EMINENT DOMAIN LAW AND "JUST" COMPENSATION FOR DIMINUTION OF ACCESS

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TABLE OF CONTENTS

> *[The] power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right of compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other that they may be said to exist, not as separate and distinct*

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> *principles, but as parts of one and the same principle . . . And in this there is a natural equity which commends it to every one.*[1]

INTRODUCTION

The Just Compensation Clause of the Fifth Amendment of the United States Constitution[2] simultaneously confirms the government's authority to appropriate private property and restricts that power to appropriation for public use for which just compensation must be paid.[3] A total taking[4] may entail physical occupation of private property by a governmental entity or a regulation that, while not physically invasive, deprives the owner of all beneficial use of his property.[5] In the case of physical takings,[6] the just compensation mandate entitles a condemnee to economic remuneration for the value of the property taken by the State.[7] The fair market value standard for compensation ensures that the property owner is made whole such that his economic position prior to the taking equals his status thereafter.[8]

With the increasing complexity of infrastructure and related public projects in the 20th century came an expansion of the property interests

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1 Monongahela Navigation Co. v. United States, 148 U.S. 312, 324–25 (1893).

2 U.S. CONST. amend. V.

3 *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 231–32 (2003). The Just Compensation Clause, the final clause of the Fifth Amendment, dictates that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

4 A total taking might entail the appropriation by the state of an entire plot of privately owned land. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002). A total taking may also be regulatory in nature, whereby government action deprives a landowner of all beneficial use of his property without actually appropriating it. *See* Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1017 (1992). By contrast, a partial taking involves acquisition of an interest in the property that is less than the entire property owned. *See* Carlos A. Kelly, *Eminent Domain: Identifying Issues in Damages for the General Practitioner*, FLA. B.J., May 2009, at 52, 52.

5 *See* Kurtis A. Kemper, Annotation, *Elements and Measure of Compensation in Eminent Domain Proceeding for Temporary Taking of Property*, 49 A.L.R.6th 205, 18–19 (2009).

6 This Note will not discuss cases in which regulation has deprived property of value.

7 Kemper, *supra* note 5, at 19.

8 8A PHILIP NICHOLS ET AL., NICHOLS ON EMINENT DOMAIN § 16.01 (Matthew Bender, 3rd ed. 2013). The same is true in the event of a partial taking. A landowner is entitled to reimbursement for the net damages to his remainder property in addition to the fair market value of the independent parcel taken. Jack R. Sperber, *Just Compensation and the Valuation Concepts You Need to Know to Measure It*, SP007 ALI–ABA 1, 8–9 (2009). This inclusion of diminution of value in the just compensation calculation for condemnees in partial takings cases was meant to ensure that property owners are paid for all that is taken from them in the event that a governmental entity exercises its eminent domain power. Bos. Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910) ("[Just compensation] 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?").

considered compensable under the Fifth Amendment.[9] For some types of non-physical property damage, such as impairment of access, courts specifically delineated rights incident to property ownership that would trigger the just compensation requirement in the event of harm caused by state action.[10] While a property right to reasonable access is now uniformly accepted,[11] however, the scope of that right remains poorly defined.[12] As a result, the compensability for impairment of the right of access is a continued source of litigation.[13] This uncertainty has important implications for both property owners and state governments, as impairment of access can significantly impact a property's market value.[14]

A majority of courts now employ the "substantial loss of access" test to determine compensability in impairment of access cases in light of this ambiguity.[15] Unlike the economic remuneration approach to damages used when property is condemned, the substantial loss doctrine dictates that impairment of the property right of access is not automatically compensable.[16] Instead, compensation is required only when remaining access is unreasonably deficient,[17] shielding the state from compensating landowners who would be entitled to payment under a market value-based approach.[18] This Note argues that this

9 William B. Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEX. L. REV. 733, 734 (1969); *see also* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 120–30 (1999); Joseph G. Hebert, comment, *Expropriation—Consequential Damages Under the Constitution*, 19 LA. L. REV. 490, 492–94 (1959).

10 Stoebuck, *supra* note 9, at 734 (courts have created "jurally enforced rights and privileges arising out of the relation of an owner . . . having an interest in the land").

11 *See infra* pp. 8–9 and note 40.

12 Kurt H. Garber, *Eminent Domain: When Does A Temporary Denial of Access Become A Compensable Taking?*, 25 U. MEM. L. REV. 271, 273 (1994).

13 Stoebuck, *supra* note 9, at 733 (diminution of access cases have "been a fruitful source of litigation in the courts of all the states, the decisions have been conflicting, and often in the same state irreconcilable in principle"). Impairment of access refers to all injury less than a total elimination of access, which is compensable as a taking. *See* Jeremy P. Hopkins, *Just Compensation: Elementary Principles and Considerations to Ensure the Property Owner is Made Whole*, SL050 ALI–ABA 53, 117 (2006).

14 *See infra* Part III.B.

15 8A NICHOLS, *supra* note 8, § 16.03.

16 *See, e.g.*, State v. Petropoulos, 346 S.W.3d 525, 532 (Tex. 2011) (holding that landowners are not entitled to compensation for loss of access absent a material and substantial impairment, "even if the remainder of their property has lost some degree of value." (quoting State v. Heal, 917 S.W.2d 6, 11 (Tex. 1996))).

17 *See, e.g.*, Wilbert Family Ltd. P'ship v. Dall. Area Rapid Transit, 371 S.W.3d 506, 510 (Tex. App. 2012). For an explanation of this standard, see also *supra* Part II.A.

18 *See* George W. Clarke, Note, *Compensation for Loss of Access Under Eminent Domain: An Evaluation of Proposed New York Legislation*, 26 SYRACUSE L. REV. 899, 901 (1975) ("This limitation serves as a useful control on the amount of compensation owed . . . [.]"); Stoebuck, *supra* note 9, at 748 ("The substantial-loss theory seeks to strike a balance between the owner's desire for compensation for every measurable loss and the public's desire to be insulated from millions of petty claims."). In recent impairment of access cases, application of this standard has

approach is fraught with inconsistencies and falls far short of the constitutional requirement for just compensation, and proposes that all landowners who suffer a demonstrable diminution of the right of access as a result of government action should be entitled to compensation. This change would clearly delineate the point at which interference with this property interest would be compensable and would ensure that no individual landowner bears burdens associated with public improvement projects that should rest on the shoulders of the taxpayers of the municipality.[19]

Part I of this Note tracks the development of just compensation valuation and recognition of a property right of access. Part II examines application of the substantial impairment of access doctrine, with particular attention paid to non-compensable circuity of travel and diversion of traffic damages. Part III analyzes the ways in which the current substantial impairment of access doctrine creates inconsistent and inequitable results that conflict with the fairness principle that is central to just compensation jurisprudence. Part IV proposes that an economic remuneration approach to assessment of damages in diminution of access cases—even when no physical portion of the property at issue has been appropriated for public use—would better satisfy both the constitutional mandate and the judicially-created definition of appropriate compensation.

I. BACKGROUND

A. *The Just Compensation Mandate*

Where a physical taking of private property by a government entity has occurred, the United States Constitution and most state constitutions require that just compensation be given to the property owner as payment for the appropriation.[20] In 1947, the Supreme Court reaffirmed in *Adamson v. People of the State of California*[21] an

often left landowners without recourse for harm inflicted on their property by government action. *See, e.g.*, State, Idaho Transp. Bd. v. HI Boise, LLC, 282 P.3d 595, 597 (Idaho 2012) (diversion of traffic caused by reconfigured intersection that provided loss of business damages between $7.1 and $7.5 million was not compensable); State v. Kimco of Evansville, Inc., 902 N.E.2d 206, 209 (Ind. 2009) (street reconfiguration that prevented future expansion of existing points of ingress and egress caused estimated $2.333 million drop in market value but was not compensable); Burris v. Metro. Transit Auth., 266 S.W.3d 16, 20–24 (Tex. App. 2008) (construction of light rail line eliminated all points of entry to commercial property except one that got 97.5% less use than the main thoroughfare but was not compensable).

19 *See infra* note 23.

20 Nichols, *supra* note 8, § 16.01. North Carolina is currently the only state to have no explicit provision in its constitution for eminent domain compensation. *Id.*

21 332 U.S. 46 (1947).

interpretation of the Fourteenth Amendment that makes the Takings Clause fully applicable against state governments, endorsing the notion that the right to receive just compensation for a state invasion of property is a "fundamental right" safeguarded by the Bill of Rights.[22] The just compensation guarantee rests on principles of equity and fairness, purporting to ensure that no individual landowner is forced to bear public burdens.[23]

The measurement of the compensation owed to a condemnee in an eminent domain proceeding is a judicial inquiry,[24] and state legislatures cannot detract from the constitutionally mandated minimum.[25] In accordance with the Supreme Court's emphasis on indemnity,[26] this minimum is the amount that will reimburse the landowner for the "full and perfect equivalent of the property taken."[27] Just compensation in a total physical condemnation, then, is the fair market value of the

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22 *Id.* at 84–85. The Fifth Amendment was first incorporated as to the states in Chi., B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897) ("[A] judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment [sic] of the constitution [sic] of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."). *See also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (confirming that rights that are "explicitly or implicitly protected by the Constitution" are "fundamental" rights); Monongahela Navigation Co. v. United States, 148 U.S. 312, 324–25 (1893) ("[I]n any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government. . . . [The] power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power[.]"); Bailey v. State, 500 S.E.2d 54, 68 (N.C. 1998) ("We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State . . . . This principle is considered in North Carolina as an integral part of the law of the land." (quoting Long v. City of Charlotte, 293 S.E.2d 101 (N.C. 1982) (internal quotation marks omitted)).

23 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."); *see also* United States v. Fuller, 409 U.S. 488, 490 (1973).

24 *Monongahela Navigation Co.*, 148 U.S. at 327. As the Supreme Court noted in *Monongahela Navigation Co.*, it would be tremendously unjust to permit a governmental entity to take away private property and then determine for itself how much compensation it deemed appropriate. *Id.* at 327–28.

25 Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 304 (1923) ("Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute.").

26 *Id.*

27 *Id.* This amount can also be described as the monetary sum that will make the property owner whole. Olson v. United States, 292 U.S. 246, 255 (1934); *see also, e.g.*, United States v. 564.54 Acres of Land, 441 U.S. 506, 516 (1979); United States v. Va. Elec. & Power Co., 365 U.S. 624, 633 (1961); *see also* United States v. Reynolds, 397 U.S. 14, 16 (1970) ("The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." (citations omitted)).

property on the date of the taking.[28] In the case of partial physical takings,[29] the indemnity principle manifests itself in the concept of severance damages, which allow for compensation for the diminution in the market value of a landowner's remaining property in addition to compensation for the market value of the parcel actually taken.[30] This valuation standard reflects the judicial desire for economic remuneration and indirectly compensates a landowner for any type of injury that adversely affects the fair market value of the remainder after the taking.[31]

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28 Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 (1984); *see also* Palazzolo v. Rhode Island, 533 U.S. 606, 625 (2001); *Olson*, 292 U.S. 246. The fair market value test is used in state as well as federal courts. *See, e.g.*, United States v. 1.604 Acres of Land, 844 F. Supp. 2d 668 (E.D. Va. 2011); City of Mission Hills v. Sexton, 160 P.3d 812 (Kan. 2007); Spiegelberg v. State, 717 N.W.2d 641 (Wis. 2006). The inquiry in eminent domain cases is what a willing buyer would pay a willing seller at the time the taking occurs. *Kirby*, 533 U.S. at 10. Any diminution in value that would affect the price that a willing buyer would pay for the property necessarily factors into the just compensation calculation. United States v. 33.90 Acres of Land, 709 F.2d 1012 (5th Cir. 1983); City of New London v. Picinich, 821 A.2d 782 (Conn. App. Ct. 2003); Silver Creek Drain Dist. v. Extrusions Div., Inc., 663 N.W.2d 436, 442 (Mich. 2003) ("[T]he proper amount of compensation for property takes into account all factors relevant to market value."); Dennis v. City Council of Greenville, 646 So. 2d. 1290 (Miss. 1994). Only in the rare circumstances in which determining fair market value is prohibitively difficult or application of the test would result in injustice to the landowner (for instance, the owner would remain economically worse off after the condemnation) will a court create and apply other standards. United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950).

29 *See* Sperber, *supra* note 8, at 8.

30 Wash. Metro. Area Transit Auth. v. United States, 54 Fed. Cl. 20 (2002); *see also* Mich. Dep't of Transp. v. Tomkins, 270 Mich. App. 153, 159 (Mich. Ct. App. 2006); State v. Simon Family Enters., LLC, 842 A.2d 315, 319 (N.J. Super. Ct. App. Div. 2004). In federal and some state courts, this calculation is known as the before and after rule. Sperber, *supra* note 8, at 8–9 ("Virtually all jurisdictions allow the use of this methodology, and many of them mandate its use."). *See, e.g.*, Metro. Water Dist. of So. Cal. v. Campus Crusade for Christ, Inc., 161 P.3d 1175 (Cal. 2007); Comm'r of Transp. v. Shea, 802 A.2d 239 (Conn. Super. Ct. 2002); Henry Cnty. Water and Sewer Auth. v. Adelson, 603 S.E.2d 714 (Ga. Ct. App. 2004); City of Mission Hills v. Sexton, 160 P.3d 812 (Kan. 2007); State, Dep't of Transp. & Dev. v. Restructure Partners, LLC, 985 So.2d 212 (La. Ct. App. 2008); Coldiron Fuel Ctr., Ltd. v. State, 778 N.Y.S.2d 208 (N.Y. App. Div. 2004); State v. Henrikson, 548 N.W.2d 806 (S.D. 1996); State v. State Street Bank & Trust Co., 359 S.W.3d 375 (Tex. App. 2012); City of Va. Beach v. Oakes, 561 S.E.2d 726 (Va. 2002); *see also* 8A NICHOLS, *supra* note 8, § 16.01 (citing multiple authorities). Nichols also notes: "An exception to the general rule exists where the injury to the remainder can be 'cured' at a cost which is less than the severance damages calculated on a before and after basis. This allows the condemnor an opportunity to mitigate the loss to the defendant and, assuming accurate and fair cost to cure estimates, save the condemnor funds while leaving the condemnee as well off as before the taking." *Id.* (footnote omitted) (citing multiple authorities). Because "cost to cure" is not likely to be applicable in diminution of access cases, it is outside the scope of this Note.

31 Hebert, *supra* note 9, at 495–96 ("As long as the acquisition adversely affects the market value of the remaining property, any type of injury would seem to be recoverable as severance damages." (footnote omitted)). Courts have delineated several exceptions to the notion that *any* diminution in value of a remainder parcel is compensable. First, damages must be caused directly by the taking in order to be compensable. 8A NICHOLS, *supra* note 8, § 16.01 (citing multiple authorities); Robert I. Scanlan, *Non-Compensable Damages*, SH053 ALI-ABA 237, 239 (2003); *see also* United States v. 38.60 Acres of Land, 625 F.2d 196, 198–99 (8th Cir. 1980) ("[I]n a partial taking, the landowner may recover as just compensation not only the fair market value of the land

With the increasing complexity of public projects in the late nineteenth and twentieth centuries came further expansion of the property interests considered compensable under the Fifth Amendment.[32] Cognizant of the injustice caused by circumstances under which landowners' property was injured though no part was physically condemned[33]—leaving owners without recourse in the absence of a taking of property[34]—twenty-eight states amended their constitutions to provide a basis for compensation in the event that land is "damaged" but not "taken."[35] Even in the remaining "takings" states,

actually taken, but also severance damages for the diminution in value of the remainder directly caused by the taking itself and by the use of the land taken." (citations omitted)). Second, severance damages may only be awarded for real diminution of value that can be shown to a reasonable certainty, making remote or speculative damages non-compensable. 8A NICHOLS, *supra* note 8, § 16.01; *see, e.g.*, *Oakes*, 561 S.E.2d at 728–29 (2002) ("In ascertaining such damages, both present and future circumstances which actually affect the value of the property at the time of taking may be considered, but remote and speculative damages may not be allowed." (citations omitted)). Third, if the remainder property is benefitted by the taking, the amount of the benefit must be subtracted from the severance damage award. *Coldiron*, 778 N.Y.S.2d at 209. Finally, some jurisdictions hold that only damages that are special or peculiar to the condemnee may be recovered, though other courts continue to find any decline in the fair market value of the remaining property compensable. Hopkins, *supra* note 13, at 107; *see, e.g.*, City of Lakewood v. DeRoos, 631 P.2d 1140, 1142 (Colo. App. 1981) ("[I]n order to be compensable the damage to the property must affect some right or interest which the landowner enjoys and which is not shared or enjoyed by the public generally." (quoting Troiano v. Colo. Dep't of Highways, 463 P.2d 448, 452 (1969) (alteration in original))); State v. Strom, 493 N.W.2d 554, 560 (Minn. 1992) ("[I]n cases where there is a partial taking, the injured owner is not required to show that the injury is peculiar to his remaining property. It is sufficient that the damage is shown to have been caused by the taking of part of his property even though it is damage of a type suffered by the public as a whole." (quoting City of Crookston v. Erickson, 69 N.W.2d 909, 912–13 (Minn. 1955))).

32 *See supra* note 9.

33 Michael L. Stokes, *Access Management: Balancing Public and Private Rights in the Modern "Commons" of the Roadway*, 60 CLEV. ST. L. REV. 585, 601 (2012).

34 Stoebuck, *supra* note 9, at 734 ("Concerned that the word 'property' should be given its 'plain, popular, and obvious meaning,' and that condemnors should not be fiscally burdened by paying for 'consequential' harms, American courts . . . conceived of property in a physical sense in eminent domain cases." (footnote omitted)). Without a physical invasion, there could be compensation only if granted by an express legislative authorization or if all use and enjoyment of the property was destroyed so that the public action amounted to a constructive taking. Clarke, *supra* note 18, at 899 n.4 (1975).

35 Hebert, *supra* note 9, at 492–94; *see also* Stokes, *supra* note 33, at 601 (Illinois, the first of the states to thus amend its constitution, added a damages provision that stated that "private property shall not be taken *or damaged* for public use without just compensation." (quoting Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 119 (1999) (emphasis added)). Louisiana was among the first states to adopt such a provision, which it applied to both severance and consequential damages, recognizing:

> The injury occurring in severance and consequential damages is essentially the same, that is, there is a deflation in the market value of property which has not been physically taken. Thus, there would appear to be no reason why the absence of a taking of an injured whole, as in a consequential damage situation, should be treated any different from the absence of a physical taking with respect to an injured part of the property, as in a severance damage case.

while the rights of the public seemingly remain paramount to the rights of individual landowners, there is still a trend among courts toward recognition of non-traditional property rights in eminent domain proceedings.[36] This trend is further evidence of the importance to the judiciary of the equitable principle of indemnity and the focus on compensating landowners for the full extent of the damages caused to their property interests by government projects.[37]

B. *The Property Right of Access*

One of the non-physical interests of property ownership that is now accepted by takings and damages states alike as susceptible to being "taken" by the state is the property right of access.[38] Generally, amidst the bundle of rights incident to property ownership are: (1) the right to reasonable ingress and egress from one's property onto a public way adjacent to the land and (2) the right to access the broader infrastructure system from the immediately adjacent road.[39] While these two elements combine to form a right of access that is definitively considered a property interest in jurisdictions across the country,[40] the

Hebert, *supra* note 9, at 494. For an overview of which state constitutions retain language that indemnifies landowners only in the event of a physical "taking" of private property and which contain language that allows a landowner to recover when his property is taken or damaged, see John R. Hamilton & J. Casey Pipes, *Right of Way Changes Without a Physical Taking: Is There An Inverse Condemnation Claim?*, SS035 ALI–ABA 723, 725–26 (2011).

36 Stokes, *supra* note 33, at 601.

37 Stoebuck, *supra* note 9, at 734 ("This change is wholly consonant with a basic principle of property law that 'property' rightly denotes, not the physical thing land but certain jurally enforced rights and privileges arising out of the relation of an owner . . . having an interest in the land.").

38 *Id.* The difference between the jurisdictions lies in when loss of access is compensable. In takings jurisdictions, only a loss of access that rises to the level of a "taking" is compensable. In damage jurisdictions, impairment of the right of access is compensable as damage to an interest in real property caused by government action. Stokes, *supra* note 33, at 601–02.

39 8A NICHOLS, *supra* note 8, § 16.03; *see also* Stoebuck, *supra* note 9, at 765 ("The property right of access should be defined as the reasonable capacity of a landowner to reach the abutting public way by customary means of locomotion and then to reach the general system of public ways."). Stoebuck notes that in Bacich v. Board of Control, 144 P.2d 818 (Cal. 1943), "the Supreme Court of California undertook to explain why access exists as a species of property: because the courts have so recognized it. . . . It simply would be unfair, in other words, and would be prima facie implausible to argue in our milieu, that a landowner should be unprotected in reaching the adjacent public way." Stoebuck, *supra* note 9, at 736 (footnote omitted).

40 Garber, *supra* note 12, at 273. *See* Lesley v. City of Montgomery, 485 So. 2d 1088, 1089 (Ala. 1986); City of Yuma v. Lattie, 572 P.2d 108, 113 (Ariz. Ct. App. 1977); People v. Edgar, 32 Cal. Rptr. 892, 897 (Dist. Ct. App. 1963); Pinellas Cnty. v. Austin, 323 So. 2d 6, 8 (Fla. Dist. Ct. App. 1975); Metro. Atlanta Rapid Transit Auth. v. Fountain, 352 S.E.2d 781 (Ga. 1987); Brown v. City of Twin Falls, 855 P.2d 876, 878 (Idaho 1993); Streeter v. Cnty. of Winnebago, 357 N.E.2d 1371, 1374 (Ill. App. Ct. 1976); Simkins v. City of Davenport, 232 N.W.2d 561, 564 (Iowa 1975); Lewis v. Globe Constr. Co., 630 P.2d 179, 183 (Kan. Ct. App. 1981); Rieke v. City of Louisville, 827 S.W.2d 694, 696 (Ky. Ct. App. 1991); Hay's W. Wear, Inc. v. State, 624 So. 2d 975, 976 (La. Ct.

scope of that interest has not been well defined.[41] By extension, the point at which the government must compensate a landowner for interference with the ability to enter and leave his property has long been contested by litigants and remains unclear to this day.[42] While the comprehensive elimination of access is compensable as a taking,[43] any lesser impairment of the right of access is judged on its facts to assess the extent to which it interferes with an owner's reasonable—but not wholly unfettered—access to his property.[44] As a result of this uncertainty and the discretion left to the courts for deciding compensability, impairment of the right of access is often excluded from just compensation fair market value calculations altogether.[45]

A closer examination of the two prongs of the right of access demonstrates the various factual scenarios in which diminution of access cases arise. The first access-related landowner interest is simply the ability to get by vehicle from an adjacent roadway onto the property.[46] While there is broad consensus that total elimination of

App. 1993); Lim v. Mich. Dep't of Transp., 423 N.W.2d 343, 345 (Mich. Ct. App. 1988); Hendrickson v. State, 127 N.W.2d 165, 173 (Minn. 1964); State Highway Comm'n v. McDonald's Corp., 509 So. 2d 856, 861 (Miss. 1987); Capitol Plumbing & Heating Supply Co. v. State, 363 A.2d 199, 200 (N.H. 1976); Hill v. State Highway Comm'n, 516 P.2d 199, 200 (N.M. 1973); Dep't of Transp. v. Craine, 365 S.E.2d 694, 697 (N.C. Ct. App. 1988); Boehm v. Backes, 493 N.W.2d 671, 673 (N.D. 1992); Gruner v. Lane County, 773 P.2d 815, 817 (Or. Ct. App. 1989); Truck Terminal Realty Co. v. Commonwealth, 403 A.2d 986, 989 (Pa. 1979); Woods v. State, 431 S.E.2d 260, 262 (S.C. Ct. App. 1993); State v. Gorman, 596 S.W.2d 796, 797 (Tenn. 1980); Brookside Mills, Inc. v. Moulton, 404 S.W.2d 258, 262 (Tenn. Ct. App. 1965); City of San Antonio v. Guidry, 801 S.W.2d 142, 148 (Tex. App. 1990); State Highway Comm'r v. Easley, 207 S.E.2d 870, 875 (Va. 1974); Keiffer v. King Cnty., 572 P.2d 408, 409 (Wash. 1977); Narloch v. Dep't of Transp., 340 N.W.2d 542, 548 (Wis. 1971). Garber, *supra* note 12, at 273 n.5 (collecting cases).

41 Garber, *supra* note 12, at 274.

42 8A NICHOLS, *supra* note 8, § 16.03 ("As early as 1907, the U.S. Supreme Court noted: 'The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting, and often in the same State irreconcilable in principle. The courts have modified or overruled, their own decisions, and each state has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy.'" (quoting Sauer v. New York, 206 U.S. 536, 548 (1907))).

43 Hopkins, *supra* note 13, at 117. *See, e.g.*, Wellswood Columbia, LLC v. Town of Hebron, 992 A.2d 1120 (Conn. 2010) (road closure depriving owners of sole means of access to property amounted to taking of owners' property in violation of state and federal constitutions).

44 8A NICHOLS, *supra* note 8, § 16.03.

45 *See supra* note 18.

46 Stokes, *supra* note 33, at 634. The analysis in this Note also applies to cases where water or railroad access is impaired. *See, e.g.*, Wilbert Family Ltd. P'ship v. Dallas Area Rapid Transit, 371 S.W.3d 506, 509 (Tex. App. 2012) (landowner brought inverse condemnation action after city removed main rail tracks that had been affixed to the property, as they were primary means of supplying materials to the mill and wood fabricating facility operated on the property); Wernberg v. Alaska, 516 P.2d 1191, 1199–1201 (Alaska 1973) (holding that state may not take riparian owner's right of ingress and egress between his land and navigable waters without compensation). However, because cases with those fact patterns arise with much less frequency, they will not be discussed further.

access is compensable as a taking,[47] there are many ways in which vehicular access may be impaired to a lesser degree without leaving property landlocked. For instance, use of existing driveways may be hindered, but not prevented, by public projects.[48] Similarly, alterations to abutting roads may impede landowners from accessing their property from some of the multiple points which were previously available.[49] The second access-related right is the right to access the network of public roads.[50] Infrastructural alterations that affect this facet of the right of access, but do not necessarily make it harder to get onto the property from the immediately adjacent road, can take many forms. For instance, street modifications such as closures and expansions may convert direct access into indirect access,[51] installations of overpasses or bridges may

47 *See, e.g.*, Heath v. Parker, 30 P.3d 746, 750 (Colo. App. 2001) (municipality must compensate landowner abutting public road if formal abandonment of the road deprives landowner of all access to property); Comm'r of Transp. v. Shea, 802 A.2d 239, 254 (Conn. Super. Ct. 2002) (landowner whose property access is totally and permanently eliminated is entitled to recover damages); Stoebuck, *supra* note 9, at 738–41.

48 *See, e.g.*, State v. Kimco of Evansville, Inc., 902 N.E.2d 206 (Ind. 2009) (street reconfigurations prevented shopping center from expanding existing points of ingress and egress, but left existing access points in place); Lake George Assocs. v. State, 857 N.E.2d 517, 518–20 (N.Y. 2006) (installation of turning lanes to and from highway designed to improve safety and construction of sidewalks abutting highway reduced one curb cut by fifty percent and removed another altogether); Metro. Transp. Auth. v. Washed Aggregate Res., Inc., 958 N.Y.S.2d 405, 407–08 (N.Y. App. Div. 2013) (installation of guardrails and change of grade of abutting road prevented trucks from accessing landowner's sand and gravel quarry).

49 *See, e.g.*, City of Phoenix v. Garretson, 302 P.3d 640, 641–42 (Ariz. Ct. App. 2013) (landowner lost driveway access to main downtown thoroughfare but retained access to property from another street); White v. Nw. Prop. Group—Hendersonville No. 1, LLC, 739 S.E.2d 572, 574–75 (N.C. Ct. App. 2013) (as part of road improvement project, existing road was re-graded and a four-foot wall was erected along the boundary such that the driveway that connected to property's garage was no longer accessible, though other access to the property as a whole remained); State *ex rel.* Preschool Dev., Ltd. v. Springboro, 792 N.E.2d 721, 723–24 (Ohio 2003) (city closed curb cut by installing a concrete barrier to maximize safety and traffic flow, replacing eliminated access point with an easement to abutting highway through adjacent property); Burris v. Metro. Transit Auth., 266 S.W.3d 16, 18–21 (Tex. App. 2008) (construction of light rail line eliminated one of two driveways to four-lane main road and left second "exit only," with only remaining access to commercial property existing through parking lot behind the building).

50 Stokes, *supra* note 33, at 626.

51 *See, e.g.*, Miller v. Preisser, 284 P.3d 290, 295–96 (Kan. 2012) (closure of intersection to create controlled-access highway did not affect access to abutting road but moved direct highway access several miles from the property); Adcock v. Miss. Transp. Comm'n, 981 So. 2d 942, 945–46 (Miss. 2008) (highway expansion project left owner without direct access to highway and remaining access to and from the property "wasn't near as good"); Mont. Dep't of Transp. v. Simonson, 87 P.3d 416, 417–18 (Mont. 2004) (as part of highway expansion project, direct access to highway was eliminated and replaced by median crossovers at either end of a frontage road); Nat'l Auto Truckstops v. State, 665 N.W.2d 198, 201 (Wis. 2003) (truck stop lost both direct highway access points due to highway expansion project, and new frontage road could only be accessed at an intersection north of property); State v. Harvey Real Estate, 57 P.3d 1088, 1089–90 (Utah 2002) (state closed an intersection that eliminated direct access to the property from highway).

re-route traffic,[52] traffic controls may divert passersby away from a previously well-travelled entrance,[53] and closure of intersections may force property into a cul-de-sac with access from only one direction.[54] As with vehicular access off and onto the property, access to and from the property via the broader network of public roads has led to compensability issues for some time.[55]

The "substantial impairment of access" test has taken the place of a bright-line rule for delineating which of the multiplicity of fact patterns that generate diminution of access problems constitute an interference with the property right of access and which are non-compensable harms.[56] This test represents a balance struck between property owners' desire for a broad interpretation of the property right of access that would make any measurable loss of value due to public projects compensable, and the narrow interpretation espoused by the government which shields the public coffers from compensation claims

52 *See, e.g.*, Wichita v. McDonald's Corp., 917 P.2d 1189, 1192–93 (Kan. 1999) (conversion of four-lane highway into six-lane freeway, turning frontage road into a "fly-over" street approximately twenty-one feet above its previous grade, would force motorists to pass Wal-Mart property); State v. Momin Props., Inc., 409 S.W.3d 1, 1–2 (Tex. App. 2013) (construction of overpass diverted main flow of traffic which had previously passed directly in front of landowner's gas station).

53 *See, e.g.*, State, Idaho Transp. Bd. v. HI Boise, LLC, 282 P.3d 595, 597 (Idaho 2012) (highway improvement project that reconfigured intersection produced backed-up traffic at hotel's main driveway which impeded access, though driveway was not physically affected); Dale Props. v. Minnesota, 638 N.W.2d 763, 764–65 (Minn. 2002) (closure of median crossover blocked property's direct westbound highway access); Sienkiewicz v. Penn. Dep't of Transp., 883 A.2d 494, 497–98 (Pa. 2005) (reconfiguration of highway interchange required highway traffic to proceed past landowner's service station and convenience store, by and around his closest competitor); Hall v. State, 712 N.W.2d 22, 25–26 (S.D. 2006) (relocation of controlled-access highway interchange, eliminating highway access at that location, resulted in truck stop's loss of business from passing interstate traffic); Texas v. Petropoulos, 346 S.W.3d 525, 532 (Tex. 2011) (highway on which property abutted was converted into a toll road, but frontage on and direct access to highway remained in tact); Ehrhart v. Agency of Transp., 904 A.2d 1200, 1201–02 (Vt. 2006) (placement of median prevented traffic on opposite side of road from directly entering business premises without making detour and U-turn); Gibson v. City of Spokane Valley, 176 Wash. App. 1019, *1–2 (Ct. App. 2013) (construction of three-way roundabout prevented traffic from using only well-known and easily accessible entrance to apartment building complex).

54 *See, e.g.*, Dep't of Transp. v. Bridges, 486 S.E.2d 593, 593 (Ga. 1997) (closure of intersection between public road abutting property and highway did not diminish access to the abutting road but lengthened access to main public thoroughfare); Kau Kau Take Home No. 1 v. City of Wichita, 135 P.3d 1221, 1223–24 (Kan. 2006) (city traffic project increased distance to KFC restaurant from public roads by turning one road into a cul-de-sac just west of property); Boehm v. Backes, 493 N.W.2d 671, 672 (N.D. 1992) (construction of overpass converted abutting street into a cul-de-sac and closed off direct access to street from nearby highway).

55 *See* 8A NICHOLS, *supra* note 8, § 16.03; Hopkins, *supra* note 13, at 117 ("While the elimination of access is certainly a compensable damage, different jurisdictions vary greatly on the standards of compensability for a change or alteration in access.").

56 *See supra* note 55.

in borderline cases that could drain its resources.[57] Under this doctrine, only substantial impairment of access interferes with a compensable property right, while lesser damage is damnum absque injuria—financial injury without legal recourse.[58] Though impairment of either prong of the access right can significantly diminish a property's market value,[59] a closer look at the malleable substantial impairment standard demonstrates that it often precludes compensation for landowners who have suffered significant financial loss, allowing courts to circumvent the just compensation mandate.

II. THE SUBSTANTIAL IMPAIRMENT OF ACCESS DOCTRINE

The substantial impairment of access doctrine creates an exception to the simple market value-based assessment of damages typical of other eminent domain cases.[60] Compensability for interference with the property right of access depends on the severity of the resulting harm to the property owner's interest—a fact-based judgment independent of any finding of diminution of the property's market value caused by the public project.[61] As a result of the discretion left to courts to determine substantiality, there are also widely accepted, judicially-created rules for non-compensability—specifically, for circuity of access and diversion of traffic—that further limit recovery for landowners in access cases.[62]

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57 Stoebuck, *supra* note 9, at 748; *see, e.g.*, Dale Props., LLC v. State, 638 N.W.2d 763, 767 (Minn. 2002) ("[W]e are wary of creating a legal environment in which the cost of regulating traffic and improving roadways becomes prohibitive." (citations omitted)).

58 *See, e.g.*, Spiek v. Mich. Dep't of Transp., 572 N.W.2d 201, 208 (Mich. 1998).

59 *See, e.g.*, City of Phoenix v. Garretson, 302 P.3d 640, 642 (Ariz. Ct. App. 2013) (loss of driveway access to main thoroughfare caused estimated loss of $1.9 million in market value); State, Idaho Transp. Bd. v. HI Boise, LLC, 282 P.3d 595, 597 (Idaho 2012) (diversion of traffic caused estimated loss of business damages between $7.1 and $7.5 million); Mabe v. State, 385 P.2d 401, 404 (Idaho 1963) (appraiser concluded that property lost all commercial value when newly constructed highway caused all traffic to bypass section of old highway on which property abutted); State v. Kimco of Evansville, 902 N.E.2d 206, 209 (Ind. 2009) (street reconfiguration that prevented future expansion of existing points of ingress and egress caused estimated $2.333 million drop of market value); *Dale Props.*, 638 N.W.2d at 765 (closure of median crossover on abutting road caused estimated drop in property value of $800,000); Mont. Dep't of Transp. v. Simonson, 87 P.3d 416, 417–18 (Mont. 2004) (expert testified that elimination of direct access to highway caused decrease in property value of $47,542, because property on a frontage road is less valuable than property in a highway); Split Rock P'ship v. State, 713 N.Y.S.2d 64 (App. Div. 2000) (loss of access to highway caused roughly $900,000 drop in market value); Texas v. Heal, 917 S.W.2d 6, 7 (Tex. 1996) (trial court jury found that diminution in value to remainder property after condemnation caused by traffic bottleneck amounted to $43,147); Dep't of Forests, Parks, and Recreation v. Ludlow Zoning Bd., 869 A.2d 603, 604 (Vt. 2004) (trial court jury awarded more than $150,000 to compensate landowner for lack of year-round access to his property); Gibson v. City of Spokane Valley, 176 Wash. App. 1019, *1 (Ct. App. 2013) (restriction of access to apartment building reduced market value by estimated $1.325 million).

60 *See infra* Part II.A.

61 *See infra* Part II.A.

62 *See infra* Part II.B–C.

A. *What Is "Substantial" Impairment?*

Under the substantial impairment of access doctrine, not all impairment of a landowner's access is compensable. Rather, compensation is dependent upon a showing that the property right of access has been substantially impaired.[63] In practice, this standard results in denial of compensation for a change or diminution of access provided reasonable access remains.[64]

In some courts, access is reasonable unless it has been rendered "unreasonably deficient."[65] For example, in *Burris v. Metropolitan Transit Authority*,[66] construction of a light rail line eliminated one of two driveways from a commercial building to a four-lane main road and left the other "exit only."[67] A third entrance was left intact, but it connected the property to a side street that experienced 97.5% less use than the main thoroughfare via a parking lot behind the building.[68] Relying in part on the fact that access *to* the main road had not been eliminated,[69] the court held that the remaining access was not unreasonably deficient.[70] Other courts deny compensation unless

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63 Breidert v. S. Pac. Co., 394 P.2d 719, 722 (Cal. 1964); *see* Metro. Water Dist. of S. Cal. v. Campus Crusade for Christ, 161 P.3d 1175, 1186 (Cal. 2007) (right of access must be "substantially impaired"); City of Livermore v. Baca, 141 Cal. Rptr. 3d 271, 278 (Ct. App. 2012) (compensation requires showing of substantial impairment of access); *HI Boise*, 282 P.3d at 599–601 (no compensable taking occurs unless right of access is destroyed or substantially impaired, and no reasonable alternative remains); State *ex rel.* Preschool Dev., Ltd. v. City of Springboro, 792 N.E.2d 721, 724 (Ohio 2003) (in loss of access cases, landowner must demonstrate a substantial or unreasonable interference with property right); ASAP Storage, Inc. v. City of Sparks, 173 P.3d 734, 741 (Nev. 2007) (compensability turns on whether impairment substantially interferes with owner's right of access); Hall v. State, 712 N.W.2d 22, 28 (S.D. 2006) (property right of access cannot be taken for public use or materially impaired without compensation); City of Houston v. Song, No. 14–11–00903–CV, 2013 WL 269036, at *2 (Tex. App. 2013) ("[D]iminished value resulting from impaired access is compensable when access is materially and substantially impaired." (citation omitted)); *Gibson*, 176 Wash. App., at *3 (must show that right of access was either eliminated or substantially impaired).

64 *See, e.g.*, Nat'l Auto Truckstops, Inc. v. State, Dep't of Transp., 665 N.W.2d 198, 206 (Wis. 2006) ("Deprivation of direct access to a highway does not constitute a taking of property provided *reasonable access* remains." (quoting Schneider v. State, 187 N.W.2d 172, 175 (Wis. 1971)).

65 Wilbert Family Ltd. P'ship v. Dallas Area Rapid Transit, 371 S.W.3d 506, 510 (Tex. App. 2012).

66 266 S.W.3d 16 (Tex. App. 2008).

67 *Id.* at 18.

68 *Id.* at 20–21.

69 *Id.* at 24.

70 *Id.* The Texas Supreme Court has followed the same test for compensation in loss of access cases. *See* State v. Petropoulos, 346 S.W.3d 525, 532 (Tex. 2011) (conversion of highway on which property fronted to a toll road did not constitute material and substantial impairment of access because property still had frontage on and direct access to highway, and there was no evidence that other access to the property would be affected); State v. Heal, 917 S.W.2d 6, 11 (Tex. 1996) (traffic bottleneck caused by highway expansion project was not compensable because it did not

government action has made remaining access "unsuitable for the property's highest and best use."[71] In *Split Rock Partnership v. State*,[72] the court held that damages were improper for appropriation of .106 acres of an unimproved sixty-five-acre lot that eliminated the property's highway access, absent evidence that this loss of access impaired the development potential of the property for its highest and best use as a commercial office building.[73] The Court reversed a $915,000 award by the Court of Claims on the theory that the diminished access would continue to support the property's degree of development potential that existed prior to the taking.[74] Absent a denial of reasonable access or a similar showing, the substantial impairment of access doctrine precludes reparation for damages to access caused by public projects.

Although courts agree that a reasonableness test applies to the determination of compensable impairment of access, it does not necessarily follow that in applying that assessment they reach the same results when presented with seemingly comparable facts.[75] One fact pattern particularly susceptible to conflicting reasonableness interpretations entails elimination of one access point when others remain. In *State ex rel. OTR v. Columbus*,[76] the court held that construction of an overpass which eliminated direct access to the abutting street was an unreasonable interference with the right of access, even though the property had no developed entrypoint on that road and all routinely used driveways were unaffected by the public project.[77] As in *Burris* above, however, other courts consistently find that retention of access via additional roads negates a finding of unreasonable

materially and substantially impair access, though it was more hazardous and created difficulty turning left onto property).

71 Metro. Transp. Auth. v. Washed Aggregate Res., 958 N.Y.S.2d 405, 412 (App. Div. 2013) (state must compensate landowner if public improvement project so impairs access that it "limits the potential exploitation of the property for its highest and best use" (citations omitted)).

72 713 N.Y.S.2d 64 (App. Div. 2000).

73 *Id.* at 65–66.

74 *Id.* For the opposite outcome, see *Chemung Canal Trust Co. v. State*, 456 N.Y.S.2d 518 (App. Div. 1982) (holding that eliminating point of ingress supporting bank's drive-in teller facility left access unreasonably ill-suited to sustain property's highest and best use—though the bank retained direct access to three other public streets—because commercial bank must have drive-in facilities to be competitive in New York State).

75 46 AM. JUR. 3D *Proof of Facts* § 19 (1998). As the foregoing analysis demonstrates, this can be true of intrastate courts or courts across state boundaries.

76 667 N.E.2d 8 (Ohio 1996).

77 *Id.*; *see also* City of Phoenix v. Garretson, 322 P.3d 149 (Ariz. 2014) (landowner was entitled to compensation for elimination of established access to an abutting roadway even though other streets provided access to the property); Efurd v. City of Shreveport, 105 So. 2d 219 (La. 1958) (construction which completely blocked access to abutting road and substantially interfered with alternate access was unreasonable and caused compensable damages); Finkelstein v. Dep't of Transp., 354 A.2d 14 (Pa. Commw. Ct. 1976) (installation of curbing which prevented access on the southern and western boundaries of property was unreasonable, notwithstanding remaining access by roads on northern and eastern sides).

interference with the property right of access even when direct access to one road is destroyed.[78] Most recurring factual circumstances in loss of access cases are vulnerable to this subjectivity—divergent outcomes occur as well in cases involving cul-de-sacs,[79] curb cuts,[80] frontage roads,[81] median barriers,[82] and changes of grade,[83] to name a few.

78 *See, e.g.*, Merritt v. State, 742 P.2d 397 (Idaho 1986) (preferred access point was eliminated, but reasonable vehicular access remained via other roads); Grossman Invs. v. State, 571 N.W.2d 47 (Minn. Ct. App. 1997) (even imposition of substantial inconvenience caused by closure of one point of access is not compensable when reasonable access remains in at least one direction of travel); White v. Nw. Prop. Group—Hendersonville No. 1, LLC, 739 S.E.2d 572 (N.C. Ct. App. 2013) (it was not unreasonable for state to eliminate access to only entrypoint that connected to garage, because other access onto property as a whole remained); Or. Inv. Co. v. Schrunk, 408 P.2d 89 (Or. 1965) (prohibition on access to abutting street to accommodate twenty-four-hour bus loading zone was not compensable because reasonable access remained from two other roads); Boese v. City of Salem, 595 P.2d 822 (Or. Ct. App. 1979) (although closure of private driveway serving garages in rear of rental units resulted in access that was less satisfactory or even nonexistent for purpose of utilizing garages, such inconvenience was damnum absque injuria and not compensable because landowners retained adequate access to their property from another street for principal purpose of accessing rental units); Gibson v. City of Spokane Valley, 176 Wash. App. 1019 (Ct. App. 2013) (prevention of access to most well-known and easily accessible entrance for potential customers was not unreasonable because alternative access remained).

79 *See* Boehm v. Backes, 493 N.W.2d 671 (N.D. 1992) (construction of a highway overpass which converted abutting road into a cul-de-sac, cut off direct access to the street from the nearby highway, and created an indirect route to the property of an additional six city blocks through a residential neighborhood was an unreasonable impairment of the landowner's right of access). *But see* Dep't of Transp. v. Durpo, 469 S.E.2d 404 (Ga. Ct. App. 1996) (conversion of abutting road into dead end street which necessitated additional mile of travel to reach a nearby highway was not compensable because remaining access was reasonable); Hardin v. S.C. Dep't of Transp., 641 S.E.2d 437 (S.C. 2007) (reconfiguration of road that led to highway, which left owner on a one-way street ending in a cul-de-sac and limited access to highway by requiring navigation of a series of secondary roads, was reasonable).

80 *See* City of Sevierville v. Green, 125 S.W.3d 419 (Tenn. Ct. App. 2002) (installation of curbing which converted unlimited access to highway along property border to limited access at two driveway openings was unreasonable because of the restrictions it placed on the size of area by which property could be accessed and necessarily changed the amount of traffic that could enter and exit). *But see* Lake George Ass'n v. State, 857 N.E.2d 517 (N.Y. 2006) (reduction of one curb cut by 50% and removal of another altogether was reasonable because property retained access via two easements on government land); Tucci v. State, 280 N.Y.S.2d 789 (App. Div. 1967), *aff'd*, 277 N.E.2d 784 (N.Y. 1971) (reduction of total highway frontage from 100 feet to 44 feet was not unreasonable simply because it was more difficult or inconvenient to enter or leave the premises); State *ex rel.* Preschool Dev., Ltd. v. Springboro, 792 N.E.2d 721 (Ohio 2003) (elimination of entirety of daycare facility's curb cut onto abutting highway was reasonable because it was replaced with indirect access by way of easement across neighboring property).

81 A frontage road is akin to a service road that provides indirect access to a main thoroughfare. *See* 8A NICHOLS, *supra* note 8, § 16.03; *see also* State, Dep't of Transp. v. Kreider, 658 So. 2d 548 (Fla. Dist. Ct. App. 1995), *review denied*, 669 So. 2d 250 (Fla. 1960) (conversion of direct highway access to more burdensome indirect route down 1.4 miles of service roads constituted a substantial diminishment of access because the service road was a "road to nowhere"). *But see* Rubano v. Dep't of Transp., 656 So. 2d 1264 (Fla. 1995) (no compensable taking of access occurred when interstate highway was severed from state road and property was placed on a service road that added two miles of travel).

82 *See* Cady v. N.D. Dep't of Transp., 472 N.W.2d 467, 469 (N.D. 1991) (installation of median barriers at adjacent intersection was unreasonable diminution of access when resulting in a six-block detour through a "bizarre and bewildering array of access roads which presents all the good order of an upset bowl of spaghetti"); Jackson Gear Co. v. Commonwealth, 657 A.2d 1370 (Pa.

Despite uniform reliance on the substantial impairment of access test, it is far from clear how a court will come out on the question of reasonableness of the remaining access in each case.[84]

Unlike damages in physical takings cases, impairment of access is not automatically compensable when it causes a diminution in the market value of the property[85] or leaves the landowner with less of a property interest than he had prior to the commencement of the public project.[86] Application of the substantial impairment of access doctrine permits different valuation rules and procedures in different jurisdictions.[87] Courts also remain free to delineate broad categories of circumstances in which loss of access will be deemed reasonable, and, therefore, non-compensable, regardless of its economic effect on the

Commw. Ct. 1995) (installation of median barrier on abutting street created unreasonable interference with access right by requiring additional travel of between 6 and 11.5 miles or travel of 4 miles through residential areas which roads were steep and winding and would be unsafe if navigated by trucks in inclement weather). *But see* Cartee v. Commonwealth, 374 S.W.2d 860 (Ky. Ct. App. 1964) (median divider did not cause compensable damages because additional travel in either direction was reasonable); Dale Props., LLC v. State, 638 N.W.2d 763 (Minn. 1991) (damages caused by closure of median crossover which caused westbound traffic to travel an additional five-eighths of a mile and make a U-turn was not compensable because the remaining access was reasonable); Commerce Land Corp. v. Commonwealth, 383 A.2d 1289 (Pa. Commw. Ct. 1978) (damages caused by installation of median barrier were not so unreasonable as to constitute a taking even though it prohibited left turns onto the property, required a detour of 2.35 or 2.8 miles, and destroyed the site's suitability for truck terminal use). In many instances, compensation for damages caused by median barriers is denied on the grounds that a landowner does not have a property interest in a particular traffic pattern, nor is he entitled to remuneration for damages caused by a valid exercise of the police power. *See infra* Part II.C; *see also* Brown v. City of Twin Falls, 855 P.2d 876 (Idaho 1993) (landowner not entitled to damages caused by median barriers which prevented left turn access because the right of access does not encompass a right to any particular pattern of traffic flow); Hales v. Kansas City, 804 P.2d 347 (Kan. 1991) (installation of median divider that prevented left turn access was a valid exercise of the police power and the damages were not compensable); Deyle v. State, 229 N.W.2d 565 (Neb. 1975) (state's refusal to allow median cut was a reasonable exercise of police power although it required approaching traffic from the south to travel "an unusually long distance to reach the plaintiff's property and industrial traffic was routed into residential areas").

83 *See* Thom v. State, 138 N.W.2d 322 (Mich. 1965) (change of grade was unreasonable because it substantially impaired access by making it more dangerous to move farm machinery off of the property and significantly diminished the property's market value). *But see* Grigg Hanna Lumber & Box Co. v. Van Wagoner, 293 N.W. 675 (Mich. 1940) (change of grade allegedly impaired property's value but was not compensable because reasonable access remained in the form of an alternative, albeit less convenient, route).

84 Hopkins, *supra* note 13, at 74.

85 State v. Petropoulos, 346 S.W.3d 525, 532 (Tex. 2011) (held that landowners are not entitled to compensation for loss of access absent a material and substantial impairment, "even if the remainder of their property has lost some degree of value." (quoting State v. Heal, 917 S.W.2d 6, 11 (Tex. 1996))).

86 Adcock v. Miss. Transp. Comm'n, 981 So. 2d 942, 946 (Miss. 2008) (landowner could not recover for loss of direct highway access because other access to and from the home remained intact, even though "it wasn't near as good").

87 Hopkins, *supra* note 13, at 74.

property.[88] Often, this leads to unjust denial of compensation for landowners who would have been entitled to remuneration under any market valued-based assessment.

B. *No Compensation for Circuity of Access*

Courts almost uniformly agree that circuity of access—implying a more indirect or inconvenient means of access to a property—is not compensable.[89] Circumstances in which government action may render access to a property more circuitous include, but are certainly not limited to, closure of an intersection or railroad crossing,[90] change of an abutting street from two-ways to one-way,[91] closure of highway median crossings,[92] or closure of part of a roadway not adjacent to the claimant's land.[93] In general, a landowner is not entitled to compensation when his access is merely rendered less convenient by government action because he will still retain access that is altogether reasonable and thus fails to reach the requisite level of substantial impairment.[94]

The prohibition of compensation for circuity of access precludes remuneration for damages characterized as a mere inconvenience, even if the impaired access significantly diminishes the market value of the

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88 *See* Troiano v. Colo. Dep't of Highways, 463 P.2d 448, 454 (Colo. 1969) ("[A]lthough market value of the property may be reduced, it is universally recognized that there are elements of damage for which no compensation will be given."); *see also* Scanlan, *supra* note 31, at 239 ("These non-compensable items of damage evolved from the realization that government does not have enough money to pay for all consequences of a condemnation taking for a public project or to pay for new uses of existing public property, and still have sufficient funds to provide the infrastructure and services that the governed expect. Public policy has acknowledged that there are just some impacts of a taking for a legitimate public project that the nearby landowners must bear for being part of the citizenry of this country.").

89 8A NICHOLS, *supra* note 8, § 16.03; *see, e.g.*, State v. Bristol Hotel Asset Co., 293 S.W.3d 170, 174 (Tex. 2009) (damages which result from traffic being required to travel a more circuitous route to reach a property are not compensable).

90 *See, e.g.*, Kemp v. City of Claxton, 496 S.E.2d 712 (Ga. 1998) (closure of two railroad crossings was not compensable to nearby landowners simply because it would make access to their properties less convenient).

91 *See, e.g.*, Georgia Dep't of Transp. v. Bae, 738 S.E.2d 682, 684 (Ga. Ct. App. 2013) (change of abutting road from two-way to one-way "was no different from mere inconvenience and circuity of travel and was not compensable in the instant proceedings" (quoting Dep't of Transp. v. Katz, 312 S.E.2d 309, 313 (Ga. 1983))).

92 *See, e.g.*, Dale Props., LLC v. State, 638 N.W.2d 763, 767 (Minn. 2002) (closure of highway median crossover was not compensable because it merely resulted in circuity of route, as opposed to substantial impairment of access); *see also supra* note 82.

93 *See, e.g.*, LaCroix v. Commonwealth, 205 N.E.2d 228, 229–32 (Mass. 1965) (landowner is not entitled to compensation when closure of part of abutting highway not adjacent to his property results in more circuitous route to reach the broader system of public roads).

94 *See LaCroix*, 205 N.E.2d at 232 ("[L]andowner is not entitled to compensation merely because his access to the public highway system is rendered less convenient, if he still has reasonable and appropriate access to that system after the taking." (citations omitted)); *Dale Props.*, 638 N.W.2d at 764.

property.[95] In *LaCroix v. Commonwealth*,[96] the Commonwealth of Massachusetts took a small portion of the parcel at issue for construction of a new highway, but no previously existing access points were affected by the severance.[97] The remaining land was, however, affected by closure of a portion of the abutting road 300 feet south of the property.[98] As a result of the closure, the owner was forced to travel several additional miles to reach a main thoroughfare.[99] The court determined that although this damage might be considered substantial if the owner was entitled to recover under a market value-based assessment of injury,[100] a landowner may not recover for the damage caused by circuitous access if reasonable access remains.[101]

Despite the widespread acceptance of this non-compensability standard, the difference between "mere circuity of travel" and substantial impairment of access is still one of degree, dependent upon the unique facts of each case.[102] In 2006, the Supreme Court of Kansas followed the majority non-compensability approach in *Kau Kau Take Home No. 1 v. City of Wichita*.[103] Patrons of a restaurant were forced to travel an additional two miles to access the property following closure of an intersection that created a cul-de-sac just west of the property.[104] Despite the inconvenience, the court determined that this change was reasonable notwithstanding the diminution of the property's market value.[105] By contrast, in *Boehm v. Backes*,[106] the Supreme Court of North Dakota found that an objectively less circuitous route unreasonably

95 *LaCroix*, 205 N.E.2d at 228–30.

96 *Id.* at 228.

97 *Id.* at 228–30.

98 *Id.* at 230.

99 *Id.*

100 *Id.* ("The evidence indicated . . . that the injury to LaCroix was substantial if, as matter of law, he was entitled to recover the amount of any reduction in the value of his remaining land by reason of the severance of Howard Road and the loss of a short, convenient approach to King Street[.]").

101 *Id.* at 232 ("[A] landowner is not entitled to compensation merely because his access to the public highway system is rendered less convenient, if he still has reasonable and appropriate access to that system after the taking." (citations omitted)).

102 8A NICHOLS, *supra* note 8, § 16.03; *see* Priestly v. State, 242 N.E.2d 827, 829–30 (N.Y. 1968) ("'Circuitous,' in its commonly accepted understanding, indicates that which is roundabout and indirect but which nevertheless leads to the same destination. 'Suitable,' in its commonly accepted understanding, describes that which is adequate to the requirements of or answers the needs of a particular object. The concepts are not mutually exclusive and, therefore, a finding that a means of access is indeed circuitous does not eliminate the possibility that that same means of access might also be unsuitable in that it is inadequate to the access needs inherent in the highest and best use of the property involved.").

103 135 P.3d 1221 (Kan. 2006).

104 *Id.* at 1224–25.

105 *Id.* at 1229–30.

106 493 N.W.2d 671 (N.D. 1992).

impaired direct access and entitled the landowner to compensation.[107] The Highway Department's construction of an overpass converted the property's abutting road into a cul-de-sac and cut off direct access to the street from the nearby highway, creating an indirect route to the property of an additional six city blocks through a residential neighborhood.[108] The court held that this interference unreasonably impaired the landowner's right of direct access and constituted a compensable taking of property as a matter of law.[109] As in other impairment of access cases, compensation for circuity of access is dependent upon a subjective assessment of the severity of the impact of a public project and is not guaranteed.

C. *No Compensation for Diversion of Traffic*

Like circuity of travel, it is also widely accepted that diminution in value resulting from diversion of traffic—i.e., a reduction in the volume of traffic that uses the road adjacent to the property—may not be included in the valuation of damages for loss of access.[110] The factual circumstances that give rise to impairment of access cases based on diversion of traffic heavily overlap those in circuity of access cases:[111] construction of new roadways,[112] construction of median strips prohibiting crossovers on existing roadways,[113] installation of traffic

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107 *Id.* at 674–75 ("[L]oss of traffic, loss of business, and circuitry of travel are factors to be fairly weighed in determining the reasonableness of access remaining to and from an adjacent highway after the direct physical disturbance by closure of the street intersection.").

108 *Id.* at 672–74.

109 *Id.* at 675.

110 8A NICHOLS, *supra* note 8, § 16.03; *see also* State v. Momin Props., Inc., 409 S.W.3d 1, 7 (Tex. App. 2013) (noting that it is "well-settled that diminution in the value of property due to diversion of traffic, diminished exposure to traffic, or altered accessibility to the roadway does not amount to a material and substantial impairment of access" (citations omitted)); Howe v. State Highway Bd., 187 A.2d 342, 345 (Vt. 1963) ("Benefits attached to the currents of public travel are not vested rights and so diversion of traffic does not furnish a ground for compensation." (citation omitted)).

111 In fact, courts often use both circuity of access and diversion of traffic arguments to preclude compensation based on the same facts in a single impairment of access case. *See, e.g.*, Kau Kau Take Home No. 1 v. City of Wichita, 135 P.3d 1221, 1227–30 (Kan. 2006) (damage arising from elimination of intersection that created cul-de-sac and re-routed patrons was non-compensable because (1) it was permissible regulation of traffic flow pursuant to state's police power; (2) no property owner has right to continuation of flow of traffic past their property; and (3) increased driving distance between property and nearby roadways was merely circuitous); Dale Props., LLC v. State, 638 N.W.2d 763, 766–67 (Minn. 2002) (impairment of access caused by closure of highway median crossover was not compensable because it resulted in mere circuity of access and was exercise of state's police power pursuant to its duty to ensure public safety).

112 *See, e.g.*, Mabe v. State, 385 P.2d 401, 403–04 (Idaho 1963) (construction of new interstate highway bypassed section of old highway on which property had abutted, depriving it of all commercial value).

113 *See, e.g.*, Dale Properties, 638 N.W.2d at 764–65 (closure of highway median forced those wishing to access property from the westbound lane to travel an additional five-eighths of a mile

lights or turning lanes,[114] reconfiguration of intersections[115] or traffic interchanges,[116] construction of bridges or overpasses,[117] and specification of driveway locations[118] are a few of the many possibilities. The distinguishing feature of diversion of traffic cases is the injury to the property interest claimed, namely, loss of patronage associated with the rerouting of traffic as a result of government action.[119]

The non-compensability of impairment of access damages caused by diversion of traffic is explained in part by the argument that no landowner possesses a property right to a particular flow of traffic on the abutting road.[120] In *Mabe v. State*,[121] construction of a new interstate highway that bypassed the section of the old highway on which a café and service station abutted effectively deprived the property of all commercial value.[122] The court determined that the landowner was without remedy for any loss of value caused by the diversion of traffic. Because direct access between the property and the old highway remained unchanged, the landowners recovered nothing.[123] Similarly, in *Sienkiewicz v. Commonwealth*,[124] state reconfiguration of a highway interchange re-routed traffic 100 yards past the landowner's property

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and make U-turn); Ehrhart v. Agency of Transp., 904 A.2d 1200, 1201–02 (Vt. 2006) (placement of raised median strip on abutting road resulted in loss of business).

114 *See, e.g.*, Idaho Transp. Bd. v. HI Boise, LLC, 282 P.3d 595, 597 (Idaho 2012) (highway improvement project reconfigured intersection and produced traffic bottleneck that impeded access to hotel's primary driveway).

115 *See, e.g.*, Gibson v. City of Spokane Valley, 176 Wash. App. 1019, at *1–2 (Ct. App. 2013) (construction of three-way roundabout at an intersection diverted traffic away from the property's most well-traveled access point).

116 *See, e.g.*, Hall v. State, 712 N.W.2d 22, 24 (S.D. 2006) (relocation of interstate interchange, which eliminated highway exit on which landowner operated convenience store and filling station, forced landowner to close operation due to lack of business); Sienkiewicz v. Commonwealth, 883 A.2d 494, 495–97 (Pa. Commw. Ct. 2003) (redesign of traffic interchange re-routed traffic approximately one hundred yards past landowner's commercial property, by and around his closest competitor).

117 *See, e.g.*, State v. Momin Props., Inc., 409 S.W.3d 1, 3 (Tex. App. 2013) (construction of an overpass diverted the main flow of traffic which had previously passed directly in front of the landowner's gas station).

118 *See, e.g.*, Miller v. Preissler, 284 P.3d 290, 295 (Kan. 2012) (conversion of highway to controlled-access entailed elimination of direct connection of private driveways and some public roads between newly-designated "grade-separated interchanges").

119 8A NICHOLS, *supra* note 8, § 16.03.

120 *See infra* Part B and note 39; *see also* Dep't of Transp. v. Gefen, 636 So. 2d 1345, 1346 (Fla. 1994) ("Access, as a property interest, does not include a right to traffic flow even though commercial property might very well suffer adverse economic effects as a result of reduced traffic." (citation omitted)).

121 385 P.2d 401 (Idaho 1963).

122 *Id.* at 403–04 ("The property actually would be valueless at the present time only for a limited value for grazing. It has a potential value for farm land, but that is merely potential, depending (upon) the development of water in the future.").

123 *Id.* at 403–06.

124 883 A.2d 494 (Pa. Commw. Ct. 2005).

and by and around his closest competitor.[125] As the court reasoned, there is no cognizable legal interest in a particular traffic pattern.[126] Therefore, although the landowner had chosen the property specifically for its close proximity to the interstate[127] and was forced to close the business due to diminished profits in the wake of the construction,[128] the court determined that recovery was not warranted.[129]

Additional justification for the compensation exception for diversion of traffic is derived from the state's interest in the reasonable exercise of its police power.[130] The police power grants the state the authority to regulate for the enhancement and protection of public health and safety, and no damages caused by such regulation are compensable.[131] This theory maintains that highways and infrastructure exist primarily for the benefit of the traveling public and not for the benefit of those who happen to have property situated alongside public roadways, and therefore abutting landowners must necessarily assume some risk that the roadways will be altered to their detriment in the interest of public benefit.[132] Additionally, travel restrictions affect all members of the traveling public and do not uniquely affect any property right of abutting landowners.[133] For these reasons, in diversion of traffic cases the interests of landowners abutting on public roads are viewed as subordinate to the interests of society and the governing bodies charged

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125 *Id.* at 495–97.

126 *Id.* at 498; *see also* State, Idaho Transp. Bd. v. HI Boise, LLC, 282 P.3d 595, 600 (Idaho 2012).

127 883 A.2d at 495.

128 *Id.* at 497.

129 *Id.* A corollary of the non-compensability of diversion of traffic is that loss of view of a property caused by diversion of traffic is also not compensable. *See, e.g.*, Dep't of Transp. of Colo. v. Marilyn Hickey Ministries, 159 P.3d 111, 113 (Colo. 2007) ("We hold that because a landowner has no continued right to traffic passing its property, the landowner likewise has no right in the continued motorist visibility of its property from a transit corridor.").

130 *See e.g.*, Pringle v. City of Wichita, 917 P.2d 1351, 1353 (Kan. Ct. App. 1996) ("Regulation of traffic under the police power without liability for compensation includes prohibiting left turns, prescribing one-way traffic, prohibiting access or crossovers between separated traffic lanes, prohibiting or regulating parking, and restricting the speed, weight, size, and character of vehicles allowed on certain highways." (citations and internal quotation marks omitted)).

131 James D. Masterman, *Eminent Domain and Land Valuation Litigation*, SN041 ALI-ABA 115, 119 (2008).

132 State v. Momin Props., Inc., 409 S.W.3d 1, 7 (Tex. App. 2013).

133 Dale Props., LLC v. State, 638 N.W.2d 763, 766 (Minn. 2002); *see also* Ehrhart v. Agency of Transp., 904 A.2d 1200, 1205–06 (Vt. 2006) ("The State's regulation of traffic through its police power . . . has at least some effect on everyone who uses the highway. The public as a whole benefits from the safety and efficiency gains that result from effective traffic regulation, and the public as a whole is burdened when regulation restricts the flow of traffic."). There is a tangentially related argument that compensating landowners for damages caused by diversion of traffic would make public roadway projects cost prohibitive; *see, e.g.*, *Ehrhart*, 904 A.2d at 1206 ("Compensating abutting property owners under circumstances such as these would require the State to consider the indirect effects of highway improvements on certain members of the public and not others, and it might ultimately make most highway projects impracticable." (citation omitted)).

with protecting it.[134] The difficulty in diversion of traffic cases is distinguishing between the non-compensable exercises of police power and the compensable takings that, in most cases, will also divert traffic[135]—a distinction that turns on the judicially-created line between a reasonable interference with the property right of access and substantial impairment thereof.

III. ANALYSIS OF THE SUBSTANTIAL IMPAIRMENT TEST

Application of the substantial impairment of access test in eminent domain cases often leads to results that are inconsistent with judicially recognized principles of fairness[136] and indemnity[137] that have shaped the evolution of eminent domain case law. Not only does the requirement of substantial impairment preclude compensation in ways that would seem facially unjust to the ordinary observer, but it also results in the denial of remuneration for landowners who would be entitled to damages under the market value-based test applied to all other partial and total takings cases. Judicial justifications for this exception to the Before and After market value analysis[138] are lacking, signifying the weak foundational basis for a practice that threatens the robustness of the just compensation mandate.

A. *The Substantial Impairment Test Is Inconsistent with Principles of Equity and Fairness*

Use of the substantial impairment of access test has created results in modern cases that seemingly contradict the principles of equity and fairness that shape the just compensation guarantee in eminent domain proceedings.[139] In *State ex rel. Preschool Dev., Ltd. v. Springboro*,[140] the state was not required to compensate a landowner whose curb cut to the highway was eliminated in its entirety because the landowner was granted indirect access across an easement on neighboring land.[141] Construction of a light rail line that eliminated one of two driveways to

134 Paul's Lobster, Inc. v. Commonwealth, 758 N.E.2d 145, 150 (Mass. App. Ct. 2001).

135 8A NICHOLS, *supra* note 8, § 16.03; *see also* Troiano v. Colo. Dep't of Highways, 463 P.2d 448, 456 (Colo. 1969) ("All authorities agree that the distinction between a non-compensable exercise of the police power and a taking which must be compensated under the power of eminent domain is blurred and difficult to apply.").

136 *See supra* note 23.

137 *See supra* note 31.

138 *See supra* note 30.

139 *See supra* note 23.

140 792 N.E.2d 721 (Ohio 2003).

141 *Id.*

a four-lane main road and left the other "exit only" was non-compensable in *Burris v. MTA*,[142] because the commercial property retained access to a side street—though that street got 97.5% less use than the main through street.[143] In *White v. Northwest Property Group—Hendersonville No. 1*,[144] the landowner was unable to recover damages for impairment of access when construction of a four-foot wall along the border of the property eliminated access to the only driveway that connected to the property's garage.[145] In each of these cases, the outcome seemingly conflicts with the notion that no individual landowner should be forced to bear public burdens.[146]

Additionally, application of the substantial impairment test for access seems unwarranted in light of the types of severance damages that are compensable in total or partial physical takings cases to the full extent that they diminish a property's market value.[147] In *Metropolitan Water District of Southern California v. Campus Crusade for Christ* in 2007,[148] fear of rupture of a water pipeline was found to be a compensable damage by the California Supreme Court.[149] The Metropolitan Water District constructed a portion of a forty-three-mile pipeline underneath the property, crossing a branch of the San Andreas Fault at a site where the pipeline came within several feet of the earth's surface.[150] Fear that the pipeline would rupture in an earthquake, negative visual and aesthetic impacts of the pipeline on landscaping, and

142 266 S.W.3d 16 (Tex. App. 2008).

143 *Id.* at 20–24. The court rests its rejection of a finding of material and substantial impairment in part on the fact that the landowner retained access *to* the main thoroughfare. *Id.* at 24. However, it would seem to be the case that access *from* the main thoroughfare *to* the property would have a much more significant effect on its market value since it is used exclusively for commercial purposes.

144 739 S.E.2d 572 (N.C. Ct. App. 2013).

145 *Id.* at 574–75.

146 *See supra* note 23.

147 *See* Hebert, *supra* note 9, at 495–96 ("[A]s long as the acquisition adversely affects the market value of the remaining property, any type of injury would seem to be recoverable as severance damages." (footnote omitted)); Metro. Water Dist. of S. Cal. v. Campus Crusade for Christ, 161 P.3d 1175, 1184 (Cal. 2007) ("Severance damages are not limited to special and direct damages, but can be based on *any factor,* resulting from the project, that causes a decline in the fair market value of the property." (citations and internal quotation marks omitted)). While partial takings cases, unlike most access cases, involve a taking of fee ownership of a portion of the property at issue, this comparison still highlights an important feature of the substantial impairment test. When calculating severance damages, a court may indirectly compensate for anything that affects market value, even if independently—in the absence of a physical taking—that harm would not be considered a compensable interference with a property interest. In access cases, however, to which the just compensation mandate clearly attaches independent of a physical taking, landowners must jump through additional hoops to secure compensation and may be denied compensation outright if a court subjectively determines that the harm was not severe enough, even if the diminution substantially diminishes the property's market value.

148 161 P.3d 1175.

149 *Campus Crusade for Christ*, 161 P.3d at 1185.

150 *Id.* at 1179.

limitations on potential development caused by placement of the pipeline were all held to be compensable severance damages to the extent their effect on market value was not conjectural, speculative, or remote.[151] By contrast, the court determined that access rights must be *substantially* impaired as a matter of law before the jury can hear the evidence of diminution of value.[152] It seems incongruous that only for the right of access have courts carved out an exception to the market-based assessment of damages. Courts calculating severance damages in the event of a partial taking are not required to find substantial impairment of a property's aesthetically pleasing view, drainage capacity, or increased traffic hazards[153]—all damages to property that directly result from a taking are compensable to the extent that they affect the amount that a willing buyer would pay for the remainder property on the open market.[154]

Finally, the substantial impairment of access test's arbitrariness and broad reliance on judicial discretion corrodes the foundation of reciprocity on which the just compensation mandate rests.[155] Subjecting the impairment of a property right by the government to a reasonableness test as a prerequisite for a finding of compensability directly contradicts the principle that a landowner is entitled to remuneration for the value of his property taken or the diminution in the value of property damaged by the state.[156] In the case of physical takings, a property owner is entitled to recover the fair market value of the land taken, whether the appropriated portion comprises a miniscule percentage of his acreage or encompasses it in its entirety. There is no *de minimis* doctrine in the law of eminent domain, nor does it seem equitable for the courts to effectively create one for cases that involve impairment of access. Failing to compensate landowners who have suffered impairment of access that is deemed insubstantial by virtue of

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151 *Id.* at 1185.

152 *Id.* at 1186.

153 *See* City of Livermore v. Baca, 141 Cal. Rptr. 3d 271, 278 (Ct. App. 2012) ("Contrary to the trial court's statement of the standard for admissibility in this case, a showing of *substantial* impairment is *only required when the taking interferes with access to the property from a public street*[.]" (emphasis added)).

154 *Id.* at 1466–68; *see also Campus Crusade for Christ*, 161 P.3d at 1184 ("Items such as view, access to beach property, freedom from noise, etc. are unquestionably matters which a willing buyer in the open market would consider in determining the price he would pay for any given piece of real property." (internal quotation marks omitted)).

155 *See* Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 304 (1923) ("The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken." (citations omitted)).

156 *See* Stokes, *supra* note 33, at 638 ("[M]arket-based evidence of use and value does not distinguish between amenities that happen to be available to properties in a given area and ownable rights that are specific to individual tracts of land . . . [.]").

the fact that reasonable access remains means that any property owner who purchased land with extra-reasonable access has no recourse when state action interferes with his property right—an outcome inconsistent with the requirement that the landowner in an eminent domain proceeding be made whole.[157]

A recent case in Texas suggests that the substantial impairment of access test is sufficiently favorable to state actors that they are incentivized to frame damages as impairment of access for the sole purpose of precluding compensation. In *Crosstex DC Gathering Co. v. Button*,[158] the condemnor attempted on appeal to categorize severance damages as impairment of access in order to trigger use of the substantial impairment test (and thus a higher burden of proof for the condemnee), though in fact no such damages were claimed in the complaint.[159] Crosstex had filed suit in condemnation to obtain a permanent easement to construct a natural gas pipeline under the Button's 144-acre property,[160] for which the trial court awarded $750,000 in severance damages to the landowner.[161] Among the factors affecting the property's market value was a restriction on the placement of roads, driveways, and parking lots on the property—so as not to interfere with or risk damage to the pipeline—that had great potential to impede development.[162] The court, using a diminution of market value test for compensability of severance damages, allowed evidence of this loss of internal access at trial.[163] Though the condemnee's theory of damages did not include impairment of access to and from the property via adjacent public roads,[164] the condemnor attempted to categorize the

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

158 No. 02–11–00067–CV, 2013 WL 257355 (Tex. App. Jan. 24, 2013).

159 *Compare* Brief of Appellees at 17, 32, Crosstex DC Gathering Co. v. Button, No. 02–11–00067–CV, 2013 WL 257355 (Tex. App. Jan. 24, 2013) ("Crosstex attempts to plug the very straight forward facts of this pipeline condemnation case into several well-known road takings cases so as to try to convince this Court that the outcomes should be the same. However, this case is not and never was about impairment/denial of access . . . ."), with Brief of Appellant at 7, Crosstex DC Gathering Co. v. Button, No. 02–11–00067–CV, 2013 WL 257355 (Tex. App. Jan. 24, 2013) ("Mr. Cross's testimony related to a theory of damages that is not compensable in Texas—the idea that the Buttons should be compensated for difficulties in accessing their property from one road, even though access remained unencumbered from another.").

160 Brief of Appellees, *supra* note 158, at 1–2.

161 *Crosstex DC Gathering Co.*, 2013 WL 257355, at *2.

162 *Id.* at *4.

163 *Id.* at *6 (noting that Supreme Court of Texas has determined that courts may consider evidence "upon all such matters as suitability and adaptability, surroundings, conditions before and after, and all circumstances which tend to increase or diminish the present market value. . . . This testimony related to factors that a willing buyer and willing seller would consider in determining the market value of the property at the time of the taking. To the extent that these circumstances affect the property's marketability and would be reflected in the property's market value, the testimony was relevant." (footnote omitted)).

164 *Id.* at *8.

damages as such so as to preclude compensation.[165] The court acknowledged that in fact the outcome would be different were this framed as an impairment of access case, though the damages were more accurately described as internal severance damages in the case at bar.[166] As this case demonstrates, courts may allow compensation for damages when they are framed in the context of diminished market value but fail to compensate on the same facts when they are framed as impairment of access—an illogical outcome inconsistent with the constitutional entitlement to just compensation.

B. *The Substantial Impairment Test Is Inconsistent with the Tenet of Indemnity*

The result of implementation of the substantial impairment of access test in condemnation cases has been a break with the tenet of monetary indemnity that guides determinations of compensability after total or partial takings of land for public use.[167] Instead of making the landowner financially whole, courts have employed the substantial impairment test to circumvent the obligation to put the owner in the same position in which he would have been had the public project not taken place.[168] Since 2009, multiple courts have grappled with damages awards in excess of $1 million.[169] Last year in *Gibson v. Spokane Valley,* the court held that impairment of access that resulted in a $1.325 million drop in the market value of a residential property was non-

165 Brief of Appellees, *supra* note 158, at 1–2.

166 *Crosstex*, 2013 WL 257355, at *8. ("We would therefore agree with Crosstex's argument if Cross testified merely that any potential developer would have to design plans such that the driveway did not run across the pipeline and therefore an impairment existed to accessing the remainder property. Because there was no evidence produced by the Buttons that there would be no other way to access the remainder property except over the pipeline, they did not establish substantial impairment to the remainder. So if, as Crosstex claims, their theory of damages was based on impaired access, there would be no evidence of damages. But Crosstex is not correct that the Buttons' [sic] theory of damages was access impairment.").

167 *See* United States v. Reynolds, 397 U.S. 14, 16 (1970) ("The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." (footnote omitted)); Olson v. United States, 292 U.S. 246, 255 (1934) (property owner is to be made whole).

168 Metro. Transp. Auth. v. Washed Aggregate Res., 958 N.Y.S.2d 405, 409 (App. Div. 2013) ("When private property is taken for public use, the condemning authority must compensate the owner so that he may be put in the same relative position, insofar as this is possible, as if the taking had not occurred[.]" (citations omitted and internal quotation marks omitted)). The New York Court of Appeals recognized that in the event of a partial taking "the measure of damages is the difference between the value of the whole before the taking and the value of the remainder after the taking," but that damages arising from impairment of access specifically need only be paid if the property "can no longer sustain its previous highest and best use." *Id.* at 409, 412 (citations omitted).

169 *See, e.g.*, Gibson v. City of Spokane Valley, 176 Wash. App. 1019 (2013); State, Idaho Transp. Bd. v. HI Boise, LLC, 282 P.3d 595 (Idaho 2012); State v. Kimco of Evansville, 902 N.E.2d 206 (Ind. 2009).

compensable because the remaining access was merely circuitous.[170] A similar result was reached in *HI Boise*, though the loss in market value reached an estimated $7.1–7.5 million as a result of reconfiguration of a highway interchange that diverted the flow of traffic past the commercial property's main entrance.[171] In *Kimco*, a public road project prevented the future expansion of a property's existing points of ingress and egress, causing an approximately $2.333 million loss of value, but was non-compensable because the existing access points were not eliminated as a result of the construction.[172] As these cases demonstrate, the substantial impairment of access test effectively shields state actors from the burden of compensating landowners who would be entitled to payment under a market value-based approach with a focus on reimbursement for the value of the property taken.[173]

C. *Justifications for the Substantial Impairment Test Are Insufficient*

In addition to the unjust results ensuing from application of the substantial impairment of access test to impairment of access cases, there is a dearth of reasons for the existence of the doctrine that leaves it vulnerable to attack. The main justification that courts have proffered for refusing to rely on a market value-based calculation of damages in access cases is that doing so might be cost prohibitive for beneficial public improvement projects,[174] but to allow a reading of the just compensation mandate whereby compensation is required *unless* the public project benefits the public more than it hurts the afflicted landowner(s) would render the Just Compensation Clause useless. Similarly, the substantial loss approach is defended as an appropriate compromise between the desire of landowners for total economic remuneration for every measurable loss and the public's desire to curb

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170 *Gibson*, 176 Wash. App. at *1.

171 *HI Boise*, 282 P.3d at 596–97.

172 *Kimco*, 902 N.E.2d at 209–14; *see also* Split Rock P'ship v. State, 713 N.Y.S.2d 64 (App. Div. 2000) (damages award was knocked down from $915,000 to $6300 because appellate court determined that property could still be developed for its highest and best use as a commercial office building, notwithstanding $908,700 drop in market value caused by impairment of access).

173 *See supra* note 27.

174 Clarke, *supra* note 18, at 918 ("The major problem is that [a market-value based approach] would cause a substantial increase in the costs of condemnation and public development. Projects that otherwise might be beneficial could be delayed or even stopped, and needed regulation could be prevented as a result of [its] broad reach."); Scanlan, *supra* note 31, at 239 ("[This theory of non-compensability] evolved from the realization that government does not have enough money to pay for all consequences of a condemnation taking for a public project or to pay for new uses of existing public property, and still have sufficient funds to provide the infrastructure and services that the governed expect.").

drainage of state funds necessary for public projects.[175] However, this does not negate the principal flaw in the substantial impairment approach, namely, that a subjective assessment of reasonableness may bear no relation to the extent of the monetary injury suffered by a landowner.[176] Were this rationale alone sufficient to justify the substantial impairment test, it could easily be expanded to preclude government compensation for use of its eminent domain power in other circumstances in which the State's budget is spread too thin. Such a poorly justified and subjective approach is ill suited to address the fundamental right to just compensation for a state invasion of a property interest.[177]

IV. PROPOSAL

A flagrant deficiency of judicial justifications for use of the substantial impairment standard in loss of access cases supports the proposition that adhering to the bright-line market-value-based assessment of damages used in total and partial physical takings cases would more justly and uniformly compensate landowners and prevent the cost of public projects from falling on the shoulders of an unlucky few. Using the Before and After test,[178] landowners would be compensated to the full extent that government action impairs the property right of access. Application of a pecuniary remuneration approach to loss of access cases would lead to results more consistent with the principles of fairness and indemnity that have traditionally shaped just compensation jurisprudence, and would create greater certainty for landowners who face increasing monetary losses as the nation's infrastructure grows increasingly complex.

This approach necessitates a simple two-part inquiry for determination of compensability for impairment of access. First, courts should assess whether the landowner's property interest in the reasonable right of access was affected by state action.[179] This property interest consists of the ability to drive on and off the property from the abutting road and from the immediately adjacent road onto the public

175 Stoebuck, *supra* note 9, at 748 ("The substantial-loss theory seeks to strike a balance between the owner's desire for compensation for every measurable loss and the public's desire to be insulated from millions of petty claims."); *see also* Clarke, *supra* note 18, at 901 ("This limitation serves as a useful control on the amount of compensation owed, and gives the public authority an opportunity to provide substitute access which is suited to the property, thereby avoiding the payment of damages for a change in access which results in mere inconvenience." (footnote omitted)).

176 Clarke, *supra* note 18, at 912.

177 *See supra* note 22.

178 *See supra* Part I.A.

179 *See supra* Part I.B.

infrastructure network.[180] If no property interest is affected—for example, in pure diversion of traffic cases in which the harm complained of is a loss of business[181]—no just compensation is required. Second, if the property interest has been impaired, courts should assess damages using the Before and After market value-based test used in other eminent domain proceedings.[182] This analysis abolishes the categories, such as circuity of access and diversion of traffic, into which impairment of access fact patterns are currently placed based on *how* a landowner's access was affected.[183] Instead, it asks a simpler question: whether or not a property interest was impaired. Under this assessment, it is the "what"—and not the "how"—that is paramount. If a property interest is affected, the requirement of just compensation is triggered, at which point an assessment of damages based on economic harm is appropriate.

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180 *See supra* notes 39–40. The dual-part nature of this approach should ameliorate any line drawing problems associated with determining the scope of the property right of access. Where the second—and concededly more ambiguous—prong of the property right is affected, the requirement of a demonstrable diminution of market value directly caused by the public project will serve to destroy many unwarranted claims based on changes to access that are too far removed from the property to be encompassed by the property right.

181 *See supra* Part II.C. In the same vein, there is no access right to a road that did not exist prior to the public project. *See* Thomsen v. State, 170 N.W.2d 575, 578 (Minn. 1969) (landowner was not entitled to compensation for denial of access to new highway—he never had a right to access a road that did not exist and therefore no access right was impaired); Missouri v. Clevenger, 291 S.W.2d 57, 62 (Mo. 1956) ("[T]here could be here no taking of an easement of access to the new roadway, because no prior right of access existed; thus, the supposed deprivation of a right of *access to the [new] road* itself could not constitute a compensable element of damage.").

182 *See supra* Part I.A.

183 Because one fact pattern could fit into any number of judicially-created categories of non-compensable harm given the right emphasis, this change eliminates the arbitrariness of the current treatment of access cases in favor of a more predictable approach. *See* 46 AM. JUR. 3D *Proof of Facts* § 26 (1998) ("In many cases, the courts have ruled that alleged loss of access . . . is more appropriately considered a mere diversion of traffic flow, which is a noncompensable consequence of the government's exercise of its police power to regulate traffic safety, not a compensable taking of private property rights. On the other hand, some courts have found that long and circuitous travel caused by [the same type of project] . . . was an unreasonable interference with the right of access, entitling the landowner to compensation. Other courts, however, have concluded that, under the particular circumstances, any increased circuity of travel resulting [from the project] . . . was not substantial enough to constitute a deprivation of reasonable access." (footnotes omitted)). This new approach would also preclude use of the police power rationale as a defense to a loss of access claim, since a state's exercise of its police power is on its face no different from the exercise of the eminent domain power to appropriate private property. See Richard S. Mayberry & Frank A. Aloi, *Compensation for Loss of Access in Eminent Domain in New York: A Re-Evaluation of the No-Compensation Rule with a Proposal for Change*, 16 BUFF. L. REV. 603, 624 (1967) ("The conceptually separate taking and regulation have an economically inseparable impact upon the property. If, as the cases and authorities uniformly state, the property owner must be compensated for what he lost rather then [sic] for what the governmental authority has obtained, it is difficult to rationalize the cases in terms of the police power-eminent domain dichotomy . . . ." (footnote omitted)).

The Before and After test embodies the notion that the fundamental right to just compensation[184] in eminent domain cases consists of the amount that will put the landowner in the same fiscal position he would have occupied had there been no state interference.[185] In other words, just compensation is the fair market value of the property interest taken from the landowner.[186] This is the approach currently applied to total and partial physical takings,[187] and the judiciary has proffered scant good reasons for not also applying it to the property right of access. Application of a market value-based assessment to access cases would eliminate the excessive subjectivity of the substantial impairment test. Furthermore, elimination of a reasonableness determination would conform the approach to access cases to that used in other eminent domain proceedings in which a landowner is entitled to monetary remuneration for the value of his property interest taken or damaged by the state.[188]

Application of the bright line Before and After test to loss of access cases would also correct the inconsistencies between the current substantial impairment standard and the principles of equity and indemnity that form the foundation of the just compensation mandate.[189] The Before and After test would preclude states from placing the burden of public projects on the shoulders of the landowners unfortunate enough to be situated in close proximity by ensuring compensation for any diminution of value and distributing the cost to society at large. The market value-based test would also prevent states from denying compensation to landowners based on a subjective

184 *See supra* note 22.

185 *See supra* note 27.

186 Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910) ("[Just compensation] 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?").

187 *See, e.g.*, Metro. Water Dist. of S. Cal. v. Campus Crusade for Christ, 161 P.3d 1175, 1184 (Cal. 2007) ("Severance damages are not limited to special and direct damages, but can be based on *any factor,* resulting from the project, that causes a decline in the fair market value of the property." (citation and internal quotation marks omitted)); City of Livermore v. Baca, 141 Cal. Rptr. 3d 271, 278 (Ct. App. 2012) ("[A] showing of *substantial* impairment is *only required when the taking interferes with access to the property from a public street. . . .*" (emphasis added)).

188 *See supra* Part I.A. For obvious reasons, we do not see courts applying a substantial impairment test to other facets of damage to private property caused by a taking because the results would be even more flagrantly absurd. For example, damage to a property's drainage system would not become non-compensable because the property still drains reasonably well. Nor would damage to a hyper-marketable view from a property become non-compensable because the reasonable person does not expect to have a costly view of stunning landscapes. Such items of damage are compensable to the extent that they diminish a property's market value. *See supra* note 147.

189 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.").

analysis that "reasonable" access remains, when no such limitation exists elsewhere in eminent domain law.[190]

While there is some merit to the argument that abandonment of the substantial impairment of access test will be costly,[191] a simple desire to save municipalities money is insufficient to justify sacrificing the fundamental right to just compensation in eminent domain proceedings.[192] Despite the fact that the system of public roads no longer serves the sole purpose of providing accessibility to property for private landowners,[193] the right of the public to means of safe and convenient travel must not completely supplant the constitutional right of abutting owners to just compensation for state interference with an established property right. Moreover, the amount saved in litigating the reasonableness standard must be subtracted from the additional amounts that will be expended.[194] Any benefit derived from the flexibility of a broad standard for assessment of damages[195] can just as well be obtained using the Before and After approach—market value is the quintessential expression of the community consensus on the worth of a good—without depriving landowners of compensation altogether. The Before and After approach should replace the substantial impairment standard in access cases because it better satisfies the constitutional just compensation mandate.

190 As noted throughout this Note, application of the substantial impairment of access test can result in losses of millions of dollars for landowners who retain arbitrarily determined reasonable access to their property.

191 Stoebuck, *supra* note 9, at 748.

192 *See, e.g.*, Thom v. State, 138 N.W.2d 322, 328 (Mich. 1965) ("It has always been a basic principle of the law that, if the work is of great public benefit, the public can afford to pay for it." (citation and internal quotation marks omitted)).

193 Clarke, *supra* note 18, at 902. Clarke notes that a restrictive viewpoint regarding compensation develops in part from recognition of the fact that public infrastructure must serve "two separate and not wholly compatible functions." Infrastructure must "provide the public with means of safe and convenient travel at the same time that it services and gives value to the adjacent land." At one point in time, the transportation function was subordinate to the private access function of roads. Once transportation needs intensified and road building and maintenance became a purely governmental function, however, the rights of abutting landowners to the roads ceased to be superior to those of the general public. *Id.*

194 It is also not likely, as courts fear, that there will be an influx of "petty claims," as landowners will still need to front the cost of an expert to obtain an estimate of the diminution of the market value of the property to use in court. The likely claims remain those in which the diminution in market value caused by impairment of access is significant and therefore evident to the lay observer.

195 *See* Stoebuck, *supra* note 9, at 765 ("The doctrine is sufficiently flexible to allow expression of the gradual changes in community consensus.").

CONCLUSION

Fairness and pecuniary indemnity are the lynchpins in the evolution of the just compensation mandate in eminent domain law.[196] The substantial impairment of access test, however, falls far short of the goal of making whole landowners who have suffered loss of a property interest at the hands of the government. With the growing complexity of infrastructure and related public projects, courts should employ a more consistent and equitable rule to impairment of access cases which increasingly entail a great deal of monetary loss for landowners abutting public roads. Unlike the substantial impairment test, an economic remuneration approach typical of other eminent domain cases would make clear the point at which the government must compensate a landowner for interference with the ability to enter and leave his property and would ensure that no individual landowner is forced to bear burdens associated with public improvement projects. Therefore, all landowners who suffer a demonstrable diminution of the right of access as a direct result of government action should be entitled to compensation to the extent that a public project has diminished the fair market value of their property interest.

196 *See supra* Part I.A.