



# Eminent Domain Issues in a Down Economy

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# Full Compensation in a Down Economy

- I. Current Economic Conditions
- II. A Framework for Full Compensation
- III. Survey of Courts Nationwide
- IV. Practically Speaking...

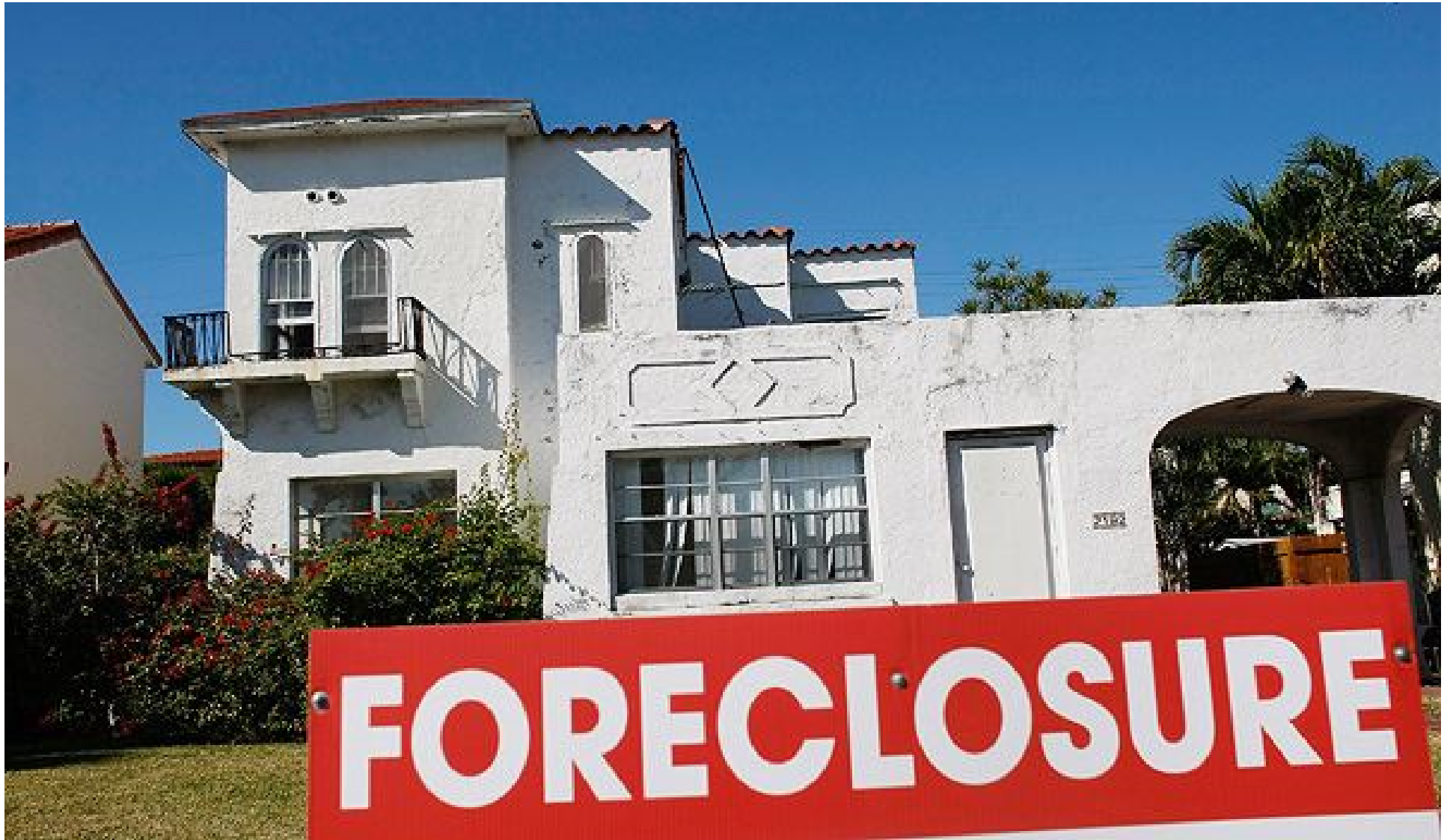
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# The U.S. Economy

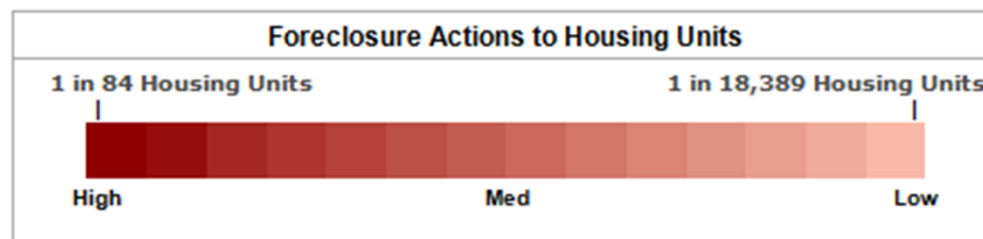
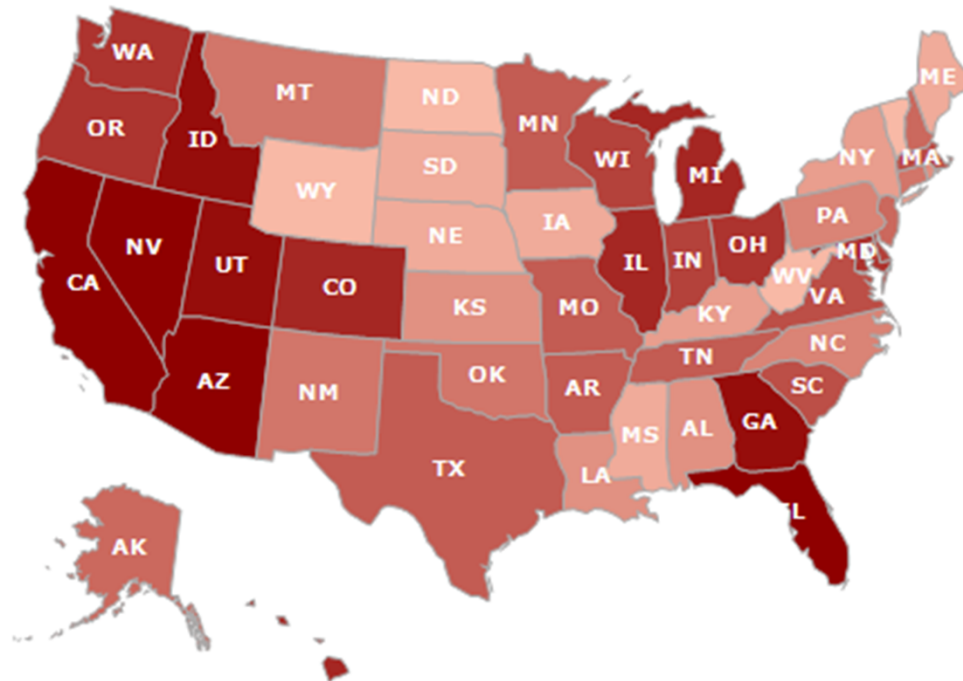
- Labor Dept. Report: 95,000 jobs lost in September 2010
- Goldman Sachs: Economy to be “fairly bad” or “very bad” over next six months (Bloomberg 10/6/10)
  - “The “fairly bad” outlook for slow growth and rising unemployment without a recession will probably be the one that occurs.” (Bloomberg)
- Unemployment at 9.6%
- U.S Fiscal Deficit \$1.3 Trillion (8.9% of GDP)

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# The Real Estate Market

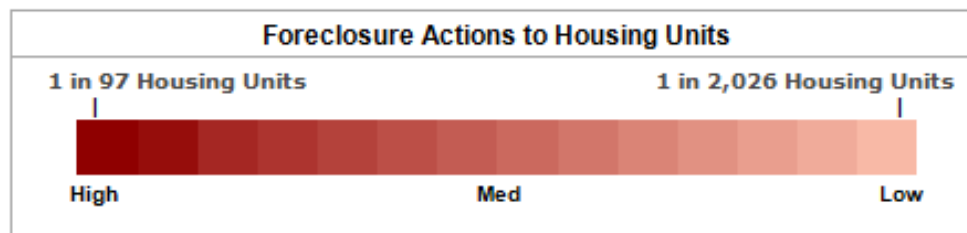
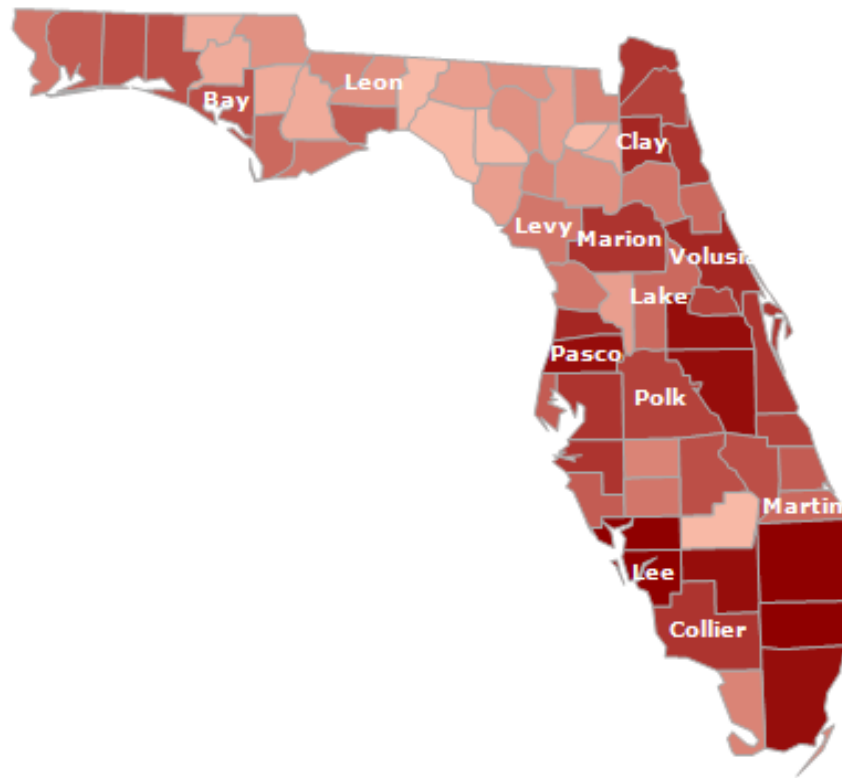


# U.S. Foreclosures



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# Florida Foreclosures



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# From the Headlines:

- “Bank of America to halt foreclosures nationally” -- LA Times, October 8, 2010
- “Short sales on the uptick in Florida, accounting for one in five of all home sales in Q2” – Palm Beach Post, Sept. 30, 2010
- “Mortgages drying up in Southwest Florida” – Sarasota Herald-Tribune, Oct. 8, 2010
- “Bottom-Feeding Activity Continues to Drive Down Orlando Home Prices” – Real Estate Channel, October 5, 2010

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# A Framework for Full Compensation

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# Florida Constitution

- Article X, Section 6:

“No private property shall be taken except for a public purpose and with **full compensation** therefor...”

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# What Is “Full Compensation?”

- “There is no single test for what is full compensation.” *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 897 n. 2 (Fla. 1987).
- “The issue in eminent domain proceedings is to determine what is full compensation for both the property taken and for damages to the remaining property.” *Blankenship v. Department of Transportation*, 890 So. 2d 1130 (Fla. 5th DCA 2005)

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# Full Compensation, cont.

- “Thus, the ‘full compensation’ mandated by Article X, Section 6 of the Florida Constitution is restricted to
  - (1) the value of the condemned land,
  - (2) the value of associated appurtenances and improvements, and
  - (3) damages to the remaining land (i.e., severance damages).”

*System Components Corp. v. Florida Dept. of Transp.*, 14 So.3d 967, 976 (Fla. 2009)

- Determined as though condemnation were to never have occurred and the owners voluntarily sold the property.  
*Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994)

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# What is the Problem?

- Difficulty in determining “fair market value” in this abnormal market
- Definitions of Fair Market Value
- The Value of the Property Right of not having to sell at a bad time (right to avoid alienation)

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# Fair Market Value

- *Nichols* on Eminent Domain:

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

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# Fair Market Value

- Appraisal Institute, The Appraisal of Real Estate:

“The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, **with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.**”

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# What is the Problem?

- In the eminent domain context, the seller is never a “willing” or “voluntary” seller
- Right now, the “market” is dominated by short sales, foreclosure sales, other sales made under duress –necessarily not “arms length”
- In this market, the rational condemnee would hold his property until values rise again – now is an inopportune time to sell

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# What Should the Courts to Do?

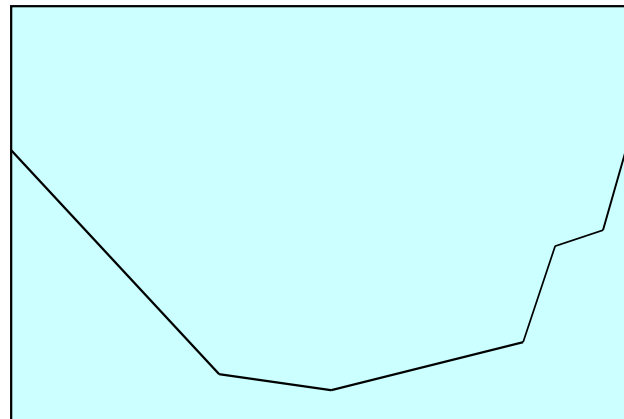
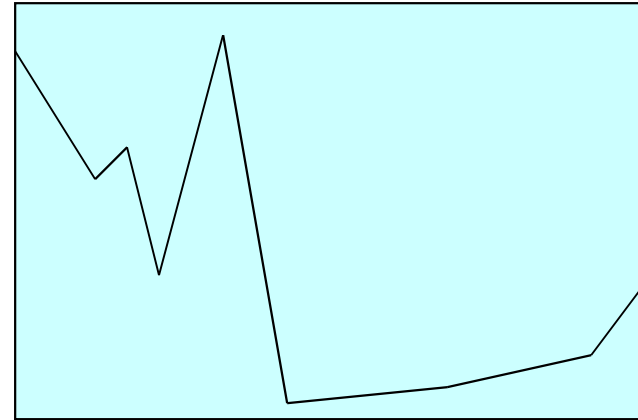
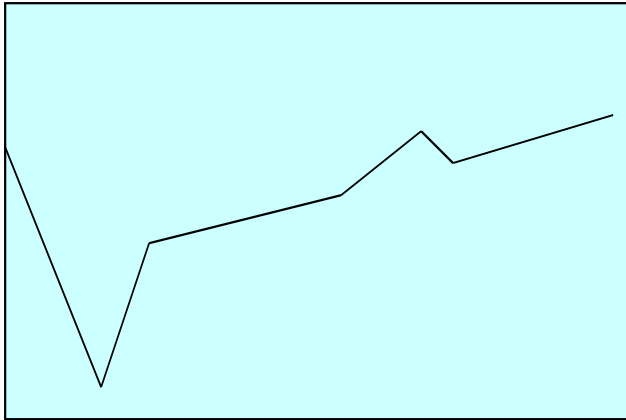
## A Survey of Other Jurisdictions

- Florida's appellate courts have been silent on this issue
- Other states have seen cases dealing with valuation in a depressed real estate market
- There is agreement in the distinction between a “temporary” and a “permanent” depression but division exists in the judicial treatment of a permanent depression



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# Temporary Depressions



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# Temporary Depression

- *U.S. v. Inlots*, 26 F.Cas 490 (S.D. Ohio 1873):

“While the language of the law or its construction is that its value must be fixed at the time of its appropriation or taking of the property, still **it is not right that you should subject these parties to the consequences of what we all believe to be a temporary depression** and stringency of the money market. If this were permitted, it would have great effect upon the value of this property. Therefore, you will not take into consideration the state of affairs existing today, but of, say two months ago, relieving it from the pressure which may now be upon it. This rule applies more particularly to real estate.”

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# Temporary Depression

- *Howell v. State Highway Department*, 166 S.E. 129 (S. Car. 1932)
  - Jury charge deemed “not open to serious criticism”:
  - “The actual value of the land means the fair market value of the land, upon a fair market, upon fair advertisement, and a fair sale at normal times. **It does not mean any value in times of great inflation in currency nor does it mean the value in times of great depression.** The actual value of the land means a fair market value, a fair market in normal times.”

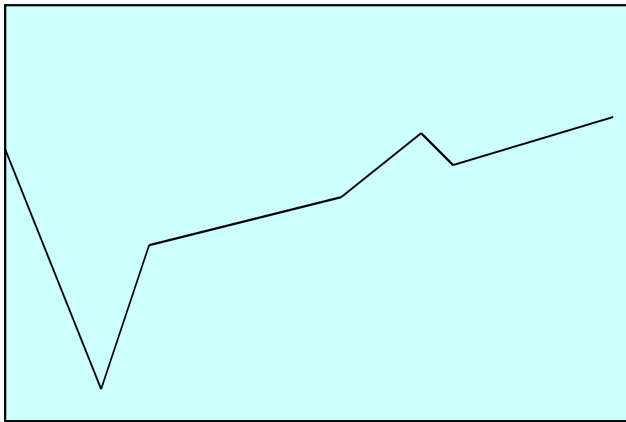
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# Temporary Depression

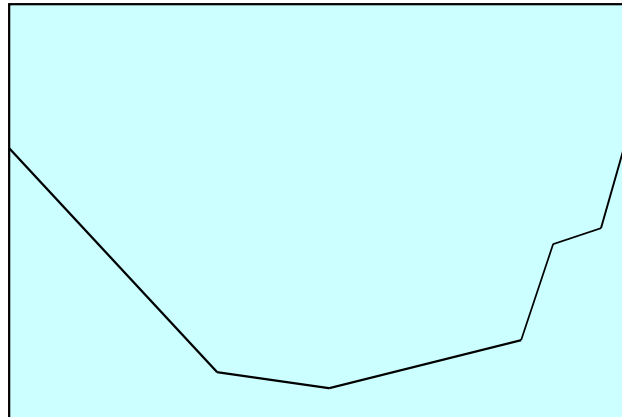
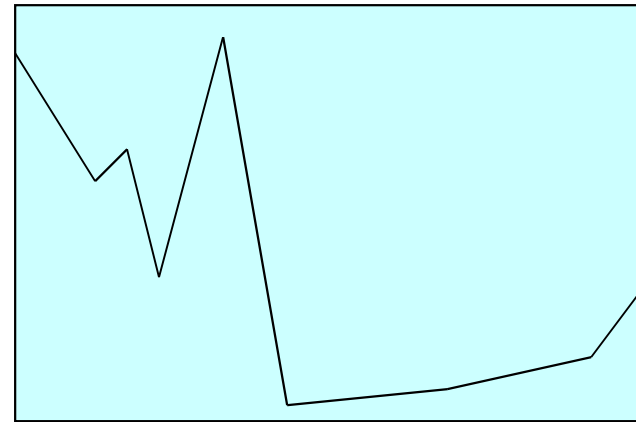
- *Howell v. State Highway Department*, 166 S.E. 129 (S. Car. 1932)
  - “It would be manifestly unfair to the owner if the taking of the property be during a period of deep depression to fix the value as of that exact date.” *Id.* at 131
  - “We think the circuit judge exercised a wise judgment when he defined the market value as that which prevailed in ‘normal times.’”

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# Temporary Depressions



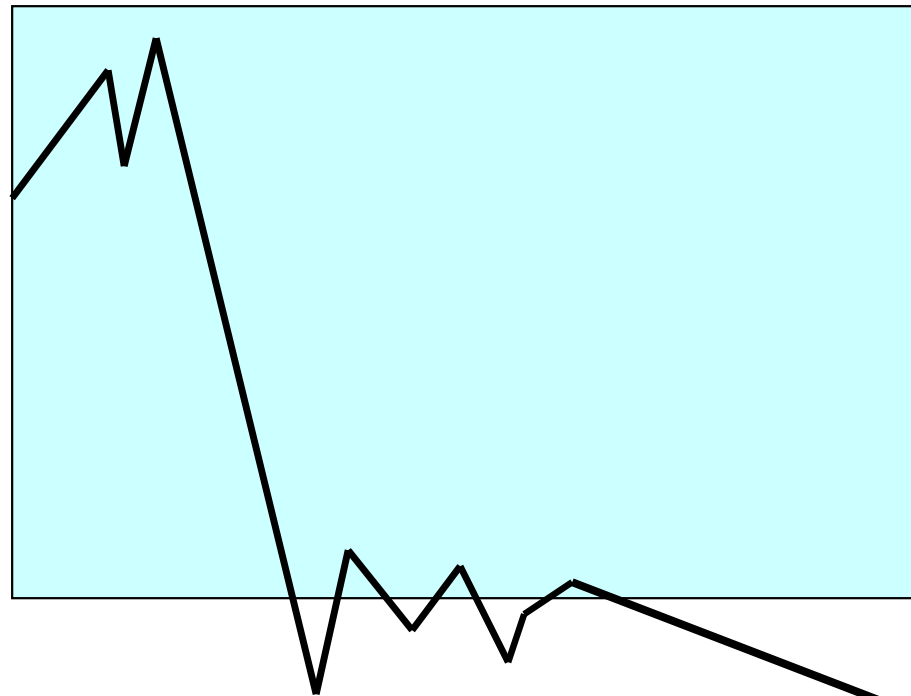
Which are?  
Which aren't?



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# “Permanent” Depression

## Two Schools of Thought



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# Permanent Depression and the Unwilling Seller

- *In re: Board of Water Supply of City of New York*, 14 N.E.2d 789 (Ct. App. NY 1938)
  - “Fair market value’ means neither panic value, auction value, speculative value, nor a value fixed by depressed or inflated prices. **A fair market value is not established by sales where prices offered are so small that only sellers forced to sell will accept them.**”

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# Permanent Depression and the Unwilling Seller

- *Kornegay v. Richmond*, 41 S.E.2d 45 (Va. 1947)
  - “Neither an inflated market nor a depressed market is the proper criterion of fair market value. The one is unfair to the condemnor and the other is unfair to the property owner.”
  - “Market value means value under ordinary conditions – not conditions of either depression or inflation.” *Id.* at 51 (citing *Public Market Co. v. Portland*, 170 P.2d 586 (Or. 1946)).



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# Permanent Depression? Too Bad.

- *Forest Preserve District of Cook County v. Eckhoff*, 24 N.E.2d 52 (Ill. 1939)
  - Jury instructions would have told the jury they had “the right to take into consideration the prevailing economic conditions and their effect in depressing the present real estate market and that market value meant market value under ordinary conditions and circumstances.”
  - Illinois Supreme Court said NO
  - Note that this case was decided 10 years after the initial crash and before recovery.

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# Permanent Depression? Too Bad.

- Policy Answer:

- “One of the purposes of an eminent domain suit is to give the land owner an equal value, in money, for the land taken. If values are low at the time taken, he can replace the land at a lower cost than when the market is higher.”  
*Id.* at 54.

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# Permanent Depression? Too Bad.

- *Alishausky v. MacDonald*, 167 A. 96 (Conn. 1933)
  - “The purpose of an appraisal of damages in condemnation is to give to the landowner an equivalent in value for the land taken measured in money. In a time of general depression the money so received will purchase much more than in normal times...”

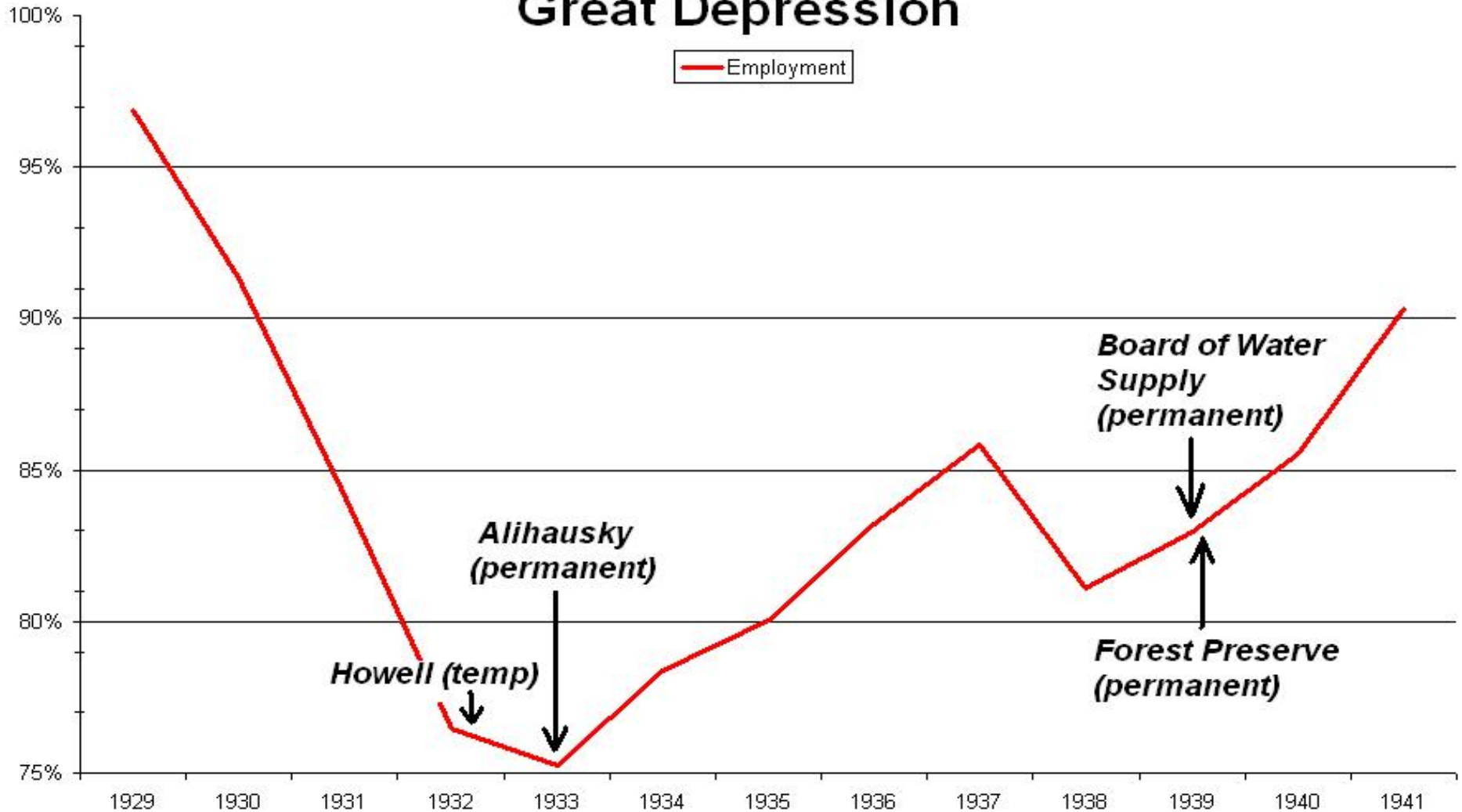
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# Historic Treatment of Depression Periods

- Temporary Depression – look back to what would be “fair market value” in normal, not depressed market conditions
- Permanent Depression - \*Split\*
  - Some hold to the same reasoning as the Temporary Depression
  - Others establish that the market is the market

# Where the Cases are Coming From

## Great Depression



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# What is Florida To Do?



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# Uncharted Territory in Florida

- What is the just result?
  - Landowner did not ask for the government's exercise of its condemnation power
    - “The power of eminent domain...is among the harshest powers known to the law....” *Canal Authority v. Miller*, 230 So. 2d 193 (Fla. App. 1969).
  - Condemning authorities have the upper hand in a depressed market

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# Uncharted Territory in Florida

- The “market” is filled with short sales, bank sales and other kinds of distress
- Anything but “normal” market
  - Sluggish approval of short sales
  - Existing “Bid/Ask” spread
- Problem of the underwater mortgagor



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# Practically speaking . . .

Here are some real issues here in  
Florida

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# Scenario 1 – Unencumbered Fee Owner

- Property owner owns property outright
- No intention of selling in this dismal market
- Despite appraiser's best efforts to ignore short sales, distress sales, and foreclosures – they have an overall effect on the “fair market value” of the property
- What is a just result?

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## Scenario 2 – Underwater Mortgagee

- Property owner purchased in 2006 – peak of the market – for \$500,000
- 100% Financed
- In 2010, property's estimated value is \$350,000 – Mortgagor is underwater, according to all estimates, by \$150,000
- Owner current on mortgage payments and not otherwise in default
- Whole take by condemning authority – and “fair market value” would leave around \$150,000 owed by owner to the bank

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# Impacts of a Forced Sale

- Can a condemning Authority really meet its Constitutional Obligation to make the owner whole by paying “Fair Market Value” when the result is that an innocent property owner suffers:
  - A deficiency judgment from his Mortgagee?
  - A bankruptcy?
  - A ruined credit record for life?

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# Scenario 3 – Loss of Accrued SOH

- Longtime homeowner has built up Save Our Homes tax cap value
- Forced to sell in a down market and loses a significant accrued tax savings because of it

EXAMPLE:

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- Purchase house and homestead in Year 0 for \$100,000
  - House increases \$50,000 in value per year from Y1-Y4 (worth \$300,000 at end of Y4)
  - In Y4, being taxed as worth \$112,550 (3% per year SOH cap)
  - Market crash makes home worth \$112,000 in Y6. Immediately condemned.
  - If they waited out the crash before selling, would carry with them an accrued SOH cap.
  - Instead, they lose all accrued SOH savings without payment of any compensation.

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## Scenario 4 – Condemnee Can't get a Loan

- Subprime or barely-prime mortgagor bought house in 2005
  - Too much other debt (credit cards, car, student loans)
  - Too little down payment (95% LTV)
  - Too low monthly income
  - Mediocre/bad credit
- Property now condemned
- Even if full amount of mortgage is paid off, Owner has \$0 to put towards new home
- No lenders are making subprime, and many aren't even making low end prime loans
- Is this person just left homeless?

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# Scenario 5

- Wekiva Parkway Project – Real Example
  - Alignment known for years
    - Published at public meetings
    - Available on the internet
  - Couple in divorce proceedings must sell home
  - Cannot sell because of disclosure requirement
- Trapped in a home with your nearly ex-spouse
- Offering to sell your home for less than a depressed appraised value and being turned down



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Thank you.  
Have a Great Weekend

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