 13 Ill. 2d 537, 150 N.E.2d 124 (1958).

44. 1 AMERICAN LAW OF PROPERTY § 3.55 (J. Casner ed. 1952).

Orgel is skeptical of such provisions: "[T]hey are generally very poorly drawn, apparently by attorneys who have no special knowledge of the law of eminent domain. They must therefore be 'interpreted' by reference to the presumed 'intention' of the parties—a somewhat difficult matter in view of the likelihood that the parties had no definite intention at all." 1 ORGEL § 121, at 527. For possible corroboration, see Waesche v. Redevelopment Agency, 155 Conn. 44, 229 A.2d 352 (1967).

Another complicating factor is inequality of bargaining power between lessor and lessee, which may be particularly striking in short-term leaseholds. *See* Baker, *supra* note 42, at 409.

For suggested lease provisions, see Report, *Condemnation of Leasehold Interests*, 3 REAL PROP. PROB. & TR. J. 226, 243-54 (1968).

provisions, statutory or judicial rules of apportionment are employed.

A factor of primary significance in apportionment proceedings is the effect of the taking on the leasehold relationship. A threshold issue concerns the lessee's duty to pay rent. Under common law analysis, eviction by the sovereign is not a violation of the covenant of quiet enjoyment;[45] consequently, the duty to pay rent is not affected by condemnation proceedings. This result, indefensible in practical terms, is no favorite of the commentators[46] and has been rejected in cases involving total takings.[47] A few cases[48] and statutes[49] require proportionate abatement of rent in cases of partial taking. Where, however, there is no such relief, the lessee is entitled to compensation respecting his liability for future rent as well as for deprivation of use and occupancy of the land.[50] Although sound in theory, this result raises practical difficulties.[51] The rule of proportional abatement of rent seems clearly preferable.

But even if the duty to pay rent is abated, eviction from all or a part of the leased premises often imposes substantial financial detriment upon lessees.[52] In hope of receiving compensation for such losses, they have pressed two alternative arguments: (1) the condemnor is required to pay such damages independently of the value of the land taken, or (2) compensation for such losses must be included in the lessee's portion of the final award. If relief on the

45. The covenant is breached upon eviction of the tenant by one claiming under the landlord or one asserting a title superior to the landlord's. Eminent domain is an inherent attribute of sovereignty, exercisable irrespective of the landlord's title or consent. Consequently, the taking does not breach the covenant. 1 AMERICAN LAW OF PROPERTY, *supra* note 44, § 3.54. The tenant is thus prevented from recovering damages from his landlord for eviction resulting from a taking. 4 NICHOLS § 12.42[1].

46. "[I]t is much the better and more practical rule to allow a taking of the entire property to operate as a termination of the obligation to pay rent . . . ." 4 NICHOLS § 12.42[1], at 305. "If this is not done, a difficult problem of apportioning the award arises, because the landlord may have suffered an injury when his right to the future rentals is not secured by the premises." 1 ORGEL at 522.

47. 1 AMERICAN LAW OF PROPERTY, *supra* note 44, at 289 n.5; *cf.* 4 NICHOLS § 12.42[2]; 1 ORGEL § 121.

48. *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 44, at 289 n.9; Great Atlantic & Pacific Tea Co. v. State, 22 N.Y.2d 75, 238 N.E.2d 759, 291 N.Y.S.2d 299 (1968).

49. *See* 4 NICHOLS at 309 n.46.

50. *See* 4 NICHOLS § 12.42[3]; 1 ORGEL § 121.

51. For example, "[I]t might happen in many cases that a tenant . . . would spend the sum awarded or waste it by unfortunate investments before the end of the term, so that the landlord would lose his rent altogether." 4 NICHOLS at 304.

52. For example, loss or depreciation of fixtures, equipment, and improvements; cost of acquiring and preparing substitute facilities; moving expenses; business interruption; loss of goodwill.

former theory is denied, the lessee is forced to press his argument twice during the proceeding: initially, to maximize the total award, and later to maximize his recovery in the apportionment of that award between himself and the lessor. The tender of such evidence presents the lessor with an uncomfortable conflict of interest: he also wishes to maximize the total award, but must minimize the proportion representing the lessee's ultimate recovery.[53] Evidence of such losses is likely to be ruled inadmissible against the condemnor unless it can be established that their existence would affect the price a willing buyer would pay and a willing seller would accept for the leasehold interest.[54] Consequently, the lessee's best opportunity for recovery of such losses is in the apportionment proceeding. It is impossible to generalize about the lessee's prospects, because they vary radically depending upon the apportionment formula which is employed. There are two basic formulas.

1. *Reversion valuation method.*—The lessor's compensation is determined by adding the capitalized value of the income receivable under the lease to the commuted value of his reversion. The balance of the (previously determined) total compensation is awarded to the lessee.[55] This formula is reputed to be the preferred method where the unexpired portion of the leasehold is a long term.[56] But in such cases, some courts have awarded a minimal or zero value to the reversion because of its remoteness, treating the lessor's interest as the equivalent of an annuity.[57]

2. *Leasehold valuation method.*—The "rental value" of the lessee's interest is determined by first assigning a fair rental, or "economic rent," payable for the leased property.[58] If this amount

53. In Sholom, Inc. v. State Roads Comm'n, 246 Md. 688, 229 A.2d 576 (1967), the lessor contended that evidence of the value of an option to renew should have been admitted—even though theoretically such evidence could benefit only the lessee. Maryland's Court of Appeals recognized, however, that the lessor's somewhat awkward position was action in its "enlightened self-interest." *Id.* at 701, 229 A.2d at 583. For further illustrations of dilemmas facing landlord and tenant, see Purnell, *The Valuation of the Leasehold Estate*, 1959 INST. ON EM. DOM. 79, 94-95.

54. See text accompanying notes 41-44 *supra*.

55. F. BABCOCK, THE APPRAISAL OF REAL ESTATE 247-65 (1924); 1 ORGEL § 125; J. STEWART, REAL ESTATE APPRAISAL IN A NUTSHELL 173-85 (1967); Polasky, *supra* note 38, at 519-21.

56. 1 ORGEL § 122.

57. *See* authorities cited at note 55 *supra*.

58. "The legal profession, and largely without the aid of academic economists, has arrived at a practical solution for the determination of economic rent. Further, the determination is in accord with sound economic theory. The solution of the law is the coneept of fair rental value as an imputed measure of economic rent." Boyer & Wilcox, *supra* note 19, at 266.

exceeds the rent specified in the lease, the lessee's recovery is the aggregate of this excess throughout the remaining term of the lease,[59] and the balance of the award is paid to the lessor. Where the stated rent equals or exceeds the economic rent, the lease has no "rental value." If the lease grants the lessee an option to renew or purchase, the value of this right[60] is added to the rental value of the leasehold, and the sum is the market value of the leasehold.[61] The leasehold valuation method is said to be especially efficacious where short-term leases are concerned,[62] although the asserted utility differential between apportionment methods based upon the length of the unexpired leasehold term is admittedly not grounded in "formal doctrine."[63] Each method has, of course, many variations.[64]

Fair rental value is established in largely the same way as fair market value of a fee simple estate: expert testimony. This evidence is often sharply conflicting. *See, e.g.*, Eisenring v. Kansas Turnpike Auth., 183 Kan. 774, 332 P.2d 539 (1958). In State v. Corkerham, 182 So. 2d 786 (La. App. 1965), the court merely averaged the divergent expert conclusions as to economic rent.

As Boyer & Wilcox point out, the "experts" often do not even attempt an independent calculation of the value of the lessee's interest. Boyer & Wilcox, *supra* note 38, at 267-75.

59. *See* 4 NICHOLS § 12.42[3]; 1 ORGEL § 126. Where the agreed rent is payable on a monthly basis, the economic rent is also established in monthly installments. The excess of agreed rent over economic rent, multiplied by the number of months remaining in the term, equals the gross leasehold "bonus" value. This sum, when discounted to present terms, is the net rental value. *See* Profit-Sharing Blue Stamp Co. v. Urban Redev. Auth. 429 Pa. 396, 241 A.2d 116 (1968).

60. Options to renew or to purchase, when destroyed pursuant to the power of eminent domain, are treated as compensable property interests. Sholom, Inc. v. State Roads Comm'n, 246 Md. 688, 229 A.2d 576 (1967). Their value is added to the lessee's portion of the award. Baker, *supra* note 42, at 409-11.

61. This is a fictitious concept, since leases "are so infrequently sold, and vary so much in length of term, rent reserved and other particulars as well as in the character of the property, that it is almost impossible to apply the customary tests of market value to a leasehold interest." 4 NICHOLS 318. *See also* Note, *A Survey of Landlord and Tenant in Eminent Domain*, 3 WILL L.J. 39, 48 (1964); Comment, *Eminent Domain: Compensation for Leasehold Interest Where No Provision in Lease*, 48 MARQ. L. REV. 90, 93 (1964). Consequently, courts have attempted to establish an "intrinsic" value for leaseholds through application of the test described in the text accompanying notes 58-59 *supra*. Land Clearance for Redev. Corp. v. Doernhoefer, 389 S.W.2d 780 (Mo. 1965).

Frank recognition of the unsuitability of customary tests to determine the market value of leaseholds led the Supreme Court of Iowa to formulate a more flexible, indemnity-oriented approach. In Des Moines Wet Wash Laundry v. City of Des Moines, 197 Iowa 1082, 198 N.W. 486 (1924), the court perceptively observed that "[t]he real right of which [the lessee] is deprived . . . is the right to remain in undisturbed possession and enjoyment to the end of the term" and concluded that, in determining the lessee's award, "[v]alue must be determined by a consideration of the uses to which the property is adapted. All circumstances naturally affecting this value are open to consideration." *Id.* at 1087, 1089, 198 N.W. at 488, 489.

62. JAHR § 131; 1 ORGEL § 126.

63. 1 ORGEL 528.

64. *See, e.g.*, Hitchings, *The Valuation of Leasehold Interests and Some Elements of Damage Thereto*, SECOND ANN. INST. ON EM. DOM. 61 (1960). In T. & D. Golf, Inc. v. State, 53

B. *Application of the Unit Valuation Method: A Critique*

If the owner of an estate in fee simple absolute transfers a leasehold interest in that estate, it becomes fragmented into two parts, the leasehold and the reversion. If the leasehold is later transferred back to the reversioner, his estate in fee simple absolute is restored; the leasehold is said to "merge" into the reversion. The relationships among the three interests may be expressed algebraically: leasehold (L) plus reversion (R) equals estate in fee simple (E), or $L + R = E$.

If we apply elementary algebraic concepts to the equation,[65] it follows that $E - L = R$, and that $E - R = L$. It would make no difference if we assigned the character X, or "unknown," to one interest in each of these two formulas. Its identity may be deduced from—indeed it is compelled by—disclosure of the identity of the other two interests.

If the foregoing statements are true regarding the *quantum* relationships among these various interests, it would seem to follow that they would also be true as to the *value* relationships. Thus, the value of the estate in fee simple (Ev) is equal to the sum of the values of its constituent interests, the leasehold (Lv) and the reversion (Rv). Thus, $Lv + Rv = Ev$. And if this be true, it seemingly follows that $Ev - Rv = Lv$ and $Ev - Lv = Rv$. That is, if we know the value of the estate in fee simple and of the reversion, we can compute the value of the leasehold; or, given the value of the estate in fee simple and the value of the leasehold, we can compute the value of the reversion. This is precisely the assumption underlying the unit valuation method and its corollary apportionment formulas: first value the entire fee, then value one of the constituent interests, then give the balance of the award to the other condemnee.

This analysis is beguilingly simple, but unfortunately, inaccurate. The value of leasehold plus the value of reversion *do not necessarily equal* the value of a fee simple estate. Hence, the balance of the award may bear scant relationship to to the value of the interest of the condemnee who receives it.

Misc. 2d 1046, 280 N.Y.S.2d 280 (Ct. Cl. 1967), the so-called "reversion principle" was employed. A value is assigned to the land and structures as of the time of expiration of the lease and then discounted by the length of the remaining term to determine the present value of the reversion. The proportion which the present value of the reversion bears to the undiscounted value is the percentage of the award apportioned to the lessor. The lessee receives the rest.

Valuation and apportionment formulas become even more complicated in cases where only a portion of the leased premises is taken. *See* Woodruff, *Legal Damages in the Partial Taking of a Leasehold Interest*, FIFTH ANN. INST. ON EM. DOM. 137 (1963). Such cases present problems of severance damage which are beyond the scope of this article.

65. Algebraic formulas are not completely foreign to judicial opinions in leasehold cases. *See, e.g.*, State v. Parkey, 295 S.W.2d 457, 460 (Tex. Civ. App. 1956).

This apparent paradox is primarily attributable to the fact that the lessor-lessee relationship is almost always accompanied by binding private arrangements respecting the use and occupancy of land. These convenants usually impose a more restricted use pattern upon the lessee than the owner of an unencumbered fee simple estate would be bound to observe. They are, in a sense, a burden on the land, and their effect could be to reduce the aggregate value of the leasehold and reversion below the value of an unencumbered fee simple estate. But such convenants do not *necessarily* depress or reduce its income-producing potential; in fact, their effect may be quite the reverse.[66] In any event, there is no universal correlation between the economic return achievable by lessor and lessee individually under such arrangements and the theoretical value of a hypothetical fee simple, taking into consideration the "highest and best use" of the land. It follows that there is no necessary correlation between the amount of consideration for which lessee and reversioner would be willing to transfer their respective interests, and the price which the owner of a theoretical fee simple estate in the same land would accept. The combined value of the "lesser" interests may be less than,[67] or greater than,[68] the value of the "total" estate. Only coincidentally would they be exactly equal.

The formulations, $Lv = Ev - Rv$ and $Rv = Ev - Lv$, incorporate another fallacy. If one begins by assigning a value to the fee simple estate, any increment of value assigned to one of the subsidiary interests is accompanied by an exactly corresponding reduction in the magnitude of the other. Thus, if the lessee has a "favorable" lease,[69] his portion of the recovery is increased at the expense of the lessor.[70]

66. Shopping center leases, for instance, frequently impose limitations on the type of business the lessee may operate and even upon the grade of merchandise he may sell. This "burden" is cheerfully undertaken by the lessee, since his quid pro quo is the lessor's agreement not to permit any other lessee in the shopping center to sell competitive merchandise.

Regardless of covenants restricting use, and of the fact that in a given case the economic rental may not exceed the agreed rent, "[a] valuable economic situation is created when land is occupied by satisfied tenants . . . ." Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 250 (1931).

67. This could easily occur where the lessee is restricted to a use which is not so economically valuable as the land's "highest and best" use. *See* Boyer & Wilcox, *supra* note 19, at 260-61; McCormick, *The Measure of Compensation in Eminent Domain*, 17 MINN. L. REV. 461, 471-73 (1933).

68. *See* McCormick, *supra* note 67, at 474; Polasky, *supra* note 40, at 490-93; Note, *Condemnation and the Lease*, 43 IOWA L. REV. 279, 282 (1958).

69. A "favorable" lease occurs when the economic rent exceeds the stipulated rental. See text accompanying notes 58 & 59 *supra*.

70. *See, e.g.*, Department Pub. Works v. Metropolitan Life Ins. Co., 42 Ill.App. 2d 378, 192 N.E.2d 607 (1963); Land Clearance for Redev. Corp. v. Doernhoefer, 389 S.W.2d 780 (Mo. 1965).

Theoretically, the lessor has been "extricated" from a relatively unfavorable situation. If, however, his actual condemnation award, invested in a medium of comparable quality to the leasehold, produces a lower net return than his former rentals, it would be difficult indeed to persuade him that he has received fair compensation for the interest he has lost.[71] If the lease is "unfavorable" to the lessee,[72] theoretically it has a negative value, and the lessee has received a benefit from the taking. The doctrine of special benefits in eminent domain has not developed so fully that it would be predicted that the lessee will be required to account to the condemnor for the benefit.[73] At the least it can be predicted that in such a case the rental value of the lease is zero.[74] This result will amaze and anger the lessee, if his operations on the leased premises happen to be profitable. In fact, from his point of view the unfairness is compounded twice over: he has lost a property interest which he would not willingly have surrendered without compensation, and the failure to compensate him for his interest has conferred an unearned and undeserved benefit upon the lessor, who in effect is treated as the sole owner.

When the sum of the values of the leasehold and the reversion, as independently determined, is less than the market value of a fee simple estate in the same land, application of the usual apportionment formulas confers a windfall, or "bonus," upon that condemnee who receives the balance of the award after computation of the value of the other condemnee's interest.[75] Conversely, where the aggregate value of leasehold and reversion exceeds the value of a fee simple

71. Differentials in net return reflect not only the variations in rate of return from different investment media, but also disparities in tax treatment which must be considered by the investor.

72. A lease is "unfavorable" when the stipulated rent equals or exceeds the economic rent.

73. In cases of partial taking, severance damages are usually subject to mitigation on aceount of special benefits accruing to the remainder of the condemnee's land as a result of installation of the public improvement. This is a set-off; the condemnee is not required to make cash contributions for the value of such benefits in excess of his damages unless the doctrine of special assessments is applicable. 3 NICHOLS §§ 8.62, 8.6209.

74. "So that no matter how valuable a lease may be to a particular tenant, if it is not a lease at less than the rental value of the premises the tenant is entitled to nothing." *In re* Real Property in Borough of Manhattan, 19 App. Div. 2d 44, 52-53, 241 N.Y.S.2d 44, 53 (1963) (concurring opinion). *See* Ballantyne Co. v. City of Omaha, 173 Neb. 229, 113 N.W.2d 486 (1962).

75. For illustration of a large windfall for the tenant, see Boyer & Wilcox, *supra* note 19, at 268. For illustration of large differences in award resulting from different apportionment methods, and a possible windfall to the landlord, see Polasky, *supra* note 40, at 496-97, 501-03.

Boyer & Wilcox call for more equitable apportionment of the surplus. Boyer & Wilcox, *supra* note 38, at 271. Adoption of compensation standards which do not create such windfalls would appear to be a more satisfactory solution.

estate, at least one of the condemnees will be undercompensated.[76] Since it is almost impossible to predict the distribution of windfalls or losses in advance of condemnation proceedings, the ability of the parties to protect themselves through appropriate provisions in the lease agreement is severely restricted.[77]

It is not surprising that condemnees have sought to prevent the application of these apportionment formulas on the ground that they do not provide a measure of compensation in conformity with the constitutional requirement. Phrased another way, the contention has been that the Constitution requires individual, independent valuation of each separate interest. We shall next examine the authorities bearing on this contention.

IV. INDEPENDENT VALUATION OF DIVIDED INTERESTS

A. In General

In *Boston Chamber of Commerce* v. *Boston*[78] the city condemned a private way for use as a public street. The base fee was owned by the Chamber of Commerce, subject to an easement of way, light and air, which had been reserved in the conveyance to it by the owner of adjoining land.[79] The condemnees agreed among themselves to accept a lump sum recovery. They then contended that, since the sum of their respective interests aggregated an unrestricted fee simple estate in the land, the recovery should amount to the full value of the land—by stipulation, 60,000 dollars. The city argued that the damage to the interests of the condemnees was minimal: as restricted by the easement, the base fee had little use potential, and therefore only nominal value. Since the taking was for the purpose of conversion into a public street, the owner of the dominant tenement could continue to use the land for ingress and egress and thus had suffered only nominal damage as a result of the taking. The parties agreed that, should the city's contention be upheld, the total required compensation would be only 5,000 dollars.

The Supreme Court affirmed a decision of the Supreme Judicial

76. Both cannot receive full compensation. If one does, the other will absorb the full detriment attributable to the inadequacy of the award.

77. Where such provisions have been employed, disputes over their application have generated considerable litigation. See note 44 *supra*.

78. 217 U. S. 189 (1910).

79. The land taken was also subject to a mortgage lien. Apparently there was no controversy between the Chamber of Commerce and the mortgagee over application of the award toward reduction of the indebtedness. The litigation thus centered around the valuation of the base fee and the easement.

Court of Massachusetts[80] upholding the trial court's award of 5,000 dollars to the condemnees. The opinion by Mr. Justice Holmes contains the following explication of the Court's conclusion that separate valuation of the condemnee's interests was proper:

> It is true that the mere mode of occupation does not necessarily limit the right of an owner's recovery. [Cites cases.] But the Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that 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 what has the owner lost, not what has the taker gained.[81]

This passage has occasioned considerable confusion. Out of context, the last sentence could be interpreted as an assertion that the Constitution incorporates the indemnity approach. But this interpretation is completely inconsistent with the Court's oft-repeated endorsement of the market value approach.[82] In fact, Holmes himself accepted market value as the basic standard of compensation in eminent domain cases.[83]

What, then, is the proper interpretation of the holding? The crucial issue was whether or not the base fee could be combined with the easement, requiring an award equivalent to the value of an unencumbered fee simple. Since these divided ownership interests were voluntarily created and were in independent existence at the time of taking, the Court refused to sanction the merger which the parties had attempted to effect by private agreement subsequent to the taking.[84] The justification for this approach is that the law takes the condemnees as it finds them; that is, it compensates them for the interests which they actually owned at the date of taking and which they lost as a result of the taking.

This does not mean, however, that these condemnees would inevitably be relegated to nominal damages in every conceivable case. Suppose, for instance, that the city had proposed to construct a public building on the property taken. The base fee, or servient tenement,

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80. Boston Chamber of Commerce v. Boston, 195 Mass. 338, 81 N.E. 244 (1907).

81. 217 U.S. at 195.

82. See text accompanying notes 25-29 *supra*.

83. See text accompanying note 25 *supra*.

84. "The petitioners contended that they had a right, as a matter of law under the Constitution, after the taking was complete and all rights were fixed, to obtain the connivance or concurrence of the dominant owner, and by means of that to enlarge a recovery that otherwise might be limited to a relatively small sum . . . . The statement of the contention seems to us to be enough." 217 U.S. at 194.

would still have only a nominal or nuisance value, since productive use of the land was already denied to its owner.[85] With respect to the owner of the dominant tenement, however, the situation is now entirely different from *Boston Chamber of Commerce.* If the benefit of the easement substantially enhanced the value of his land, then its destruction would undoubtedly cause him more than nominal damage. The owner of such an interest, under no compulsion to sell, would refuse to part with it for a merely nominal sum. Accordingly, substantial damage should be recoverable by him in such a case.

In cases where the taking of an easement causes substantial damage to the owner of the dominant tenement, courts have unhesitatingly awarded full compensation.[86] Even more significantly, they have refused to limit the condemnor's liability to the value of an unencumbered fee simple estate in the land taken.[87] Should the result be different when the base fee is subject to a leasehold rather than an easement? There is nothing in the rationales of these cases, or of *Boston Chamber of Commerce*, to suggest that independent valuation is not equally applicable to leasehold cases.

It is true that in *Boston Chamber of Commerce* employment of the independent valuation approach resulted in a lower condemnation award than the unit valuation approach would have required. Can it be plausibly argued, then, that the Constitution permits the utilization of independent valuation only when that approach will result in a lower award than unit valuation? Such an hypothesis would conflict directly with the statement that the Constitution "requires that 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 what has the owner lost, not what has the taker gained."[88]

Nevertheless, as we have already seen, the courts have generally rejected independent valuation in leasehold cases, in favor of the unit valuation approach.

B. Independent Valuation for Lessor and Lessee

Courts denying independent valuation in leasehold cases have

85. The usefulness, and therefore the value, of a base fee subject to an easement of way may be favorably influenced by technology, since the fee owner is entitled to make any use not interfering with the easement. Structural and mechanical engineering innovations have made development of air space feasible; thus, "air rights" above roadways may have substantial value. *See* R. WRIGHT, THE LAW OF AIRSPACE 305-41 (1968).

86. 4 NICHOLS § 12.41[1].

87. 1 ORGEL § 111.

88. 217 U.S. at 195.

placed principal reliance on two Supreme Court decisions. The opinion in one was, ironically, written by Mr. Justice Holmes.[89]

In *United States v. Dunnington* a lot in Washington, D.C., owned by a Confederate sympathizer, was confiscated and sold at public auction in 1863.[90] Nine years later, the lot was acquired by the United States in proceedings brought by the Secretary of the Interior and became a part of the Capitol grounds. The compensation award was determined by court-appointed commissioners and deposited into court, and an order was then issued confirming title in the United States. The court later approved payment of the entire award to persons claiming under the purchaser at the confiscation sale.

Much later, the heirs of the original owner brought an action in the Court of Claims, seeking compensation on account of the taking. They contended that the forfeiture was operative only during their ancestor's lifetime; consequently, upon his death they succeeded to an unencumbered fee simple estate in the lot. The Court of Claims agreed with them and awarded compensation. Both parties appealed.[91]

A crucial issue was whether the claimants were bound by the condemnation proceedings. They argued that the forfeiture divested their ancestor of standing to enter an appearance and that they had had no enforceable interest at that time as his heirs, since he was still living. This contention was rejected. The Court held that, even though the forfeiture originally divested the ancestor of the right to possess or transfer the property during his lifetime, the presidential amnesity proclamation of December 25, 1868, had "restored to him the right to make such use of the remainder as he saw fit."[92] Further, compliance by the condemnor with procedural requirements had put the ancestor on legal notice of the proceeding, and he was bound by it. As a result, the United States acquired the remainder interest as effectively as the life estate.

The Court next considered whether or not the claimants were entitled to compensation for the taking of the remainder. Since their

89. A. W. Duckett & Co. v. United States, 266 U.S. 149 (1924) (Holmes, J.); United States v. Dunnington, 146 U.S. 338 (1892).

90. The proceedings were authorized by Act of July 17, 1862, ch. 195, 12 Stat. 589. An accompanying joint resolution added the clarification that no forfeiture was operative beyond the natural life of the offender. Joint Res. July 17, 1862, No. 63, 12 Stat. 627.

91. The award was based on the value of the lot as of the date of taking. The claimants contended that they were entitled to a greater sum representing the market value on the date their ancestor died, more than fourteen years after the original condemnation proceeding. This apparently was the basis of their appeal.

92. 146 U.S. at 350.

claim was filed more than fourteen years after payment of the original award into court, discussion of the statute of limitations or laches might have been expected, but the Court chose to rest its denial of compensation on other grounds. It held that, since the original proceeding was in rem, the award represented the "whole fee, and the interests, both present and prospective, of every person concerned in the property . . . ."[93] This conclusion reflected a physical conception of property: condemnation is a taking "not of the rights of designated persons in the thing needed, but of the thing itself . . . ."[94] Finally, the Court held that, if there had been error in paying the entire award to the holders of the life estate, that error was not to be imputed to the United States.[95]

The conclusion that a compensation award "stands for" the land taken is characteristic of a relatively primitive conception of real property: that it is an *object*, rather than a legally protected relationship among persons *with respect to an object*, which permits the "owner" to exclude others.[96] Although Holmes was not required in *Boston Chamber of Commerce* to re-examine the result or reasoning of *Dunnington*, his opinion clearly rejects the physical conception in favor of the legal relations viewpoint: the Constitution "deals with persons, not with tracts of land."[97] There is, moreover, no fundamental inconsistency between Holmes' rationale and the proposition that (1) the condemnation proceeding is in rem, as a result of which the condemnor acquires the entire estate, but (2) the constitutional guarantee of just compensation confers upon each condemnee a right (subject to the statute of limitations) to recover damages from the condemnor.[98]

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93. *Id.* at 351.

94. Crane v. City of Elizabeth, 36 N.J. Eq. 339, 343 (1882), *cited in* United States v. Dunnington, 146 U.S. 338, 352-53 (1892); *accord*, Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

95. "The courts of the United States are in no sense agencies of the Federal Government, nor is the latter liable for their errors or mistakes . . . ." 146 U.S. at 351. *See* note 98 *infra*, for a discussion of the validity of this conclusion.

96. For an excellent development of this distinction, see Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954). For discussion of its relevance to eminent domain, see Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221 (1931).

97. See note 81 *supra*. That language also repudiates this statement by Mr. Justice Brewer in Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893), decided one year after Dunnington: "And this just compensation, it will be noticed, is for the property and not the owner. Every *other* clause in the Fifth Amendment is personal." (emphasis added).

98. *See* Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596, 631-33 (1942). This approach would permit the condemnor to obtain title against unknown owners who are not named in the proceeding, while preserving their right to compensation through

In *A.W. Duckett & Co. v. United States*,[99] decided fourteen years after *Boston Chamber of Commerce*, Mr. Justice Holmes was confronted with a controversy over compensation for the taking of a leasehold interest. Pursuant to a statute enacted during World War I,[100] the Secretary of War had issued a notice, addressed "To Whom It May Concern," stating that portions of the Bush Terminal in Brooklyn were thereby "requisitioned for the use of the United States Army" and adding the assurance that "steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the government of the premises."[101] The plaintiff, a lessee of one of the terminal's piers, was dispossessed pursuant to this order and brought an action in the Court of Claims to recover the value of its interest[102] in the pier. The action was grounded in implied contract, arising out of the assurance contained in the notice. The Court of Claims dismissed the complaint on the ground that, as a matter of law, no contract could be implied,[103] and the condemnee appealed.

The Supreme Court held that the proceeding was analogous to eminent domain, since the condemnor had "assumed to itself by paramount authority and power the possession and control of the piers named, against all the world."[104] The requisition was characterized as a proceeding in rem: "Such an exercise of eminent domain founds a new title and extinguishes all previous rights."[105] The Court thus concluded that the plaintiff's interest had been effectively taken pursuant to the Secretary's general order. The remaining

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institution of "inverse condemnation" proceedings under statutes such as the Tucker Act, 28 U.S.C. § 41(20) (1964). *See* United States v. Certain Parcels of Land, 40 F. Supp. 436, 443-44(D. Md. 1941) (dictum). Procedure in such situations is complicated by FED. R. CIV. P. 71A(c)(2), which became effective on August 1, 1951. This provision permits the condemnor, after a "reasonably diligent search of the records," to join all other potential claimants under the designation "Unknown Others." Service by publication is authorized by *id.*, 71A(d)(3)(ii). It is an open question whether this procedure constitutes a bar to maintenance of a Tucker Act claim. 3 BARRON & HOLZOFF, FEDERAL PRACTICE AND PROCEDURE § 1519 (Rules ed. rev. C. Wright 1958). *Cf.* FED. R. CIV. P. 71A(j): "If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of the deposit [made pursuant to 40 U.S.C. § 258a (1964)], the court shall enter judgment against the plaintiff [condemnor] and in favor of that defendant for the deficiency." *Compare* United States v. Certain Parcels of Land, 339 F.2d 414 (3d Cir. 1964), *with* Cuyahoga County v. United States, 294 F.2d 775 (Ct. Cl. 1961).

99. 266 U.S. 149 (1924).

100. Act of Aug. 29, 1916, ch. 418, 39 Stat. 619, 645.

101. 266 U.S. at 150.

102. The date of the notice was December 31, 1917; the United States took actual possession on January 31, 1918; plaintiff's lease was scheduled to expire September 30, 1919.

103. 58 Ct. Cl. 234 (1923).

104. 266 U.S. at 151.

105. *Id.*

question was whether or not the interest was a compensable one. The Court answercd affirmatively, characterizing the plaintiff's interest as "part of the *res*."[106] Furthermore, the right to compensation was a personal one, and the condemnor could not discharge its duty to pay the plaintiff by settlement with the lessor or with other tenants.[107] The judgment was reversed and the Court of Claims was dirccted, upon remand, to award compensation to the plaintiff.

If the Court intended to sanction an award based upon any standard other than independent valuation of the lessee's interest, in conformity with *Boston Chamber of Commerce*, nothing in this opinion so indicates.

The federal courts have not read *Dunnington* and *Duckett* in the light of *Boston Chamber of Commerce*. They have upheld the unit valuation procedure[108] in condemnation proceedings involving lessor and lessee, citing *Dunnington* and *Duckett* as authority.[109] And the Supreme Court itself has signalled approval of this procedure in a case involving the taking of a flowage easement.[110]

The state courts have been more willing to question unit valuation. One of the earliest cases was *City of Baltimore v. Latrobe*.[111] There, the city had taken part of a lot that was subject to an annual ground rent of 300 dollars under a 99-year lease, renewable in perpetuity.[112] The lessor and the city cross-appealed from the trial court's compensation award,[113] and the Court of Appeals of Maryland was required to formulate a rule for the guidance of lower state courts in similar cases. While accepting the majority view that the condemnor "as a rule ought not to be required to pay for the two intcrests more

106. *Id.* at 152.

107. "Any arrangement that the Government might have made with the owner [sic. *i.e.*, lessor] to pay to it what might be due to the tenants or some of them did not affect the claimant's rights." *Id.* at 151.

108. See text accompanying notes 41 & 42 *supra*.

109. *E.g.*, United States v. 53 1/4 Acres of Land, 176 F.2d 255 (2d Cir. 1949); Eagle Lake Improvement Co. v. United States, 160 F.2d 182 (5th Cir. 1947); United States v. 25.936 Acres of Land, 153 F.2d 277 (3d Cir. 1946); Meadows v. United States, 144 F.2d 751 (4th Cir. 1944); United States v. 150.29 Acres of Land, 135 F.2d 878 (7th Cir. 1943).

110. "There can be no quarrel either with the [trial] court's procedure in directing the Commissioners to appraise first the easement taken by the Government, and then to apportion its value between the respondent and the owner of the servient fee." United States v. Virginia Elec. & Power Co., 365 U.S. 624, 632 (1961).

111. 101 Md. 621, 61 A. 203 (1905).

112. Perpetual ground rents created in Maryland after 1884 were redeemable by the tenant upon payment of a sum representing a 6% capitalization of the reserved rent. MD. ANN. CODE art. 21, § 103 (1966).

113. The lessee had previously removed his case to the federal court. 101 Md. at 627, 61 A. at 204.

than the portion would be worth if owned by one person,"[114] the court refused to endorse this as an inflexible standard. It declared that each condemnee should be permitted to prove his damage independently of the other, "and, if it be true that the values of the two interests are more than what the lots would be worth if owned by one person, the necessities of the case require apparent exception to the general rule . . . ."[115] The court then emphasized that this doctrine was applicable to all leasehold-reversion cases (and not merely those involving long-term ground rents) in which the condemnees could "clearly show" that the aggregate value of their respective interests exceeded the value of an unencumbered fee simple.[116]

This rule has been followed in subsequent Maryland decisions,[117] and a recent case suggests that independent valuation of the interests of condemnees in leasehold-reversion cases is now the general rule, rather than the exception, in that state. In *Sholom, Inc. v. State Roads Commission*,[118] the lessee held a five-year lease with alternative options to renew for two additional five-year periods, or to purchase within the initial five-year term. The trial court excluded proffered evidence of the value of the option to purchase, and the condemnees appealed. The court of appeals reversed, holding that the lessee should have been permitted to offer valuation evidence with respect to either the option to renew or the option to purchase, but not both.[119]

The court also rejected the condemnor's contention that the usual two-step method for determining compensation should be employed by the trial court upon remand. Significantly, this direction was not preceded by a finding that the facts of the case qualified as an exception to the "general rule" enunciated in *Latrobe*. Rather, the court seems to have rejected the general rule itself, with the astounding observation that it had previously been eroded by *Latrobe* and a subsequent case.[120] The court endorsed the Holmes statement[121]

114. *Id.* at 629, 61 A. at 205.

115. *Id.* at 631, 61 A. at 206.

116. "Indeed when a piece of property which is subject to an ordinary lease for a short term is taken, it may happen that, although the owner of the fee is allowed full value for the property [i.e., its market value], the tenant must also be paid a large and substantial amount in addition by reason of the value of his lease." *Id.* at 632, 61 A. at 206.

117. *See, e.g.*, Viers v. State Roads Comm'n, 217 Md. 545, 143 A.2d 613 (1958).

118. 246 Md. 688, 229 A.2d 576 (1967).

119. Both options are valuable rights, and the value of each would ordinarily be recoverable by the condemnee. Here, however, the two options were mutually exclusive: exercise of one precluded exercise of the other.

120. State Roads Comm'n v. Novosel, 203 Md. 619, 102 A.2d 563 (1954). In that case, however, the court did not even reach the question of independent valuation. And of course

from *Boston Chamber of Commerce* as a "reasonably accurate crystalization of all of the past statements of this court . . . ."[122] It is unfortunate that the stated rationale does not exhibit a degree of candor comparable to the soundness of the holding.

In recent cases of first impression, the Supreme Court of Arkansas[123] and a Georgia appellate court[124] have reached a similar conclusion, rejecting the condemnor's argument that the total award to lessor and lessee may not exceed the value of a fee simple. Each relied on *Boston Chamber of Commerce.* The Arkansas court added that "it is plain that a lease may be so advantageous to both parties that the combined market value of their separate estates exceeds what the land would be worth if the lease had not been made."[125]

In another recent decision, *People v. Lynbar, Inc.*,[126] a California appellate court reached the same conclusion about independent valuation in spite of a procedural statute prescribing the two-step approach to compensation.[127] In addition, the statute had previously been construed to prescribe the unit valuation rule.[128] In *Lynbar*, the lessee operated an automobile service station under a twenty-year lease, calling for a minimum rental of 725 dollars per month. All parties stipulated that the fair market value of an undivided fee simple was 125,000 dollars. The condemnees' witness was permitted to testify, however, that the value of the actual premises—including the lease—was 180,000 dollars. The trial court denied a motion to strike this testimony and the condemnor appealed, contending that the statute required valuation of the tract as if it were held in single ownership.[129]

Latrobe cannot properly be said to have created, as a general rule, the test which it expressly reserved only for exceptional cases. In fact, *Labrobe* had later been cited by the Maryland court as an endorsement of the majority unit valuation rule. City of Baltimore v. Gamse & Brother, 132 Md. 290, 293, 104 A. 429, 430 (1918).

121. See text accompanying note 81 *supra.*

122. 246 Md. at 702, 229 A.2d at 583.

123. State Highway Comm'n v. Fox, 230 Ark. 287, 322 S.W.2d 81 (1959).

124. State Highway Dept. v. Thomas, 115 Ga. App. 372, 154 S.E.2d 812 (1967).

125. 230 Ark. at 289, 322 S.W.2d at 83.

126. 253 Cal. App. 2d 870, 62 Cal. Rptr. 320 (1967).

127. "Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff [condemnor] is entitled to have the amount of the award for said property first determined as between plaintiff and all defendants having an interest therein; thereafter in the same proceeding the respective rights of such defendants in and to the award shall be determined by the court, jury or referee and the award apportioned accordingly." CAL. CIV. PROC. CODE § 1246.1 (West 1955).

128. People v. City of Los Angeles, 220 Cal. App. 2d 345, 33 Cal. Rptr. 797 (1963); El Monte School Dist. v. Wilkins, 177 Cal. App. 2d 47, 1 Cal. Rptr. 715 (1960); People v. S. & E. Homebuilders, Inc., 142 Cal. App. 2d 105, 298 P.2d 53 (1956).

129. The condemnor's witnesses placed the land's value at figures ranging from $52,000 to

The judgement was affirmed. Although the court found support in another statutory provision which seems to support its conclusion that each outstanding interest must be separately valued,[130] it perceived a constitutional infirmity in the condemnor's position. Relying upon *Boston Chamber of Commerce*, it concluded that the requirement of just compensation[131] necessitates separate valuation.[132]

In addition to those discussed above, a few other jurisdictions have applied the independent valuation approach in leasehold reversion cases.[133] If the *Boston Chamber of Commerce* rationale eventually achieves acceptance of a federal constitutional requirement,[134] then all jurisdictions must do so; if not, an increasing number of state courts and legislatures can be expected to reconsider the wisdom of continued adherence to the traditional unit valuation methodology.

V. CONCLUSION

Lessors and lessees subjected to a total or partial taking of their interests by eminent domain are often confronted with serious disruption of their commercial affairs. The detrimental impact of this exercise of sovereign power against them can be ameliorated only by

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$125,000. The trial court awarded a total of $125,000 to the condemnees, which placed the condemnor in a somewhat awkward position in view of its stipulation that that was the value of the fee simple estate. It could hardly argue that the award was excessive. Had the court held that the condemnee's evidence was improperly admitted, however, the condemnor would have been entitled to a new trial.

130. "The court, jury or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. Value. The value of the property sought to be condemned . . . and of each and *every separate estate or interest therein* . . . ." CAL. CIV. PROC. CODE § 1248 (West 1955) (emphasis added).

131. CAL. CONST. art. I, § 14 and the "just compensation" clause of the fifth amendment to the U.S. Constitution, as incorporated by the due process clause of the fourteenth amendment. 253 Cal. App. 2d at 880, 62 Cal. Rptr. at 327-28.

132. *Cf.* Moore v. Kansas Turnpike Auth., 181 Kan. 840, 317 P. 2d 384 (1957) (dissenting opinion).

133. *E.g.*, Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85 (1948); State v. Platte Valley Pub. Power & Irrigation Dist., 147 Neb. 289, 23 N.W.2d 300 (1946); Garella v. Redevelopment Auth., 413 Pa. 181, 196 A.2d 344 (1964).

In a case involving the exercise of the federal power of eminent domain to take land owned by the State of Nebraska, the Nebraska rule was rejected in favor of the federal procedure. Nebraska *v.* United States, 164 F.2d 866 (1947), *cert. denied*, 344 U.S. 815 (1948). *But cf.* United States v. Certain Property, 344 F.2d 142 (2d Cir. 1965).

134. *See* Cormack, *supra* note 96, at 257: "This reasoning, applied consistently, would seem upon constitutional grounds to prevent use of the value of the land as a single estate to limit the compensation paid the owners of the various interests."

prompt payment of adequate compensation for the resultant damage. Unfortunately, the foregoing discussion suggests that widely accepted methods for determining compensation in leasehold-reversion cases are illogical in concept and capricious in application. Sometimes an undeserved windfall is conferred upon one or both of the condemnees at public expense. At other times, an inadequate award will impose a disproportionate share of the cost of public improvements upon one or both of them. Worst of all, the application of compensation rules to specific cases is so unpredictable that neither party can adequately protect himself through insertion of appropriate convenants in the leasehold agreement.

This article has examined two conceptual bulwarks of existing doctrine, the market value approach to compensation and the unit valuation approach to apportionment. Our analysis indicates that each is of questionable validity, if certainty of application and adequacy of result are appropriate criteria for evaluation. The market value approach precludes compensation for some of the actual costs of eminent domain and is unrealistic since there is no real market for leasehold interests anyway. Unit valuation is illogical because it is based on the premise that the value of a fee always equals the sum of the values of leasehold and reversion. Although the judiciary has not manifested a willingness to depart from the utilization of the market value standard, recent cases suggest that a judicial reassessment of the unit valuation approach is already underway.[135] Adoption of the independent valuation teehnique is undoubtedly a step in the direction of more realistic standards for determining damage awards when commercial leaseholds are taken in eminent domain.

Ultimately, responsibility for developing more adequate approaches to compensation rests with the legislatures.[136] Should they fail to meet this responsibility, recent evidence suggests that state court judges may be increasingly persuaded to subject the traditional approaches to "just compensation" for lessors and lessees to critical re-examination. Conceivably, this process could result in modification, or even rejeetion, of the market value test in eminent domain proceedings involving lessors and lessees.

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135. See text accompanying notes 111-33 *supra*.

136. Baker, *supra* note 42, at 402, reaches a similar conclusion. *See also* Michelman, *supra* note 2, at 1248-53.

The draft of a Model Eminent Domain Code, published in 2 REAL PROP., PROB. & TR. J. 365 (1967), contains an express provision for valuation in divided ownership cases. In § 501(f), it incorporates the substance of PA. STAT. ANN. tit. 26, § 1-507 (Supp. 1964), which adopts the unit valuation approach. This provision is criticized as inadequate in Note, *Eminent Domain—Problems of "Just Compensation" Under the Pennsylvania Eminent Domain Code of 1964*, 113 U. PA. L. REV. 787 (1965).