

TIME FOR A CHANGE IN EMINENT DOMAIN: A “DIRT FARMER’S” STORY SHOWS WHY JUST COMPENSATION SHOULD INCLUDE LOST PROFITS

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INTRODUCTION

The story of *Kelo v. New London*² has become famous,³ but perhaps more incredible than the story is the bipartisan response.⁴ Fueled by “post-*Kelo* outrage,”⁵ politicians put aside their partisan differences to form unlikely alliances: “Senator John Cornyn (R-Tex.) . . . found himself on the same side of the issue as Representative Maxine Waters (D-Calif.), a liberal, and Representative Bernard Sanders (I-Vt.), a self-described socialist.”⁶ In effect, the U.S. Supreme Court’s 2005 *Kelo* decision inadvertently provided legislators with a bipartisan opportunity: eminent domain reform.⁷

In *Kelo*, the Court considered whether condemning homes, as part of the city of New London’s development plan, “qualif[ied] as a ‘public use’ within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.”⁸ The goal of the “development plan” was “to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city.”⁹ To accomplish those ends, the plan aimed to redevelop “90 acres of Fort Trumbull in order to complement the facility that Pfizer was planning to build”¹⁰ The catch, however, was

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² 545 U.S. 469 (2005).

³ See *id.*; LITTLE PINK HOUSE (Korchula Productions 2017).

⁴ CARLA T. MAIN, BULLDOZED: “KELO,” EMINENT DOMAIN, AND THE AMERICAN LUST FOR LAND 174–79 (2007). See also Ron Arnold, *A Big Victory for Restoring Private Property Rights*, WASH. EXAMINER (Mar. 1, 2012, 12:00 AM), <http://www.washingtonexaminer.com/a-big-victory-for-restoring-private-property-rights/article/327151> [<https://perma.cc/GU84-RJ5R>].

⁵ MAIN, *supra* note 4, at 178.

⁶ *Id.* at 178–79.

⁷ *Id.* (“In the seven days following *Kelo*, the U.S. House of Representatives spit out bill after bill with heroic titles like the Protection of Homes, Small Businesses and Private Property Act; the Eminent Domain Limitation Act; and the Private Property Rights Protection Act. Aside from situations of national emergency or war, Congress rarely moves so fast.”).

⁸ 545 U.S. at 472, 475; U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation.”).

⁹ *Kelo*, 545 U.S. at 472.

¹⁰ *Id.* at 495 (O’Connor, J., dissenting) (internal quotations omitted).

that certain homeowners had to leave their homes to implement the plan.¹¹ Facing condemnation, the homeowners “contend[ed] that using eminent domain for economic development impermissibly blurs the boundary between public and private takings,”¹² a notion the Court rejected.¹³ In her dissent, Justice O’Connor harshly critiqued the majority opinion and its broad understanding of “public use”:

To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings ‘for public use’ is to wash out any distinction between private and public use of property—and thereby effectively to delete the words ‘for public use’ from the Takings Clause of the Fifth Amendment.¹⁴

For Justice O’Connor, the Court’s holding and interpretation of “public use” had serious implications: “The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”¹⁵ It seems Americans shared Justice O’Connor’s concerns: “An MSNBC website poll revealed that ninety-eight percent of Americans disagreed with the Supreme Court’s decision.”¹⁶

Unfortunately, in New London, not only did the property owners lose their homes, but in 2009 Pfizer “announced it would leave the city.”¹⁷ With its departure, Pfizer “pull[ed] 1,400 jobs”¹⁸ Effectively, “[t]hey stole our home for economic development,” Mr. Cristofaro explained to the *New York Times*.¹⁹ “It was all for Pfizer, and now they get up and walk away.”²⁰

Kelo sparked national concerns over eminent domain abuse, presenting unique political opportunities for bipartisan allegiances and widespread reform.²¹ For example, on the federal level, the bipartisan duo of Congresswoman Maxine Waters (D-CA) and Congressman Jim Sensenbrenner (R-Wis.) found a convergence of interests in “curbing

¹¹ *Id.* at 475 (majority opinion).

¹² *Id.* at 485.

¹³ *See id.* at 490.

¹⁴ *Id.* at 494 (O’Connor, J., dissenting).

¹⁵ *Id.* at 503.

¹⁶ MAIN, *supra* note 4, at 174.

¹⁷ Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. TIMES (Nov. 12, 2009), <https://nyti.ms/2kY5vIw>.

¹⁸ *Id.*

¹⁹ *Id.* (internal quotations omitted).

²⁰ *Id.* (internal quotations omitted).

²¹ Ilya Somin, *The Political and Judicial Reaction to Kelo*, WASH. POST: VOLOKH CONSPIRACY (June 4, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/?utm_term=.3d473bbfa06d [<https://perma.cc/KW48-WW8F>].

eminent domain abuses.”²² As a result, they sponsored the Private Property Rights Protection Act, a bill designed to protect against “eminent domain power to transfer private property to other private parties for the purpose of economic development.”²³ The pair have supported the legislation for years, even passing it in “the House in 2005, 2012, and 2014.”²⁴

Sensenbrenner and Waters have complementary goals in supporting the legislation. Congressman Sensenbrenner aims to “restore the government’s power of eminent domain to its limited, proper role.”²⁵ Congresswoman Waters, on the other hand, hopes to prevent eminent domain abuses that have impacted “[b]etween 3 and 4 million Americans, most of them ethnic minorities.”²⁶ She explained that since the 1940s, these individuals “have been forcibly displaced from their homes as a result of urban renewal takings.”²⁷ These takings often come “at the expense of the poor and politically weak.”²⁸

In addition to politicians working across the aisle, a broad range of advocacy groups and states have addressed eminent domain abuses.²⁹ For example, an impressive coalition of groups has come together, including the NAACP, “the Farm Bureau, the Mexican American Legal Defense and Educational Fund, and the National Federation of Independent Business.”³⁰ But arguably the most effective response to *Kelo* has come from the states: “forty-four states have reformed their eminent domain laws.”³¹ Moreover, “[a] dozen states have gone even further and amended their state constitutions to stop eminent domain for private gain.”³²

²² Press Release, Maxine Waters, Representative, House of Representatives, Representatives Waters, Sensenbrenner Reintroduce the Private Property Rights Protection Act (Mar. 22, 2017), <https://waters.house.gov/media-center/press-releases/congressman-waters-reintroduces-private-property-rights-protection-act> [<https://perma.cc/5XVW-KJLS>] [hereinafter Press Release, Maxine Waters].

²³ *Id.*

²⁴ Ilya Somin, *House Passes Private Property Rights Protection Act—But Celebration is Premature*, REASON: THE VOLOKH CONSPIRACY (July 26, 2018), <https://reason.com/volokh/2018/07/26/houses-passes-property-rights-protection> [<https://perma.cc/Z4LN-6TD7>].

²⁵ Press Release, Maxine Waters, *supra* note 22.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *House Tries to Rewrite Eminent Domain Rules*, CBS NEWS (Feb. 28, 2012, 9:40 PM), <https://www.cbsnews.com/news/house-tries-to-rewrite-eminent-domain-rules> [<https://perma.cc/BP6L-4VB9>].

²⁹ Nick Sibilla, *It’s Time For Congress To Actively Condemn Eminent Domain Abuses*, FORBES (June 28, 2013, 8:00 AM), <https://www.forbes.com/sites/realspin/2013/06/28/its-time-for-congress-to-actively-condemn-eminent-domain-abuses/#6ec8389964c2> [<https://perma.cc/D87Q-ETTW>].

³⁰ *Id.*

³¹ *Eminent Domain*, INST. JUST., <http://ij.org/issues/private-property/eminent-domain> [<https://perma.cc/ML2T-DKGW>].

³² *Id.*

With the country wary of eminent domain and open to curbing abuses following *Kelo*, now is a perfect time to implement other common-sense reforms to protect against eminent domain abuses, including fixing interpretations of just compensation in the Takings Clause. Specifically, just compensation under the Takings Clause in the Fifth Amendment should include consequential damages,³³ such as “loss of profits,”³⁴ “business good will,”³⁵ and “going-concern value.”³⁶ The importance of these reforms can be seen through the story of Chad Jarreau, a Louisiana dirt farmer whose property was taken.³⁷

In Jarreau’s case, the taking of his land impacted his dirt excavation business, leading the trial court to award him “\$164,705.40 for economic and business losses.”³⁸ However, the Louisiana Supreme Court disagreed, denying lost profits to Jarreau for his business losses and limiting his compensation to “that required by the Fifth Amendment, which is the fair market value of the property at the time of the appropriation”—an award of \$11,869.³⁹

To properly accommodate property owners like Jarreau for their losses, the Supreme Court should adopt the 1974 standard Louisiana had in place for takings compensation: “compensated to the full extent of [the] loss.”⁴⁰ As the Louisiana Supreme Court explained, the standard required that the property owner “be placed in an equivalent financial position to that which he enjoyed before the taking.”⁴¹ Anything

³³ See *State v. Hammer*, 550 P.2d 820, 823 n.2 (Alaska 1976). It should be noted that courts do not uniformly refer to these damages as consequential damages. For example, the Alaska Court stated: “[W]e prefer to call them incidental damages, reserving ‘consequential’ damages to describe losses to the remainder of a condemner’s property in instances of partial taking.” *Id.*

³⁴ Comment, *Consequential Damages and “Just Compensation” in Federal Condemnations*, 18 U. CHI. L. REV. 349, 349–50 (1951).

³⁵ *Id.* at 350 n.5 (“Good will has been defined as the value of the business reputation of the firm and the patronage that accompanies it or as the value of anticipated future profits based on the past earnings of the business.”).

³⁶ *Id.* at 350 n.6 (noting that the going-concern value “consists of the intangible contributions to the value of the business such as patronage and increased earning power because of skillful management”).

³⁷ *S. Lafourche Levee Dist. v. Jarreau*, 217 So. 3d 298 (La. 2017); Mark Sherman, *Louisiana ‘Dirt Farmer’ Asks Supreme Court’s Help*, U.S. NEWS (Oct. 26, 2017, 5:43 AM), <https://www.usnews.com/news/politics/articles/2017-10-26/louisiana-dirt-farmer-asks-supreme-courts-help> [<https://perma.cc/D3RF-2A2V>].

³⁸ *Jarreau*, 217 So. 3d at 302.

³⁹ *Id.* at 311–12.

⁴⁰ *Id.* at 306.

⁴¹ *Id.* (discussing the more robust protections in place under the 1974 Louisiana Constitution). The 2006 Louisiana constitutional amendments removed these protections for takings related to hurricane protection projects. See La. CONST. art. 1, § 4(G) (adding § 4(G) to limit compensation for hurricane projects); *id.* art. 6, § 42; LA. STAT. ANN. § 38:301 (C)(1)(h); LA. STAT. ANN. § 38:281(3) (defining “fair market value” for takings under article 1, section 4(G) and article 6, section 42); LA. STAT. ANN. § 38:281(4) (redefining “full extent of the loss” for

less than the “equivalent financial position” before the loss is not just compensation because the person is not being “made whole” for actions taken against them.⁴²

The Supreme Court in *Kimball Laundry co. v. United States*⁴³ supported the notion that compensation for temporary takings could include consequential damages, such as injury to the going-concern value.⁴⁴ The Court, however, limited compensation for consequential damages to temporary takings, not extending it to permanent takings, i.e., “[w]hen fee title to business property has been taken.”⁴⁵ The Court should expand its understanding to permanent takings, because permanent takings tend to be more burdensome than temporary takings.⁴⁶ Moreover, fair market value compensation often fails to satisfy just compensation requirements of putting the owner “in the same position monetarily as he would have occupied if his property had not been taken” as it fails to account for incidental costs or consequential damages resulting from the taking.⁴⁷

The practical impact of requiring higher levels of compensation for takings is that the government might more judiciously utilize its eminent domain powers.⁴⁸ In effect, the higher costs for takings would incentivize the government to: (1) act cautiously in exercising its eminent domain power and be more selective in the location choices for takings;⁴⁹ and (2) provide advance notice to condemnees so they can alleviate disruptions to their businesses.⁵⁰

Section I.A of this Note offers a brief background on the origins of the Fifth Amendment and just compensation, exploring John Locke and James Madison’s understandings of the proper role of government related to property and protection

takings to a constricted understanding that “shall not exceed the market value” under article 1, section 4(G) and article 6, section 42).

⁴² *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2434 (2015) (finding the property owner “must be made whole” as the owner “is entitled to be put in as good a position pecuniarily as if his property had not been taken. . .”).

⁴³ 338 U.S. 1 (1949).

⁴⁴ *Id.* at 15.

⁴⁵ *Id.* at 14.

⁴⁶ *Id.* at 23 (Douglas, J., dissenting) (“There would be a complete destruction of the trade-routes if the taking of the plant were *permanent* and a depreciation of them (I assume) where it is *temporary*. Why the latter is compensable when the former is not is a mystery.”).

⁴⁷ *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *Luber v. Milwaukee Cty.*, 177 N.W.2d 380, 384 (Wis. 1970) (“In theory, the market value standard is directed toward compensating the condemnee for the *physical* property loss suffered; thus it generally excludes recompense for incidental losses—losses typified by damage to or destruction of good will. . .”) (citations omitted).

⁴⁸ *See State v. Hammer*, 550 P.2d 820, 827 (Alaska 1976) (“The amount of such damages is a matter largely within the state’s control.”).

⁴⁹ Amicus Curiae Brief of Pacific Legal Foundation in Support of Petitioners at 15, *S. Lafourche Levee Dist. v. Jarreau*, 217 So. 3d 298 (La. 2017) (No. 17-163), 2017 WL 3867884 [hereinafter Brief Amici Curiae Pacific Legal Foundation].

⁵⁰ *Hammer*, 550 P.2d at 827.

of rights. In Sections I.B and I.C, this Note examines the U.S. Supreme Court's, the Alaska Supreme Court's, and the Louisiana Supreme Court's interpretations of just compensation related to lost profits resulting from takings.

Section II.A examines *South Lafourche Levee District v. Jarreau*⁵¹ in order to highlight the importance of expanding just compensation to include lost profits. In particular, the taking of Jarreau's land significantly impacted Jarreau beyond the fair market value of his land, failing to provide him with the value of his dirt,⁵² disrupting fulfillment of his existing contracts,⁵³ and imperiling his business's longevity and location.⁵⁴

In Section II.B, this Note rebuts three theories against awarding compensation for lost profits highlighted in *State v. Hammer*⁵⁵: (1) "that damage to personal property need not be compensated for"; (2) "that the state has taken the land only, and not the business"; and (3) "that the damages are too speculative to be awarded."⁵⁶

Section II.C considers a new standard for just compensation. Section II.C.1 explores why the Supreme Court should expand *Kimball Laundry* to include consequential damages for temporary takings and permanent takings. Section II.C.2 looks at adopting the 1974 Louisiana standard "compensated to the full extent of [the] loss."⁵⁷ Finally, in Section II.D, this Note presents two crucial practical benefits of a broadened understanding of just compensation.

I. HISTORY OF THE TAKINGS CLAUSE AND JUST COMPENSATION

A. Philosophical and Historical Development: Fifth Amendment and Just Compensation for Taking of Property

To understand the development of the Just Compensation Clause and its inclusion in the Constitution, it is helpful to step back and consider the enlightenment thinkers that influenced the Founding Fathers. John Locke, in particular, had a major influence on the principles underlying the founding of America and is instructive in understanding their conception of the proper role of government.⁵⁸ For Locke, people leave the

⁵¹ 217 So.3d 298 (La. 2017).

⁵² *Id.* See Brief Amici Curiae of National Federation of Independent Business Small Business Legal Center et al. in Support of Petitioner at 20, *S. Lafourche Levee Dist. v. Jarreau*, 217 S. 3d 298 (La. 2017) (No. 17-163), 2017 WL 423 1477 [hereinafter Brief Amici Curiae NFIB] ("Jarreau has been denied compensation for his carefully cultivated commercial-grade dirt.")

⁵³ *See id.* at 11–12.

⁵⁴ *See id.* at 13–14.

⁵⁵ 550 P.2d 820 (Alaska 1976)

⁵⁶ *Id.* at 823.

⁵⁷ *See S. Lafourche Levee Dist. v. Jarreau*, 217 So. 3d 298, 306 (La. 2017).

⁵⁸ The Declaration of Independence is one prominent example of Locke's influence on the Founding as the language of the Declaration mimics the ideas, and even some of the language, of Locke. *See* JOHN LOCKE, *THE SECOND TREATISE ON GOVERNMENT AND A LETTER CONCERNING TOLERATION* 5 (J.W. Gough ed., Oxford: Basil Blackwell 1948) ("The state of

state of nature and enter into civil society to receive certain protections of their individual rights not available in the state of nature.⁵⁹ The individual's rights are not safe in the state of nature—a state prior to the creation of society and government—because “some individuals continually try to take that which by right belongs to others.”⁶⁰ As a result, the individual faces “[u]ncertainty and insecurity,” limiting the ability to plan, “which prevents individuals from effectively utilizing their talents and external goods.”⁶¹ They, therefore, leave the state of nature to attain certain protections through society.⁶² However, unless “the sovereign is to be fully constrained, so that the lives, liberties, and estates of the citizens may be preserved,” individuals will suffer the same abuses and uncertainty under an unconstrained government as they did in the state of nature.⁶³ The proper role of government is to determine “how the natural rights over labor and property can be preserved in form and enhanced in value by the exercise of political power.”⁶⁴

Similarly, James Madison, the author of the Bill of Rights, thought just government “protect[s] property of every sort.”⁶⁵ In his 1792 essay *Property*, published after the Bill of Rights, Madison explained how a “just government . . . impartially secures” property rights of all citizens.⁶⁶ An unjust government, in contrast, takes property “by arbitrary seizures of one class of citizens for the service of the rest.”⁶⁷ Property rights are more susceptible to these abuses “[w]here an excess of power prevails.”⁶⁸

Madison explains how a just government cannot take property “directly even for public use without indemnification to the owner.”⁶⁹ Madison also warns that American

nature has a law of nature to govern it, which obliges every one; and reason, which is that law, teaches all mankind who will but consult it, that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.”); see also THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

⁵⁹ See LOCKE, *supra* note 58, at 62 (“[I]n the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasions of others. . . . This makes him willing to quit this condition, which, however free, is full of fear and continual dangers. . . . he seeks out and is willing to join in society with others. . . . for the mutual preservation of their lives, liberties, and estates.”).

⁶⁰ RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 3 (1985).

⁶¹ *Id.*

⁶² See LOCKE, *supra* note 58, at 62.

⁶³ EPSTEIN, *supra* note 60, at 163.

⁶⁴ *Id.* at 3.

⁶⁵ James Madison, *Property*, <http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html> [<https://perma.cc/HK7Y-DZW2>]. See also William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *YALE L.J.* 694, 694 (1985).

⁶⁶ Madison, *supra* note 65.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

government should not follow “a pattern” that “*indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares”⁷⁰ While Madison did not explicitly mention business losses, Madison’s vision for property rights in America include protections for “indirect[] violat[ions]” of property rights.⁷¹ These indirect violations, such as interferences with the “labor that acquires their daily subsistence,” resemble the business losses that indirectly result from a taking.⁷²

Examining the language of the Constitution, the Fifth Amendment states: “nor shall private property be taken for public use, without just compensation.”⁷³ According to the Supreme Court, just compensation includes the “full monetary equivalent of the property taken.”⁷⁴ More specifically, “[t]he owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.”⁷⁵ In other words, the property owner “must be made whole” as the owner “is entitled to be put in as good a position pecuniarily as if his property had not been taken”⁷⁶ Despite these precedents, the Court has reached differing conclusions on whether to extend compensation to consequential damages, such as going-concern value, depending on whether the taking is permanent or temporary.⁷⁷

B. History of Compensation for Business Losses: Mitchell and Kimball Laundry

In 1925, the Supreme Court in *Mitchell v. United States*⁷⁸ denied “consequential damages for losses to [a] business, or for its destruction.”⁷⁹ The case arose from a taking in 1917 of 440 acres, where the plaintiff “rais[ed] [and canned] whole-grain Shoe Peg corn.”⁸⁰ In exchange for taking their “farm and canning plant” the government provided \$76,000 as compensation.⁸¹ But after, the “plaintiffs were . . . unable

⁷⁰ *Id.*

⁷¹ *See id.*

⁷² *See id.*

⁷³ U.S. CONST. amend. V.

⁷⁴ *United States v. Reynolds*, 397 U.S. 14, 16 (1970).

⁷⁵ *Id.*

⁷⁶ *Horne v. Dep’t. of Agric.*, 135 S. Ct. 2419, 2434 (2015) (quoting *Olson v. United States*, 54 S. Ct. 704, 708 (1934)). *See also* *U.S. v. Miller*, 317 U.S. 369, 373 (1943) (“Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken.”).

⁷⁷ *Kimball Laundry Co. v. United States*, 338 U.S. 1, 11, 14–15 (1949) (providing compensation for “demonstrable loss of going-concern value” under temporary takings). In contrast, compensation does not extend to permanent takings because “the going-concern value has not been taken.” *Id.* at 11.

⁷⁸ 267 U.S. 341 (1925).

⁷⁹ *Id.* at 345.

⁸⁰ *Mitchell v. United States*, 58 Ct. Cl. 443, 443 (1923).

⁸¹ *Id.* at 445.

to reestablish themselves in their former business of growing and canning this kind of corn” because the government had taken “a very large part of the lands in that section of country available for and especially adapted to the growing of Shoe Peg corn”⁸² The business losses did not matter to the Court: “[i]f the business was destroyed, the destruction was an unintended incident of the taking of land.”⁸³

In 1949, the Court in *Kimball Laundry* adjusted its standard, interpreting just compensation to include consequential damages resulting from a temporary taking, such as going-concern value.⁸⁴ However, the Court only applied this rule to temporary takings, not permanent takings.⁸⁵

In *Kimball Laundry*, the government took possession of a laundry property during WWII from November 22, 1942 until March 23, 1946.⁸⁶ In addition to awarding the owner compensation for the rental value of the property, the Court also awarded compensation for intangible losses to the property, including “demonstrable loss of going-concern value.”⁸⁷ The temporary taking effectively “appropriated the Laundry’s opportunity to profit from its trade routes,” which “depriv[ed] the owner of the going-concern value of his business,” including goodwill they developed with customers.⁸⁸ Excellent service creates goodwill with customers and that goodwill has value because the customers “will continue to want particular goods or services” from “a particular supplier of them.”⁸⁹ In these circumstances, “the intangible acquires a value to a potential purchaser no different from the value of the business’ physical property.”⁹⁰ The Court explained that “[i]n determining the value of a business . . . the goodwill and earning power due to effective organization are often more important elements than tangible property.”⁹¹

The Court, in its assessment, made a distinction between a temporary taking and a permanent taking.⁹² Since it was a temporary taking, the laundry owner’s “investment remained bound up in the reversion of the property,” and he could not relocate the business to a new location because he still owned the premises taken by the government.⁹³ It would not make sense for the laundry to open a second location, especially given the uncertainty of when the condemned property would be free from government use.⁹⁴

⁸² *Id.*

⁸³ *Mitchell*, 267 U.S. at 345.

⁸⁴ *Kimball Laundry Co. v. United States*, 338 U.S. 1, 15 (1949).

⁸⁵ *See id.* at 11, 14–15.

⁸⁶ *Id.* at 3–4.

⁸⁷ *Id.* at 15–16.

⁸⁸ *Id.* at 13–14.

⁸⁹ *Id.* at 10.

⁹⁰ *Id.* at 11.

⁹¹ *Id.* (internal quotations omitted).

⁹² *See id.* at 14–15.

⁹³ *Id.* at 14.

⁹⁴ *See id.*

In contrast, the Court reasoned that a permanent taking allows the impacted owner to transfer locations and maintain the going-concern value of the business as “only the physical property has been condemned, leaving the owner free to move his business to a new location.”⁹⁵ Therefore, permanent takings create no obligation to compensate for consequential damages to a business.⁹⁶

C. Alaska and Louisiana: Other Jurisdictions Interpreting Just Compensation and Business Losses

1. Alaska: *State v. Hammer*—“Loss of Profits Due to Business Interruption”⁹⁷

The Alaska Supreme Court awarded lost profits compensation in *State v. Hammer*.⁹⁸ In order to build a highway, the State of Alaska forced Richard Kito to vacate his leasehold and relocate his bar business on September 29, 1973.⁹⁹ On the day Alaska vacated him, Kito had not yet found a new location for his bar.¹⁰⁰ He explored many “alternative locations, including dry-docking a small ferry boat,” before he “finally constructed a building for the bar, with the help of a substantial Small Business Administration loan.”¹⁰¹ His business “reopened in July 1974, nine months after it had closed.”¹⁰² The jury in the trial court found that “five of the nine months” Kito had his business interrupted “were directly caused by the state’s taking of Kito’s leasehold.”¹⁰³

The Alaska Supreme Court assessed “whether temporary loss of profits due to business interruption directly resulting from a state’s taking of the land on which the business operated is a damage to property compensable under our constitution.”¹⁰⁴ Typically, incidental damages,¹⁰⁵ such as lost profits, are precluded from compensation as “a loss which does not give rise to an action for damages.”¹⁰⁶ The Alaska Supreme Court highlighted three theories courts use to reject awarding compensation for lost profits: (1) “that damage to personal property need [not] be compensated for;” (2) “that the state has taken the land only, and not the business;” and (3)

⁹⁵ *Id.* at 11 (citations omitted).

⁹⁶ *Id.*

⁹⁷ *State v. Hammer*, 550 P.2d 820, 823 (Alaska 1976).

⁹⁸ *Id.* at 825–27.

⁹⁹ *Id.* at 822.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 823.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 823 n.2 (Alaska 1976). The Alaska Court prefers the phrase “incidental damages” over “consequential damages.” *Id.*

¹⁰⁶ *Id.* at 823.

“that the damages are too speculative to be awarded.”¹⁰⁷ The Alaska Supreme Court rejected all three theories in *Hammer*.¹⁰⁸

Concerning the first theory—“that damage to personal property need [not] be compensated for”¹⁰⁹—under “statute and case law,” Alaska includes “personal property” among “the categories of property for which the condemnor must compensate the owner.”¹¹⁰

The Alaska Supreme Court also rejected the second theory, which denies compensation because “the state has taken the land only,” an approach found in the U.S. Supreme Court’s ruling in *Mitchell v. United States*.¹¹¹ Under *Mitchell*, the government does not take or intend to take the business: “If the business was destroyed, the destruction was an unintended incident of the taking of the land.”¹¹² The Alaska Supreme Court found *Mitchell*’s approach to have “several serious flaws.”¹¹³ The first flaw was “looking at the benefit to the condemnor as a measure of compensation,” not the “loss to the owner.”¹¹⁴ The *Mitchell* approach, the Alaska Supreme Court explained, “conflicts with [Alaska’s] principle of compensation, which, instead of looking at the benefit to the condemnor as a measure of compensation, looks to the loss to the owner.”¹¹⁵ Similarly, the Court in *Kimball Laundry* acknowledged that point, relying on Justice Holmes’s question: “what has the owner lost, not what has the taker gained?”¹¹⁶ The second flaw with the *Mitchell* approach was its inapplicability in Alaska.¹¹⁷ According to the Alaska Supreme Court, the Alaska Constitution has more stringent protections for just compensation than the U.S. Constitution, which “does not expressly require compensation for damage to property.”¹¹⁸

The third, and most important, flaw in the *Mitchell* approach is “it fails to provide a realistic measure of what has been taken.”¹¹⁹ Specifically, the Alaska court criticized *Mitchell* because “[t]he court simply ignored, for the purposes of compensation, the destruction of Mitchell’s business.”¹²⁰ By ignoring the harm caused to businesses, “[t]his court would poorly serve the law if it were to so blind itself to the realities

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 823–27.

¹⁰⁹ *Id.* at 823.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 824 (quoting *Mitchell v. U.S.*, 267 U.S. 341, 345 (1925)).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 13 (1949) (quoting *Boston Chamber of Com. v. Boston*, 217 U.S. 189, 195 (1910)).

¹¹⁷ *Hammer*, 550 P.2d at 824.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

of condemnation.”¹²¹ By highlighting three flaws in the *Mitchell* approach, the Alaska Supreme Court strongly criticized the second theory for denying compensation for loss of profits.¹²²

The Alaska Supreme Court also rejected the third theory for denying damages for loss of profits: the claim that loss of profits is too speculative.¹²³ For the *Hammer* court, the “too speculative” theory was essentially an excuse not to compensate lost profits because lost profits are calculable and awarded in other legal contexts.¹²⁴ The *Hammer* court explained: “Loss of profits damages have been awarded in a variety of civil contexts, including tort actions (both personal and business), breach of contract actions, antitrust suits, and suits for infringement of a patent or trademark.”¹²⁵

To prove lost profits, *Hammer* held “damages must be ‘reasonably certain’” to “the trier of fact” based on “evidence on the record and reasonable inferences therefrom, not from mere speculation and wishful thinking.”¹²⁶ The reasonable certainty standard only allows for provable damages, while preventing compensation for “truly speculative” claims, such as those that “depend on unrealized contingencies, unproved products, or the like.”¹²⁷

After rejecting the three theories against compensating lost profits, the Alaska Supreme Court grounded its rationale in fairness reasoning because “[w]ithout such a rule, the State forces a property owner to pay a greater portion of the costs of a public project than any other taxpayer must pay by afflicting him with the unavoidable expenses of condemnation.”¹²⁸ This reasoning tracks the U.S. Supreme Court’s rationale for just compensation: “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹²⁹

Practical considerations also played a role in the Alaska Supreme Court’s decision as the amount the government owes in incidental costs is “largely within the state’s control.”¹³⁰ It can avoid paying these damages “by giving precise and early notice of the date when the property must be vacated,” thus keeping “the loss of profits due to necessary business interruption to a minimum.”¹³¹ By accommodating the

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* See also EPSTEIN, *supra* note 60, at 54. Richard Epstein makes a similar argument: “no private defendant could escape payment if he forcibly ejected an owner from his place of business.” *Id.*

¹²⁶ *Hammer*, 550 P.2d at 824–25.

¹²⁷ *Id.* at 825.

¹²⁸ *Id.* at 827 (quoting *Stewart & Grindle, Inc. v. State*, 524 P.2d 1242, 1250 (Alaska 1974)).

¹²⁹ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

¹³⁰ *Hammer*, 550 P.2d at 827.

¹³¹ *Id.*

property owner and allowing them ample time to prepare for an impending taking, “[t]he amount of such damages is a matter largely within the state’s control.”¹³² Such a solution would benefit both the property owner and the government.¹³³

2. Modern Example: Louisiana—*South Lafourche Levee District v. Jarreau*

On January 10, 2011, the South Lafourche Levee District (“Levee District”) sent Jarreau a letter, telling him to “immediately cease and desist performing any and all activities” on a portion of his property.¹³⁴ The Levee District wielded the authority as a result of Resolution 11-01,¹³⁵ which appropriated Jarreau’s property through “permanent levee servitude” for use in “hurricane protection projects.”¹³⁶ The appropriation applied to 0.913 acres of Jarreau’s “17.1 acre tract of land,” where he has his home and operates his business.¹³⁷ On his land, Jarreau runs Bayou Construction & Trucking Co., “a dirt excavation and hauling business.”¹³⁸

Jarreau, however, continued his excavation of the appropriated land because he had “to satisfy contractual obligations for Bayou Construction.”¹³⁹ Specifically, Jarreau had to fulfill “a contract for 23,000 cubic yards . . . of dirt—enough to cover a football field nearly a foot deep.”¹⁴⁰ It would be difficult for Jarreau to fulfill the contract unless he continued digging the appropriated land, because he had already “dug up pretty much the whole property.”¹⁴¹ The appropriation took the back portion of his lot, but when he first began excavating he had “started in the front.”¹⁴² Had he known the back tract of his land would be subject to an appropriation, Jarreau “would have started in the back.”¹⁴³

In response to Jarreau’s continued excavation of the dirt, “[o]n May 19, 2011, the Levee District filed a petition to enjoin Jarreau from excavating and removing any more dirt from the appropriated servitude and sought monetary damages for the ‘wrongful’ excavation.”¹⁴⁴ The Levee District followed this petition with a check to Jarreau “in the amount of \$1,326.69 as compensation for the full market value of appropriated property.”¹⁴⁵

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *S. Lafourche Levee Dist. v. Jarreau*, 217 So. 3d 298, 302 (La. 2017) (internal quotations omitted).

¹³⁵ *Id.* at 301–02.

¹³⁶ *Id.* at 302–03.

¹³⁷ *Id.* at 302.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Sherman, *supra* note 37.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Jarreau*, 217 So. 3d at 302.

¹⁴⁵ *Id.*

Jarreau disagreed with the Levee District's assessment of his property's worth and filed a counterclaim, seeking, among other things, "compensation for the appropriated land, severance damages to the land, buildings, and improvements; [and] economic and business losses."¹⁴⁶ His business, Bayou Construction, also joined the suit, "seeking compensation for lost profits, legal interest, and costs arising from the appropriation."¹⁴⁷

The trial court ultimately agreed with Jarreau and Bayou Construction that compensation for the appropriation should extend to lost profits.¹⁴⁸ In assessing lost profits, the court examined the estimates of Jarreau's CPA and engineer, who carried out "extensive calculations of lost profits considering that because of the taking the defendants were no longer able to dig and sell dirt from this particular tract."¹⁴⁹ In addition, "[t]he Court also made note of the fact that Mr. Jarreau stated, without contradiction, that the quality of the dirt in the rear tract that was taken was the best soil on his whole 17 acres."¹⁵⁰ In their writ of certiorari to the Supreme Court, the petitioners summed up the factors the trial court considered: "(1) the particular quality of the dirt taken and the existence of a contract to sell some of that dirt, (2) the total quantity of dirt available for excavation on the property, (3) the cost of excavating and selling it, and (4) the price at which it could be sold."¹⁵¹

As a result of these arguments, the trial court awarded "\$164,705.40 for economic and business losses."¹⁵² In addition, the trial court awarded "the Levee District damages of \$16,956.00 for the dirt [Jarreau] excavated from the appropriated property," but also "awarded Jarreau \$11,869.00 as just compensation for the appropriated tract."¹⁵³ The Louisiana Court of Appeals disagreed with the trial court's assessment "revers[ing] the award of \$164,705.40 against the Levee District."¹⁵⁴ The Louisiana Appeals Court claimed: "The current law under our amended constitution does not support any award for just compensation beyond the fair market value of the property on the date of the appropriation."¹⁵⁵ Therefore, the compensation does not include "lost profit damages associated with the value of the dirt in the Jarreau tract."¹⁵⁶

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ 17th Judicial District Court for the Parish of Lafourche, Rendition of Judgment and Hearing on Motion, Relevant Excerpts, Oct. 17, 2014, App. 97, <http://www.scotusblog.com/wp-content/uploads/2017/08/17-163-petition.pdf> [<https://perma.cc/2BWB-GA5A>].

¹⁵⁰ *Id.*

¹⁵¹ Petition for Writ of Certiorari at 7, *S. Lafourche Levee Dist. v. Jarreau*, 217 So. 3d 298 (2017) (No. 17-163).

¹⁵² *Jarreau*, 217 So. 3d at 302.

¹⁵³ *Id.* at 302–03.

¹⁵⁴ *S. Lafourche Levee Dist. v. Jarreau*, 192 So. 3d 214, 228 (La. App. 1 Cir. 2016).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

The Louisiana Supreme Court affirmed the Appeals Court's reversal of the lost profits awarded for the value of the dirt.¹⁵⁷ The Court held that the 2006 Amendments to the Louisiana Constitution and statutes only required just compensation as "required by the Fifth Amendment" to the United States Constitution, which is based on the "fair market value of the property at the time of the appropriation."¹⁵⁸ Prior to 2006, a more robust standard of compensation was in place for all takings.¹⁵⁹ Specifically, in 1974, Louisiana enacted a constitutional requirement for compensation "to the full extent of his loss."¹⁶⁰

Under the "full extent of his loss" standard, Louisiana "broadened the measure of damages"¹⁶¹ beyond both the "fair market value" and "severance damages to the remainder."¹⁶² The broader standard required, in addition, that the impacted property owner "be placed in an equivalent financial position to that which he enjoyed before the taking."¹⁶³ The standard would include the compensation Jarreau sought, such as "inconvenience and loss of profits from the takings of business premises so that landowners were compensated for their loss, not merely the loss of their land."¹⁶⁴

The 2006 amendment to the Louisiana Constitution, however, constricted compensation for takings related to hurricane protection projects redefining "'full extent of the loss' to the more restrictive 'just compensation' measure required by the Fifth Amendment to the United States Constitution."¹⁶⁵ Because of these limitations on compensation, the Louisiana Supreme Court restricted Jarreau's compensation to that "required by the Fifth Amendment, which is the fair market value of the property at the time of the appropriation."¹⁶⁶ Therefore, the compensation did "not include loss [of] profits and other severance damages."¹⁶⁷

¹⁵⁷ *Jarreau*, 217 So. 3d at 313.

¹⁵⁸ *Id.* at 302–03 n.5.

¹⁵⁹ *Id.* at 306.

¹⁶⁰ *Id.* See also Tracy Lee Howard, *Compensating an Owner to the Full Extent of His Loss: A Reevaluation of Compensable Damages in Louisiana Expropriation Cases*, 51 LA. L. REV. 821, 821–26 (1991) (providing background on the 1974 constitutional amendment requiring compensation "to the full extent of his loss").

¹⁶¹ *Jarreau*, 217 So. 3d at 306.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See LA. CONST. art. 1, § 4(G) (adding § 4(G) to limit compensation for hurricane projects); *id.* art. 6, § 42; LA. STAT. ANN. § 38:301 (C)(1)(h); LA. STAT. ANN. § 38:281(3) (defining "fair market value" for takings under article 1, section 4(G) and article 6, section 42); LA. STAT. ANN. § 38:281(4) (redefining "full extent of the loss" for takings to a constricted understanding that "shall not exceed the market value" under article 1, section 4(G) and article 6, section 42).

¹⁶⁶ *Jarreau*, 217 So. 3d at 311.

¹⁶⁷ *Id.*

Jarreau filed a writ of certiorari with the Supreme Court, which it denied.¹⁶⁸ Both the petition and its denial generated news coverage, showing the public interest in addressing applications of just compensation.¹⁶⁹ Even though the Court denied the petition, Jarreau's story is helpful in understanding why the Court should adopt a consistent application for consequential damages, rather than maintaining its inconsistent application of different standards for permanent and temporary takings.¹⁷⁰

II. ARGUMENT

The Supreme Court should adjust its standard for just compensation to extend to consequential damages, such as business losses. Louisiana's previous standard—"placed in an equivalent financial position to that which he enjoyed before the taking"—better captures the spirit of just compensation.¹⁷¹ Anything less than the equivalent position before the loss is not just compensation because the person is not being made whole for government actions taken against them.¹⁷² Moreover, the Court should extend the protections for temporary takings in *Kimball Laundry* to include permanent takings because permanent takings cause a more significant burden than temporary takings.¹⁷³

Eminent domain must adapt to the changing uses of property as "the original rationale for denying business losses in eminent domain—[that] most land taken was undeveloped land—has now been superseded by more modern principles."¹⁷⁴ Alaska provides an exemplary account of how states should proceed,¹⁷⁵ but property owners

¹⁶⁸ Jarreau v. S. Lafourche Levee Dist., 217 So.3d 298, cert. denied, 138 S. Ct. 381 (2017). See also *Jarreau v. S. Lafourche Levee Dist.*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/jarreau-v-south-lafourche-levee-district> [<https://perma.cc/FVC6-FHBZ>] (showing proceedings and orders related to *Jarreau*, including denial of the petition on October 30, 2017).

¹⁶⁹ See, e.g., Aurora Barnes, *Petition of the Day: Jarreau v. South Lafourche Levee District*, SCOTUSBLOG (Sep. 7, 2017, 6:18 PM), <http://www.scotusblog.com/2017/09/petition-of-the-day-1220> [<https://perma.cc/3LPM-T5HV>]; Sherman, *supra* note 37.

¹⁷⁰ *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 11, 14–15 (1949) (providing compensation for "demonstrable loss of going-concern value" under temporary takings). In contrast, compensation does not extend to permanent takings because "the going-concern value has not been taken." *Id.* at 11.

¹⁷¹ *Jarreau*, 217 So. 3d at 306.

¹⁷² *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2434 (2015).

¹⁷³ *Kimball*, 338 U.S. at 23 (Douglas, J., dissenting).

¹⁷⁴ Brief of Amici Curiae Don Howard Williams, Jr., And Owners' Counsel Of America In Support Of Petitioners at 3, *S. Lafourche Levee Dist. v. Jarreau*, 217 So. 3d 298 (La. 2017) (No. 17-163), 2017 WL 4251906 [hereinafter Brief Amici Curiae Don Howard Williams].

¹⁷⁵ *State v. Hammer*, 550 P.2d 820, 825–27 (Alaska 1976).

need more than “a patchwork of lower court rules”¹⁷⁶ and protections implemented by states. Citizens are entitled to just compensation and to being made whole.¹⁷⁷

A. Jarreau Illustrates the Need for Takings Compensation to Include Business Losses

The Louisiana Supreme Court failed to compensate Jarreau for his business losses.¹⁷⁸ Just compensation requires more than that—it requires Jarreau “be made whole” again.¹⁷⁹ The fair market value compensation for Jarreau’s land failed to fix the serious disruptions caused by the taking of his property.¹⁸⁰ The Louisiana Supreme Court’s inadequate compensation adversely impacted Jarreau on many levels: (1) it failed to award Jarreau the value of his dirt;¹⁸¹ (2) it disrupted the fulfillment of his business contracts;¹⁸² and (3) it imperiled his business’s longevity and location.¹⁸³

First, the award failed to provide him with adequate compensation for the value of his dirt.¹⁸⁴ As Justice Hughes noted in his dissent, the Louisiana Supreme Court “affirm[ed] an award of \$11,869 despite evidence in the record that the dirt taken from the land had a value in excess of \$100,000.”¹⁸⁵ Jarreau built his business around the value of the dirt on his land, the value of which increases when it is excavated and prepared for a customer.¹⁸⁶ The trial court recognized the dirt’s significant value, awarding Jarreau “\$164,705.40 as compensation for the business losses.”¹⁸⁷

¹⁷⁶ Brief Amici Curiae Don Howard Williams, *supra* note 174, at 3.

¹⁷⁷ *Olson v. United States*, 292 U.S. 246, 254–55 (1934); Brief Amici Curiae Don Howard Williams, *supra* note 174, at 18.

¹⁷⁸ *S. Lafourche Levee Dist. v. Jarreau*, 217 So. 3d 298, 313 (La. 2017).

¹⁷⁹ *Olson*, 292 U.S. at 254–55.

¹⁸⁰ Brief Amici Curiae NFIB, *supra* note 52, at 19. The fair market value “formulation overlooks the indisputable market value of commodities rooted in the land itself. . . . Indeed, none of the appraisals for the fair market value of the condemned land approximated the independent market value of the underlying dirt.” *Id.*

¹⁸¹ *Id.* at 20 (“[U]nder Louisiana’s hardline rule, the farmer would be denied compensation for ‘lost profits’ if the land were condemned at harvest—just as Mr. Jarreau has been denied compensation for his carefully cultivated commercial-grade dirt.”).

¹⁸² *Id.* at 11 (“[T]he South Lafourche Levee District took the land and destroyed an established property right (i.e., a contract) with concrete economic value.”).

¹⁸³ Brief Amici Curiae Pacific Legal Foundation, *supra* note 49, at 13 (“Indeed, when real property supporting an established business is condemned, the owner is forced either to relocate or lose his or her investment.”).

¹⁸⁴ Brief Amici Curiae NFIB, *supra* note 52, at 20.

¹⁸⁵ *S. Lafourche Levee Dist. v. Jarreau*, 217 So. 3d 298, 315 (La. 2017) (Hughes, J., dissenting).

¹⁸⁶ Brief Amici Curiae NFIB, *supra* note 52, at 20 (“[T]he government should provide independent compensation for the loss of transferable business assets created or cultivated through investment of capital and sweat equity.”).

¹⁸⁷ Petition for Writ of Certiorari, *supra* note 151, at *7.

Given that the Levee District initially offered \$1,326.69 for Jarreau's land—less than one percent of the trial court's compensation for the land—property owners need more robust just compensation protections against government overreach and abuse.¹⁸⁸

The trial court's actions help illustrate the high value of the excavated dirt compared to the value of the land itself.¹⁸⁹ The trial court essentially determined that the dirt Jarreau excavated from the appropriated tract, “without permission, after the District had appropriated it,” was worth more than the whole appropriated tract of land because Jarreau had to pay more in damages to the Levee District for the excavated dirt than the fair market value of the appropriated tract of land.¹⁹⁰

The market value test for property is an inadequate measure of compensation in order to fully compensate property owners who suffer business losses.¹⁹¹ According to Richard Epstein, the problem with market value—“the price a willing seller would receive from a willing buyer”—is that it “still contains a systematic bias that underestimates the use value, which is typically in excess of its exchange value.”¹⁹² In a scenario where the market value is lower than the current use value, “the present owner will not sell at market price because selling will deprive him of the surplus he obtains from present use, perhaps because the property is customized to his own needs or provides him with special locational advantages.”¹⁹³ Essentially, takings can force transactions that would not occur at the fair market price because the property's use value could be higher for the owner.

Second, the taking disrupted Jarreau's fulfillment of contracts with customers.¹⁹⁴ Without any advance notice, the government abruptly prevented him from utilizing his property to farm dirt for a contract requiring 23,000 cubic yards of dirt.¹⁹⁵ To stop that process midstream on the government's whim and time frame should be

¹⁸⁸ *Jarreau*, 217 So. 3d at 302.

¹⁸⁹ Petition for Writ of Certiorari, *supra* note 151, at *4, *7.

¹⁹⁰ *Jarreau*, 217 So. 3d at 298 (“[t]he decision below allows [the Levee District] to pay Jarreau less than \$12,000—even though the Levee District itself argued *in the same proceeding* that Jarreau had caused it more than \$16,000 in damages by removing some of that same dirt from the property after it was acquired.”); Brief Amici Curiae NFIB, *supra* note 52, at 16 (“[T]he lower court awarded Petitioners only \$11,869.00 for the land, but awarded \$16,956.00 to the District ‘for the dirt that Mr. Jarreau excavated after the tract had been appropriated.’”).

¹⁹¹ Brief Amici Curiae NFIB, *supra* note 52, at 19 (The fair market value “formulation overlooks the indisputable market value of commodities rooted in the land itself. . . . Indeed, none of the appraisals for the fair market value of the condemned land approximated the independent market value of the underlying dirt.”).

¹⁹² EPSTEIN, *supra* note 60, at 182–83.

¹⁹³ *Id.* at 183.

¹⁹⁴ Brief Amici Curiae NFIB, *supra* note 52, at 11.

¹⁹⁵ See Petition for Writ of Certiorari, *supra* note 151, at *6; *Jarreau*, 217 So. 3d at 302 (showing how the taking occurred abruptly and without advanced notice. The letter “demanded that they ‘immediately cease and desist performing any and all activities upon the property as appropriated’”).

accounted for through the compensation calculation.¹⁹⁶ Additionally, the taking would not only halt ongoing contracts, but also prevent new business development; potential clients would be forced to go to a different excavator, and current relationships with clients would discontinue.¹⁹⁷ The government's taking of Jarreau's land had the same effect as *Hammer*—where the government forced Kito to relocate his bar, disrupted the operation of the business, and contributed to a loss of profits.¹⁹⁸

Finally, Jarreau cannot simply relocate to a comparable location because he lives at his business.¹⁹⁹ He has literally built his life around his business.²⁰⁰ Although it is potentially conceivable to relocate, fair market value does not tend to include relocation costs.²⁰¹ It would be a significant burden for Jarreau to relocate, especially given his ties to the land as his place of business and his home.²⁰²

Even if Jarreau does not relocate immediately as a result of the taking, the government's action will require him to relocate earlier than he might have planned. With the exception of the tract of land taken by the Levee District, Jarreau “dug up pretty much the whole property.”²⁰³ He had projected that he could stay on the property much longer, but the government's taking may force him to have to transfer locations earlier than anticipated.²⁰⁴ Moreover, depending on the business, location is key.²⁰⁵ A bar relocating, for instance, may not be able to easily keep all of its clientele—it has established a brand in that particular area.²⁰⁶ And for a dirt farmer like Jarreau, the quality of

¹⁹⁶ *State v. Hammer*, 550 P.2d 820, 827 (Alaska 1976).

¹⁹⁷ *Luber v. Milwaukee Cty.*, 177 N.W. 2d 380, 384 (Wis. 1970). “[T]he [fair] market value standard . . . generally excludes recompense for incidental losses—losses typified by damage to or destruction of good will, expenses incurred in moving to a new location and profits lost because of business interruption or inability to relocate.” *Id.* The practice continues despite the fair market value standard “reflect[ing] dubious wisdom and logic. . . .” *Id.*

¹⁹⁸ *Hammer*, 550 P.2d at 823.

¹⁹⁹ *Jarreau*, 217 So. 3d at 302 (“Jarreau’s home is situated on the front portion of the tract . . . and he operates Bayou Construction & Trucking Co. . . . over the remainder of the tract.”).

²⁰⁰ *See id.*

²⁰¹ *See Luber v. Milwaukee Cty.*, 177 N.W. 2d 271, 384 (Wis. 1970).

²⁰² Brief Amici Curiae Don Howard Williams, *supra* note 174, at 15 (“Compensation is not ‘just’ when it allows the condemnor to artificially compensate only for the land, and not for the fact that a business which is integral to that land *and* cannot be easily relocated is wiped out by the taking.”).

²⁰³ Sherman, *supra* note 37.

²⁰⁴ *Id.* (“I dug up pretty much the whole property. I started in the front. I would have started in the back.”).

²⁰⁵ Brief Amici Curiae NFIB, *supra* note 52, at 8 (“The business might entirely lose its ‘trade routes’ if forced to relocate to another City, where it must start fresh.”). *See also* Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. REV. 283, 353 (1991) (“The Hammer court thus held that a temporary loss of profits during relocation resulting from the taking of property on which a business was conducted was a ‘damaging’ of property for which the Alaska constitution mandates compensation.”).

²⁰⁶ *See, e.g.*, Brief Amici Curiae NFIB, *supra* note 52, at 9–10 (“[O]ur hypothetical family-run

the dirt could play a significant role in satisfying existing and future customers.²⁰⁷ In both circumstances, the businesses will suffer from the disruptions caused by the relocations.²⁰⁸ Many customers will find new businesses to serve their needs in the time it takes for a business to relocate.²⁰⁹

Since the government forces the property owners into an involuntary transaction, the government should bear the burden it causes to others.²¹⁰ Surely, it is the government's job to protect the people, and it should not be permitted to harm citizens unless it provides compensation to make those citizens whole again.²¹¹ As *Hammer* reminds us, all other parties in society can be held responsible for lost profits in other legal settings, such as tort actions and breach of contract actions, yet the government receives a free pass when it forces citizens into an involuntary transaction.²¹² Furthermore, people can insure against other unexpected occurrences in the their life, such as devastating weather. Insurance should not be necessary for property owners as "the Takings Clause of the Fifth Amendment [acts as] a form of insurance," compensating for the losses caused to an individual.²¹³

restaurant might provide evidence that with condemnation its only available option for relocation was to a neighboring community," where "the company's base of regular customers has been displaced.").

²⁰⁷ See *id.* at 7–8 ("Condemnation may also inflict long-term injuries, as small businesses may find it difficult (sometimes impossible) to locate a comparable site that will satisfy their business needs with an affordable price-point.").

²⁰⁸ See *id.* at 7 ("Small businesses are especially vulnerable because eminent domain may cause temporary disruptions.").

²⁰⁹ See *id.* at 7–8.

²¹⁰ See *Bailey v. United States*, 78 Fed. Cl. 239, 260 (Fed. Cl. 2007) (explaining how eminent domain is an involuntary transaction: "[O]nce the involuntary 'transaction' accomplished by the eminent domain process is completed . . . that interest is no longer the property owner's to sell.").

²¹¹ See *LOCKE*, *supra* note 58, at 62; see also *United States v. Reynolds*, 397 U.S. 14, 16 (1970).

²¹² *State v. Hammer*, 550 P.2d 820, 824 (Alaska 1976). See also Tara Kinman, *Striking a Balance in the Valuation of Temporary Takings: Examining the Award of Lost Profits in Primetime Hospitality, Inc. v. City of Albuquerque*, 40 N.M. L. REV. 337, 346 (2010) (providing another example where lost profits are recoverable: "[M]odern conversion law has recognized that lost profits are recoverable as a consequential damage in all but one jurisdiction.").

²¹³ Eric Kades, *Avoiding Takings "Accidents": A Tort Perspective on Takings Law*, 28 U. RICH. L. REV. 1235, 1240–47 (1994) (highlighting, in one part, the theory of "no compensation" as a replacement for just compensation. Under no compensation, property owners purchase their own insurance, rather than relying on the insurance provided by just compensation). The "no compensation" theory argues that the Takings Clause essentially provides free insurance, creating economic inefficiencies as property owners enter into economically inefficient ventures. Normally, under private insurance, they would avoid these ventures because they would have to pay a premium to receive coverage, making it an inefficient option compared to other, less-risky ventures not requiring insurance. However, the assumption built into the argument is that the government will actually adequately compensate the party involved, similar to a private insurer. *Id.*

B. Rebutting Three Theories Against Awarding Compensation for Consequential Damages, Such as Lost Profits

Hammer highlights three theories for not awarding compensation for lost profits: (1) “that damage to personal property need not be compensated for”; (2) “that the state has taken the land only, and not the business”; and (3) “that the damages are too speculative to be awarded.”²¹⁴ These theories are not only problematic at the state level, but also the national level and the way we interpret the Constitution’s Takings Clause.²¹⁵

1. Damage to Personal Property

In *Hammer*, the Alaska court awarded compensation for damage to personal property because the Alaska Constitution had more stringent protections for just compensation than the U.S. Constitution, which “does not expressly require compensation for *damage* to property.”²¹⁶ However, the distinction in the language is without major difference: the U.S. Constitution states “nor shall private property be taken for public use, without just compensation,” while Article 1, Section 18 of the Alaska Constitution, states “Private Property shall not be taken or damaged for public use without just compensation.”²¹⁷ It seems the only major difference in the language is Alaska includes protections for “damages,” while the U.S. Constitution does not explicitly mention damages to personal property.²¹⁸

The Supreme Court, however, has recognized that a proper understanding of the Takings Clause and just compensation would extend to consequential damages, such as “future loss of profits, the expense of moving removable fixture and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses.”²¹⁹ In the 1945 case of *United States v. General Motors Corporation*,²²⁰ the Court explained that “if the owner is to be made whole for the loss consequent on the sovereign’s seizure of his property,” business losses and other consequential losses “should properly be considered.”²²¹ Then, the Court declined to extend protections to these losses.²²² The Court openly provided less than what just compensation, properly interpreted, would require.²²³

²¹⁴ *Hammer*, 550 P.2d at 823. See also Michael Debow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579, 586 (1995); Oswald, *supra* note 205, at 351–54.

²¹⁵ See *Hammer*, 550 P.2d at 824.

²¹⁶ *Id.*

²¹⁷ U.S. CONST. amend. V.; ALASKA CONST. art. I, § 18.

²¹⁸ *Id.*

²¹⁹ *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945).

²²⁰ 323 U.S. 373 (1945).

²²¹ *Id.* at 379.

²²² *Id.* at 379–80.

²²³ See Kinman, *supra* note 212, at 346 (“[T]he Court noted that consequential damages

The Court in *General Motors Corporation* highlighted three reasons for extending protections to businesses losses and other consequential damages.²²⁴ The first reason was that anyone selling their property would consider those factors in their valuation.²²⁵ Surely, the Court admitted, “all these elements would be considered by an owner in determining whether, and at what price, to sell.”²²⁶

Second, the Court acknowledged that “if the owner is to be made whole for the loss consequent on the sovereign’s seizure of his property, these elements should properly be considered.”²²⁷ In other words, to make someone whole from injury, just compensation would require consideration of these factors to reach a determination of proper compensation.²²⁸ Anything less fails to make the property owner whole again.²²⁹

Finally, the Court’s definition of property would require protections under the Takings Clause as the definition extends beyond the land itself.²³⁰ The Court defined property as “the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.”²³¹ Under that definition, property extends beyond the land itself, also including the use of the land and how to “dispose of it.”²³² Therefore, property under the Takings Clause necessarily includes property beyond the land itself, including the right to use the property and the built up “good-will which inheres in the location of the land” from operating a business on the land.²³³ The Court’s definition of property, therefore, affords property owners more protection under the Takings Clause than the Court actually extends.²³⁴

The Court, through these three reasons, essentially admitted it improperly interpreted the Takings Clause.²³⁵ The arbitrary determination holds the government to a different standard than the rest of society.²³⁶ Despite the Court’s blunt honesty, it maintained the rule in place, disregarding any possible obligation to compensate business losses and other consequential losses.²³⁷ The Court should shift its current

could be considered in calculating market value, as they would likely be used in determining the price an owner would accept for the property; however, they were not awardable as individual damages in condemnation cases.”).

²²⁴ *General Motors Corp.*, 323 U.S. at 377–79.

²²⁵ *Id.* at 379.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *See id.*

²³⁰ *Id.* at 377–78.

²³¹ *Id.* at 378.

²³² *Id.* This understanding of the property also corresponds with Madison’s understanding as laid out in his essay, *Property*. Madison, *supra* note 65.

²³³ *General Motors Corp.*, 323 U.S. at 379.

²³⁴ *Id.* at 379–80.

²³⁵ *See id.* at 377–79.

²³⁶ *See State v. Hammer*, 550 P.2d 820, 824 (Alaska 1976) (finding lost profits calculable and awardable in other legal contexts).

²³⁷ *General Motors Corp.*, 323 U.S. 379–80.

interpretation to meet the broader definition of property acknowledged by the Court itself and actually protected by the Alaska Supreme Court.

2. The State Has Taken the Land Only, and Not the Business

In *Hammer*, Alaska had greater protections in place for just compensation than in *Mitchell*. However, the Alaska court still criticized *Mitchell* Court's understanding of the Takings Clause that "the state takes only the land," thus compensation does not flow to property owners for business losses.²³⁸ Specifically, in *Mitchell* "the destruction" of the business "was an unintended incident of the taking of the land."²³⁹ The view "look[s] at the benefit to the condemnor as a measure of compensation," not the "loss of the owner."²⁴⁰ The eminent domain proceeding, as interpreted by *Mitchell*, "fails to provide a realistic measure of what has been taken."²⁴¹

The harms caused by excluding business losses from just compensation could be significant. For example, farmers make huge investments into their land as they "expend thousands of dollars in preparing land, planting, fertilizing, managing pests and irrigating a crop."²⁴² From there, the "farmer reasonably expects to make at least a modest return on investment—consistent with prevailing markets."²⁴³ But when the government intervenes, the farmers may no longer be able to fulfill "production contracts to sell their products to suppliers long before harvest."²⁴⁴ As a result, the farmers could face serious costs as they "may be forced either to pay money back to the purchaser or to buy commodities from another party in order to avoid a breach when their lands are condemned."²⁴⁵ Under the *Mitchell* standard, where the government is heavily favored at the expense of the property owner, the farmer suffers significant losses without compensation because the government's taking will not be compensated beyond the value of the land.²⁴⁶

Like farmers who have their land "condemned at harvest" Jarreau was "denied compensation for his carefully cultivated commercial-grade dirt," while disrupting his contracts to customers.²⁴⁷ As the amici parties explain, "[i]n condemning Mr. Jarreau's property, the [government] took the land *and* destroyed an established property right (i.e., a contract) with concrete economic value."²⁴⁸ "[A] realistic measure of what has been taken" would include business losses, such as the broken contract.²⁴⁹

²³⁸ *Hammer*, 550 P.2d at 823.

²³⁹ *Id.* at 824 (quoting *Mitchell v. U.S.*, 267 U.S. 341, 345 (1925)).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² Brief Amici Curiae NFIB, *supra* note 52, at 20.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *See Mitchell v. United States*, 267 U.S. 341, 345 (1925).

²⁴⁷ Brief Amici Curiae NFIB, *supra* note 52, at 20.

²⁴⁸ *Id.* at 11.

²⁴⁹ *State v. Hammer*, 550 P.2d 820, 824 (Alaska 1976).

Since the federal interpretation of the Takings Clause is weak in its protections, property owners, like Jarreau, must rely on state protections.²⁵⁰ But in some cases, the protections are not as robust as Alaska's, leaving property owners in a worse position than before the taking.²⁵¹ But as *Hammer* points out, the federal government standard "simply ignor[es], for the purposes of compensation, the destruction of" businesses.²⁵² The government fails to effectively protect the people, or even worse, directly harms the people, by "blind[ing] itself to the realities of condemnation."²⁵³

The farmer example further illustrates how takings can result in a diminution of value in the remaining land, which also diminishes the ability to generate profits.²⁵⁴ For farmers or even ranchers, "a taking that severs an existing farm or ranch may greatly diminish the potential to generate future revenue on the remaining parcel because a smaller plat of land has less production capacity."²⁵⁵ Similarly, Jarreau's remaining land will suffer a diminution in value due to a decrease in productive capacity.²⁵⁶

3. Damages Are Too Speculative

Despite claims that damages are too speculative, they are not seen as too speculative in other legal settings.²⁵⁷ As *Hammer* illustrated: "Loss of profits damages have been awarded in a variety of civil contexts, including tort actions (both personal and business), breach of contract actions, antitrust suits, and suits for infringement of a patent or trademark."²⁵⁸ Moreover, there is a check on abusing compensation for lost profits²⁵⁹—the burden of proof is on the party claiming the losses: "Since such loss of profits is an item of special damages, the condemnee has the burden of proving by a preponderance of the evidence the amount of profits lost as a direct result of the state's taking; such proof must meet the requirement of reasonable certainty as indicated."²⁶⁰ Essentially, the argument that loss of profits damages are too speculative is quite an overstatement.

²⁵⁰ See Brief Amici Curiae Don Howard Williams, *supra* note 174, at 3.

²⁵¹ Compare *S. Lafourche Levee Dist. v. Jarreau*, 217 So. 3d 298, 311 (La. 2017) (compensating takings in Louisiana does "not include los[t] profits"), with *Hammer*, 550 P.2d at 825–27 (compensating takings in Alaska includes lost profits).

²⁵² *Hammer*, 550 P.2d at 824.

²⁵³ *Id.*

²⁵⁴ Brief Amici Curiae NFIB, *supra* note 52, at 21 n.21.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Hammer*, 550 P.2d at 824.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 824–25 ("In any case seeking loss of profits, such damages must be 'reasonably certain': the trier of fact must be able to determine the amount of lost profits from evidence on the record and reasonable inferences therefrom, not from mere speculation and wishful thinking.").

²⁶⁰ *Id.* at 827.

C. New Standard for Just Compensation: (1) Expand Kimball Laundry to Permanent Takings and (2) Adopt Louisiana's Previous Standard

1. Reasoning of *Kimball Laundry* Should Apply to Both Temporary and Permanent Takings

In the Respondent's Brief in opposition to Jarreau's writ of certiorari to the Supreme Court, the Levee District argued that *Kimball Laundry* grants compensation for going-concern value "when the government takes temporary use of a business for itself," which is not "the case in any permanent taking of fee business property."²⁶¹ While the Respondent correctly interpreted *Kimball Laundry*, the Court should reconsider its arbitrary distinction between temporary and permanent takings.²⁶²

Justice Douglas, in his *Kimball Laundry* dissent, disagreed with the majority's distinction between permanent and temporary takings: "[w]hy the latter is compensable when the former is not is a mystery."²⁶³ Justice Douglas found permanent takings to be more harmful to property owners than temporary takings, explaining "[t]here would be a complete destruction of the trade-routes if the taking of the plant were *permanent* and a depreciation of them (I assume) where it is *temporary*."²⁶⁴

Justice Douglas questioned the Court's distinction because he opposed compensating consequential damages in any taking—temporary or permanent—but his point inadvertently helps illustrate why both temporary takings and permanent takings should receive compensation.²⁶⁵ Specifically, if permanent takings are potentially more burdensome on a business, they should receive similar, not less, compensation for business losses under the Fifth Amendment.²⁶⁶

The Court in *Kimball Laundry* downplayed the impact a permanent taking could have on a business.²⁶⁷ Consider, for example, a similar situation to *Kimball Laundry*, where all else is the same, except the government permanently takes the laundromat.

²⁶¹ Brief in Opposition at 20, 22, *S. Lafourche Levee District v. Jarreau*, 217 So. 3d 298 (La. 2017) (No. 17-163), 2017 WL 4251905.

²⁶² See Glynn S. Lunney, Jr., *Compensation for Takings: How Much is Just?*, 42 CATH. U. L. REV. 721, 746 (1993) ("While there are factual differences between the paired cases (temporary rather than permanent taking, private party rather than government as the source of the expectation, leasehold rather than fee interest), it is not clear that these factual differences justify the differing outcomes.").

²⁶³ *Kimball Laundry Co. v. United States*, 338 U.S. 1, 23 (1949) (Douglas, J., dissenting).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ See *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 83–84 (1957) ("But here again, the condemnee in a temporary taking seems no more deserving of special consideration than a condemnee whose fee is taken and whose entire good will is destroyed.").

²⁶⁷ *Kimball Laundry*, 338 U.S. at 11 ("[O]nly the physical property has been condemned, leaving the owner free to move his business to a new location.").

This action could be incredibly disruptive and have a devastating impact on a business's intangible value, such as goodwill.²⁶⁸ For instance, in a large city, the laundromat's success is based on how well it serves its nearby customers, building up trust, while offering convenient service.²⁶⁹ Taking the property and requiring the business to transfer to a new location hurts the intangible value of the business—customers will not follow despite the good service because the convenience of a closer laundromat will likely prevail.²⁷⁰ The business would need to start from scratch and compete against others for clients.²⁷¹ In *Kimball Laundry*, the business had operated for at least “eighteen years preceding the taking.”²⁷² Moving the business to a new location, away from its customer base, could have a devastating impact on the business's profits, built upon the goodwill of its customers.²⁷³

In circumstances where a business operation is not easily transferable to a new, comparable location, compensation should be granted for consequential intangible losses, such as the loss of an established customer base.²⁷⁴

2. Adopt Louisiana's Pre-2006 “Full Extent of the Loss” Standard for Just Compensation²⁷⁵

In 1974, Louisiana enacted a Constitutional requirement for compensation “to the full extent of [the] loss,” adjusting the previous 1921 language of “just and adequate compensation.”²⁷⁶ The “full extent of [the] loss” standard “broadened the measure of damages,” requiring that the impacted property owner “be placed in an equivalent financial position to that which he enjoyed before the taking.”²⁷⁷ These included

²⁶⁸ See *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, *supra* note 266, at 74–75.

²⁶⁹ See *id.* (“[Goodwill] inheres in the business aside from the physical property and grows from the personality and ability of the proprietor, the reputation of the business and the customers' habit of dealing with a firm due to its tradition and familiarity.”).

²⁷⁰ See *id.* at 75 (“[For] good will, often completely destroyed or greatly damaged when the owner must move from the neighborhood to some other locale, American courts rarely admit giving compensation.”).

²⁷¹ See *id.*

²⁷² *Kimball Laundry*, 338 U.S. at 8.

²⁷³ See *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, *supra* note 266, at 75 (“[D]ismissing [goodwill] loss, as one court has, by stating that ‘a good plumber should be able to continue his business in almost any location and do as well as he formerly did in a neighborhood where in many homes there was a lack of adequate plumbing facilities,’ expresses business naiveté.”).

²⁷⁴ See *id.* at 74–75.

²⁷⁵ *S. Lafourche Levee Dist. v. Jarreau*, 217 So. 3d 298, 306 (La. 2017).

²⁷⁶ *Id.* See Megan S. Peterson, *Condemnation Blight: The Need for Adoption in Louisiana*, 57 LOY. L. REV. 299, 307 (2011); see also Howard, *supra* note 160, at 821.

²⁷⁷ *Jarreau*, 217 So. 3d at 306.

“inconvenience and loss of profits from the takings of business premises so that landowners were compensated for their loss, not merely the loss of their land.”²⁷⁸ The “full extent of the loss” standard is similar to the protections provided in *Kimball Laundry*, except it extends to both permanent and temporary takings.²⁷⁹ Most importantly, the standard accurately reflects what has been taken, while the current federal *Mitchell* standard, “fails to provide a realistic measure of [this].”²⁸⁰

D. Practical Benefits: Compensation for Lost Profits Would Force the Government to Change Its Approach to Eminent Domain in Two Crucial Ways

Two big practical benefits will flow from a requirement that compensation extends to lost profits. First, the government will be more cautious in choosing to use its eminent domain power since it could result in higher costs.²⁸¹ This could help prevent abuses as in *Kelo*, where the government claimed the land for a supposedly better purpose, yet ultimately harmed the community.²⁸² By providing broader compensation for takings, such as consequential damages and incidental losses, the government would more carefully use its eminent domain power, and only when absolutely necessary.²⁸³ In addition to using the power more sparingly, it also could lead to better choices for use of the takings power. Essentially, the government will try to select a condemnee who will be least impacted by the taking to avoid high compensation costs.²⁸⁴ For example, in the case of *Jarreau*, if just compensation included lost profits, the government might have pursued a different source of dirt if a lower cost option was available. While the source might not be as conveniently located as Jarreau’s dirt, the government could have a cost incentive to acquire the dirt elsewhere, perhaps from a dirt plot not currently in use for a business. These prudent selections of takings would benefit the person operating the business, but also the customers who interact with the business, lessening disruptions to business transactions and the broader economy.²⁸⁵

²⁷⁸ *Id.*

²⁷⁹ *Kimball Laundry Co. v. United States*, 338 U.S. 1, 13 (1949) (quoting *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910)).

²⁸⁰ *State v. Hammer*, 550 P.2d 820, 823 (Alaska 1976).

²⁸¹ *State v. Alaska Laser Wash Inc.*, 382 P.3d 1143, 1153 (Alaska 2016) (Fabe, J., dissenting in part) (“[B]ecause the State could control the amount of damages by, for example, ‘giving precise and early notice,’ a business owner could claim lost profits as additional compensation.”).

²⁸² McGeehan, *supra* note 17.

²⁸³ Brief Amici Curiae Pacific Legal Foundation, *supra* note 49, at 15 (“[B]y preventing the government from transferring the business costs associated with condemnation to individual owners—which is precisely what occurs when such losses are excluded from compensation—the government is forced to consider the full and actual costs and benefits of eminent domain.”).

²⁸⁴ *Id.* (“As a result, the government will make more economically efficient condemnation decisions.”).

²⁸⁵ *Id.* at 16 (“If this prevents some public projects from going forward, it is only because the projects did not make overall economic sense in the first place.”).

The second major benefit is that the government would have an incentive to offer the business reasonable advance notice, providing more time to adjust to the disruption.²⁸⁶ Rather than the challenges of adjusting to the random actions of the state, a reasonable time frame to respond to the taking would alleviate some of the costs to businesses.²⁸⁷ When the government taxes citizens, it does not randomly choose days and capriciously spring costs on them, upending their lives.²⁸⁸ If it did, people would revolt. The current, scheduled taxation system allows citizens to plan their budget, spending, and life according to the predictable yearly occurrence of Tax Day. Some targets of eminent domain are not as fortunate to have advance notice, causing serious disruptions in their lives.²⁸⁹ Abuse of the tax power would likely stir political changes because taxes apply to every member of society.²⁹⁰ Because eminent domain only impacts a small minority of the population, there is likely less political willpower behind reforms.²⁹¹

For Jarreau, advance notice could have been far less disruptive²⁹² and could have allowed him to complete his contractual obligations, keep his customers, and search for a new location for his business.²⁹³

CONCLUSION

The Takings Clause does not require “some form of compensation,” but “just compensation” for a government taking. A proper understanding of just compensation cannot ignore real consequential harms that result from a taking. The Supreme Court in *General Motors Corporation* admitted as much: “[I]f the owner is to be made whole for the loss consequent on the sovereign’s seizure of his property, these elements should properly be considered.”²⁹⁴ By inconsistently providing consequential compensation for temporary takings and not permanent takings, the Supreme

²⁸⁶ *State v. Hammer*, 550 P.2d 820, 827 (Alaska 1976).

²⁸⁷ *Id.*

²⁸⁸ *See, e.g., IRS, Tax Filing Season Begins Jan. 29, Tax Returns Due April 17; Help Available for Taxpayers* (Jan. 4, 2018), <https://www.irs.gov/newsroom/2018-tax-filing-season-begins-jan-29-tax-returns-due-april-17-help-available-for-taxpayers> [<https://perma.cc/W2D5-SJGK>].

²⁸⁹ *See id.*

²⁹⁰ *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI., 12 (1971) (“The system is calculated to implement all strongly felt preferences of majorities and many strongly felt preferences of minorities but to disregard the lesser preferences of majorities and minorities.”).

²⁹¹ *See id.*

²⁹² *S. Lafourche Levee Dist. v. Jarreau*, 217 So. 3d 298, 302 (La. 2017) (showing how the taking occurred abruptly and without advanced notice). The letter “demanded that they ‘immediately cease and desist performing any and all activities upon the property as appropriated.’”

²⁹³ Brief Amici Curiae NFIB, *supra* note 52, at 7.

²⁹⁴ *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945).

Court has a foot in two irreconcilable camps.²⁹⁵ The Court should reconsider its stance on permanent takings in order to create a consistent standard that adequately protects its citizens, similar to the previous “full extent of the loss” standard in Louisiana.²⁹⁶ Society and the Court should not become comfortable with interpretations of the law that bypass foundational legal protections at the expense of a small minority in the name of convenience, cost saving, or the public good.²⁹⁷

²⁹⁵ *Id.* See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 14, 15 (1949).

²⁹⁶ See *Jarreau*, 217 So. 3d at 306.

²⁹⁷ See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”); *State v. Hammer*, 550 P.2d 820, 827 (Alaska 1976) (“Placing such a burden on the property owner is no more . . . just than assessing a levy against him but no others.”); Peterson, *supra* note 276, at 304 (“[T]he public is better equipped than the individual landowner to bear the burden of public improvements.”). See also Madison, *supra* note 65 (explaining how an unjust government takes property “by arbitrary seizures of one class of citizens for the service of the rest”).

