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THE MEANING OF VALUE: ASSESSING JUST COMPENSATION FOR REGULATORY TAKINGS

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INTRODUCTION

The Fifth Amendment's Takings Clause lies at the intersection of private ownership and the government's power to regulate. Deciding when a government action requires compensation has therefore become a familiar property rights battleground. Advocates for stronger private property pro-

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tection argue for compensating more often than their counterparts on the opposite side of the debate. Surprisingly, this familiar disagreement ignores what should be a central issue in takings analysis: when compensation is due, how much should the government have to pay? Valuing just compensation turns out to be largely unstudied but essential for defining the extent of constitutional protection for private property.

The valuation problem has been hidden behind a veil of apparent consensus.¹ For all the disagreement and uncertainty in the rest of takings jurisprudence, compensation is considered straightforward; it is measured by the fair market value of the property taken. In the takings context, however, fair market value hides a number of substantive decisions—what this Article dubs “valuation mechanisms”—that can have a significant impact on a property owner’s ultimate award. Moreover, different valuation mechanisms are more or less suited to advancing the goals of particular private property regimes. By failing to appreciate the range of decisions contained within the fair market value standard, courts and commentators risk internal inconsistency between their animating conceptions of the Takings Clause and their assessment of the value of government takings of private property. To take just one example, the strong private property protection reflected in a per se takings rule can be undermined by a nominal damages award.²

It is important to acknowledge up front that the fair market value standard itself is not without controversy as the benchmark for just compensation. Despite courts’ admonition that just compensation should place an owner in the position she would have occupied but for the governmental action, current compensation rules exclude whole categories of damages

¹ A few commentators have at least acknowledged the difficulty of valuing takings claims. See RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 182–86 (1985); WILLIAM A. FISCHER, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 325–68 (1995); Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721, 769 (1993); see also Douglas W. Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57 IND. L.J. 45, 80 (1982) (“Existing case law has evaded the value standard to be applied. Thus, time and again, opposing sides assume their natural positions without any consistent guiding standard.”); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation Law,”* 80 HARV. L. REV. 1165, 1216 (1967) (“Utilitarian algebra, it appears, cannot specify a sound compensation practice—the equation cannot be solved for that ‘value’ of compensation which yields a maximum excess of efficiency gains over demoralization or settlement costs—until supposed facts about human psychology and behavior have been plugged into the equation as independent variables.”). No one has provided a comprehensive treatment of the subject.

² E.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (holding that a New York City regulation requiring building owners to permit a cable company to run cable television lines over their buildings was a taking because “a permanent physical occupation authorized by government is a taking”). In the famous postscript to the case, the New York Court of Appeals on remand awarded \$1 in damages. *Loretto v. Group W. Cable*, 522 N.Y.S.2d 543 (App. Div. 1987); see JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1178 (3d ed. 1993); ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 3–127 (2d ed. 2000).

caused by government takings of private property.³ Fair market value excludes, for example, consequential damages and compensation for any of the real but subjective harms suffered by the property owner.⁴ This contributes to the popular intuition that fair market value provides inadequate compensation for takings.⁵

Given the connection between valuation and substantive takings theories, however, there is nothing in the Fifth Amendment that demands full indemnification for all losses when the government takes private property. Criticisms about the adequacy of compensation have too often elided the difficult prior question, “adequate for what?” Because the content of the Fifth Amendment’s private property protection remains deeply contested, the adequacy of compensation should depend on the purpose that compensation is meant to serve. In short, the compensation inquiry is not independent of the constitutional protection afforded to private property.⁶

This insight is a specific application of the rights-remedies scholarship arguing that the content of a right is defined by the remedy for its violation. Legal realists have long recognized that “[a] right is as big, precisely, as

³ *E.g.*, *Olson v. United States*, 292 U.S. 246, 255 (1934) (“[The property owner] is entitled to be put in as good a position pecuniarily as if his property had not been taken.”).

⁴ *See* Christopher Serkin, *Valuing Interest: Net Harm and Fair Market Value in Brown v. Legal Foundation of Washington*, 37 IND. L. REV. 417, 425–26 (2004) (examining compensation rules); *see also* EPSTEIN, *supra* note 1, at 183; Laura H. Burney, *Just Compensation and the Condemnation of Future Interests: Empirical Evidence of the Failure of Fair Market Value*, 1989 BYU L. REV. 789, 793–94 (1989) (listing excluded categories of damages from fair market value, including “good will, lost profits, and sentimental attachment”).

⁵ Many leading commentators have argued that current compensation rules are inadequate to provide just compensation. *See, e.g.*, EPSTEIN, *supra* note 1, at 53; Steve P. Calandrillo, *Eminent Domain Economics: Should “Just Compensation” Be Abolished, and Would “Takings Insurance” Work Instead?*, 64 OHIO ST. L.J. 451, 515 (2003); Hanoach Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 755 (1999) (“In some cases, fair market value may well measure the utility lost by the landowner due to the public action at hand. But this is not necessarily so, and, in fact, in many cases, it will be otherwise.”); Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAW. 765, 778 (1973); Glynn S. Lunney, Jr., *Takings, Efficiency, and Distributive Justice: A Response to Professor Dagan*, 99 MICH. L. REV. 157, 162 (2000); Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 893 n.262 (1989); Ann E. Gergen, Comment, *Why Fair Market Value Fails as Just Compensation*, 14 HAMLINE J. PUB. L. & POL’Y 181, 181 (1993); *see also* Michael DeBow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579, 580 & nn.7–8 (1995) (citing additional sources); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82–83 (1986) (discussing just compensation standard in eminent domain).

⁶ Many courts fail to appreciate the interaction between these two questions. *See, e.g.*, *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 253 F.3d 576 (11th Cir. 2001). The *A.A. Profiles* court had, in a prior case, determined that a taking occurred and remanded to the district court. *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 859 F.2d 1483, 1489 (11th Cir. 1988). On remand, the district court awarded zero damages. *A.A. Profiles*, 253 F.3d at 581 (reciting procedural history). In a ruling suggesting how easy it is to conflate the question of when a taking has occurred with the issue of damages, the Eleventh Circuit held that the district court was not free “to revisit, in the guise of determining the proper damages, the issue of whether a taking occurred.” *Id.* at 582.

what the courts will do.”⁷ Guido Calabresi and Douglas Melamed’s famous article demonstrated the difference in the nature of entitlements protected by liability as opposed to property rules—i.e., damages as opposed to injunctions.⁸ Recently, Daryl Levinson has examined how the rights-remedies distinction breaks down throughout constitutional law.⁹ This Article takes the intuition one step further, arguing that the scope of liability rule protection is determined by how courts actually value the right.¹⁰

Recognizing this connection creates a number of important benefits. First, it refutes the claim that fair market value is necessarily inadequate as a measure of just compensation.¹¹ Second, it reveals how compensation can respond to and advance substantive takings goals. Finally, adding a compensation dimension to the traditional debate over when a taking has occurred opens up a broader range of options than current takings scholarship recognizes. Takings theories traditionally presented a binary choice between compensation and no compensation.¹² This Article not only challenges the common understanding about how compensation is valued, it also suggests more nuanced resolutions to cases that often seem to require a broader range of options than paying “all” or paying “nothing.”

The diversity of approaches to compensation may strike some as unjustifiably ad hoc, much like the rest of courts’ takings inquiries.¹³ But what if, instead of fact-specific calculations that defy categorization, valuation deci-

⁷ KARL NICKERSON LLEWELLYN, *THE BRAMBLE BUSH* 84 (1960).

⁸ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

⁹ See generally Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

¹⁰ Levinson has articulated the theory behind pricing constitutional rights. As he succinctly writes, “a right with less remedy is worth *less* and a right with more remedy is worth *more*.” *Id.* at 904. This Article takes an important step forward from this broad theoretical point to examine how courts actually expand and contract the price of takings.

¹¹ See *supra* note 5 (citing sources).

¹² In Calabresi and Melamed’s framework, the choice appears to be between protecting property owners with a liability rule, or simply assigning a property right to the government. See generally Calabresi & Melamed, *supra* note 8. This Article largely leaves aside the possibility of protecting property owners with a property rule, enjoining the government’s regulation altogether, because the government’s power of eminent domain always preserves a mechanism for converting property rule protection into market-based liability rule protection. The limits of this power are the subject of a case, *Kelo v. City of New London*, for which the Supreme Court recently granted certiorari. 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (2004).

¹³ One state court has recently noted the contingent-seeming nature of valuation decisions:

Perhaps the best example of the chameleon-like form that damages can take is found in the Florida Supreme Court’s opinion in *Polk*. There, the court not only affirmed an award of damages for the value of trees beyond the 125-foot zone, but also for the “prospective net revenues” the immature trees would have produced if allowed to reach maturity. This is certainly illustrative of the varied nature of damages found in inverse condemnation cases, which appears to be dictated by the particular facts of the case.

Fla. Dep’t of Agric. & Consumer Servs. v. City of Pompano Beach, 829 So. 2d 928, 931 (Fla. Dist. Ct. App. 2002) (citing *Dep’t of Agric. & Consumer Servs. v. Polk*, 568 So. 2d 35, 43 (Fla. 1990)).

sions respond to, and reflect, broader theoretical considerations? This Article argues that valuing compensation provides just such a window into deeper theories of takings, revealing a host of considerations that map on to specific approaches to takings law.¹⁴ Moreover, compensation rules properly applied can advance the substantive goals of various takings regimes. At the least, since the range of monetary values that can be assigned to takings claims corresponds to diverse social values, compensation rules should be applied consistently with core constitutional values.

This Article therefore argues that the adequacy of compensation cannot be determined in the abstract but must rather be judged by how effectively a damages award advances the goals of the Takings Clause. Those goals are themselves deeply contested, so instead of committing to any one, this Article examines the leading theories and the function of compensation within each one. This first step is an important project in and of itself because the relationship between the Takings Clause's protection for private property, on the one hand, and compensation, on the other, is insufficiently understood. The Article goes on, however, to assess compensation under a variety of takings theories, arguing for the surprising conclusion that current valuation methods are flexible enough to advance the goals of a variety of those theories and are therefore not inadequate at all.

Part I identifies nine specific valuation mechanisms currently used to measure compensation. Part II then examines various theories of the Takings Clause, developing a new taxonomy in the process that divides takings theories by the approach to compensation that best advances their underlying goals. Part II ultimately matches these competing theories with the different valuation mechanisms identified in Part I. By examining why certain valuation mechanisms are particularly well suited to the goals of specific takings theories, Part II demonstrates that valuing takings claims is not a process of arriving at a single "true" value of property, but is rather a deeply context-dependent exercise. Part III finally puts the Article's theory about valuation to the test, interpreting actual judicial pronouncements in a manner consistent with the Article's normative prescriptions. Part III demonstrates how courts can develop approaches to valuation that advance the substantive goals of the Takings Clause.

¹⁴ For a similar approach to valuation in different contexts, see Michael Heller & Christopher Serkin, *Revaluing Restitution: From the Talmud to Postsocialism*, 97 MICH. L. REV. 1385, 1396 (1999) (reviewing HANOCH DAGAN, *UNJUST ENRICHMENT* (1997)) (arguing that "[v]aluation of gain or harm, often dismissed as a merely technical matter, reflects normative principles at the core of a national legal ethos"); see generally DAGAN, *supra*.

I. THE FAIR MARKET VALUE STANDARD

A. *The Compensation Problem*

It is no secret that takings law is in a chronic state of disarray, and not for a lack of attention. Courts, legal scholars, and economists have devoted enormous effort to solving the vexing problem of identifying when a governmental action rises to the level of a taking.¹⁵ Not surprisingly, a variety of competing theories have emerged. Some commentators have argued for strong judicial enforcement of the Takings Clause, suggesting that many, if not most, governmental actions impacting private property are compensable takings.¹⁶ Others have argued the opposite extreme.¹⁷ Within these broad camps, debate sometimes focuses on creating efficient incentives for the government or for property owners,¹⁸ on fairness or distributive justice concerns,¹⁹ on the nature of the property affected,²⁰ and sometimes on broad and contested political or economic theories.²¹ Despite, or perhaps because of, the impressive body of work in this area, seemingly intractable problems remain. Courts still struggle to identify when a regulation “goes too far,”²² coping unsatisfactorily with issues like the denominator problem, conceptual severance, the nuisance exception, temporary takings, and a host of other thorny issues.

This Article’s preliminary insight is that the same disagreements over the amount of protection the Takings Clause should afford private property are replayed in the compensation analysis. Stronger protection for private property, for example, means not only finding more governmental actions to be takings, but also awarding relatively higher compensation. The entire

¹⁵ The vast body of literature in the field is too broad to catalogue here. For a bibliography of some of the significant works in the area, see FISCHER, *supra* note 1, at 377–406.

¹⁶ Well-known representatives from this camp include, for example, Justice Scalia, *see* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014–19 (1992), and Richard Epstein, *see* EPSTEIN, *supra* note 1, at 95, 107–20.

¹⁷ Examples here include Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1625–29 (1987), and Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 151 (1971).

¹⁸ *See, e.g.*, Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 580 (1984); Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997 (1999).

¹⁹ *See, e.g.*, Dagan, *supra* note 5, at 767–70; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 847 (1995) (suggesting the Takings Clause was drafted with some redistributive concerns in mind).

²⁰ *See, e.g.*, MARGARET JANE RADIN, REINTERPRETING PROPERTY 146–65 (1993); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 965 (1982); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 387–90 (2000).

²¹ *See, e.g.*, Robert Jerome Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261, 276 n.81 (1990) (citing sources regarding political aspects of the takings debate); Michelman, *supra* note 1, at 1214–18 (proposing his famous utilitarian formula).

²² *See* *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“[I]f regulation goes too far it will be recognized as a taking.”).

breadth of the traditional takings debate can also be found in courts' compensation analysis, but subtly—often almost invisibly.

The absence of scholarship in this area is perhaps not surprising. First, there is no established canon of cases to study, as there is in the traditional takings debate.²³ Most valuation issues are resolved at trial or on remand, and are therefore the stuff of district court and intermediate appellate court opinions. Furthermore, the general valuation standard is well settled. Courts all agree that takings are to be compensated by the fair market value of the property taken.²⁴ But a closer look at cases addressing how to measure fair market value reveals deep confusion and contradictory approaches.

In its typical formulation, “[t]he market value is usually considered to be what a willing buyer would pay in cash to a willing seller.”²⁵ There are a number of ways to determine the fair market value of property, including recent sales of the property itself, comparable sales, discounted cash flow, and return on investments.²⁶ Despite a general agreement about these approaches, and even standardization in appraisal techniques, appraisers valuing the same property's fair market value can reach wildly different results.²⁷ Moreover, the nitty gritty decisions about what to include in permissible damage calculations transfers some of the most important valuation decisions from the hands of the appraiser—or, subsequently, the jury—

²³ There is little disagreement about the most relevant cases. See generally *The Supreme Court, 2001 Term—Leading Cases*, 116 HARV. L. REV. 321 (2002) (citing Takings Clause cases).

²⁴ E.g., *United States v. 50 Acres of Land*, 469 U.S. 24, 25 (1984); *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1368 (11th Cir. 2002); *Palm Beach Isle Assocs. v. United States*, 231 F.3d 1354, 1363 (Fed. Cir. 2000). This rule is subject to two narrow and seldom-applied exceptions. Fair market value does not apply where it would be too difficult to measure or where manifest injustice would result. E.g., *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 n.14 (1983) (citing *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)).

²⁵ *Berenholz v. United States*, 1 Cl. Ct. 620, 632 (1982) (citing *United States v. Miller*, 317 U.S. 369, 373–74 (1942)).

²⁶ *United States v. Toronto Hamilton & Buffalo Navigation Co.*, 338 U.S. 396 (1949) (discussing (1) original cost; (2) replacement cost; (3) past earnings; (4) insurance value; (5) scrap value; (6) book value; (7) price at the nearest market—“place value”; and (8) highest foreign sale value, as possible measures of recovery in the absence of an ascertainable fair market value); *Snowbank Enters. Inc. v. United States*, 6 Cl. Ct. 476, 486 (1984) (“A trial court is not restricted to any of these methods in arriving at its determination of fair market value. Its valuation analysis may be based upon the comparable sales, the replacement cost, the income capitalization or upon any combination of these three appraisal methods.”); see also Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 117 (2002) (identifying alternative means of assessing fair market value).

²⁷ See, e.g., *Bassett, LLC v. United States*, 55 Fed. Cl. 63, 77–78 (2002) (comparing plaintiff's appraisal of property at \$92,806,000 with defendant's appraisal at \$34,600); see also Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL'Y 1, 64–68 (2004) (describing the difficulty of valuing real property); Keith Sharfman, *Valuation Averaging: A New Procedure for Resolving Valuation Disputes*, 88 MINN. L. REV. 357, 367 n.35 (2003) (“There is what one might call a ‘zone of plausibility’ in financial valuations, ranging anywhere from plus or minus fifteen to plus or minus thirty percent.”).

into the hands of the court.²⁸ Judicial reasoning about damages reveals a staggering number of choices courts must make, as a sampling of cases quickly demonstrates.²⁹

For example, in *Antoine v. United States*,³⁰ a member of the Rosebud Sioux Indian Tribe claimed the government had expropriated 320 acres of Indian allotment land from his grandfather in 1884. The court found that the government's action a century earlier had been a taking, but denied plaintiff replacement value for the property or any measure of lost profits. Instead, the court based compensation on the fair market value of the property at the time of the expropriation back in 1884: \$3.89 per acre.³¹ Applying a 5% annual interest rate, the district court arrived at a total award of only \$7262 for the 320 acres of land.³² The timing of the fair market value determination is often critical to the ultimate award.

*A.A. Profiles, Inc. v. City of Fort Lauderdale*³³ illustrates problems identifying property's highest and best use. There, plaintiff purchased property to operate a wood-chipping and organic waste processing facility. After a public outcry, the City of Fort Lauderdale downzoned the property to prohibit the intended use, and the Eleventh Circuit agreed with the district court that this was a compensable taking.³⁴ The lower court, however, did not award damages because it found that the plaintiff's proposed facility was underfinanced and "doomed even absent the City's actions."³⁵ According to the district court, the goal of compensation was to place the plaintiff in the same position she would have occupied but for the taking. Compensation was therefore unnecessary because the plaintiff's project would have failed even without the taking. The Eleventh Circuit disagreed and remanded the case, instructing the district court to award compensation based on the property's diminution of value as a result of the downzoning.³⁶ But judgments about the highest and best use for property are complicated, at

²⁸ While there would undoubtedly be an interesting story to tell about actual dollar values awarded by juries in takings cases, this Article focuses on the legal decisions defining the contours of the damages inquiry instead of the amount of money awarded at the end of the day. At least one commentator has suggested leaving such a difficult question entirely to the jury. See Burney, *supra* note 4, at 799.

²⁹ A recent case exemplifying the contested nature of valuation is *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002), in which the Supreme Court examined the tortured history of valuing rates of return in the highly regulated telecommunications industry. This Article follows the lead of most other takings scholarship, however, and ignores the Fifth Amendment implications of government rate-making functions. No doubt a fascinating compensation story could also be told about this understudied area of law.

³⁰ 710 F.2d 477 (8th Cir. 1983).

³¹ *Antoine v. United States*, 537 F. Supp. 1163, 1168 (D.S.D. 1982).

³² *Id.* The Court of Appeals vacated and remanded the case, but only for further consideration of the appropriate interest rate. See *Antoine*, 710 F.2d at 480.

³³ 253 F.3d 576 (11th Cir. 2001).

³⁴ *Id.* at 582.

³⁵ *Id.* at 585 n.12.

³⁶ *Id.* at 585.

best, and the court of appeals did not explain why prohibiting a use that was not economically feasible in the first place would have reduced the property's fair market value.

*Herrington v. County of Sonoma*³⁷ addresses the difficult compensation problem presented when some less restrictive governmental action would not have been a taking. There, Sonoma County denied the plaintiffs' application for a residential subdivision building permit. The district court agreed the permit denial was a taking but held that the plaintiffs might not have been entitled to construct the project they wanted. The district court therefore reduced the value of the taken property by the chance that regulatory approvals would have been permissibly denied, expressing its methodology as:

$$[(aX + bY) - Y] Rt + ac$$

In which:

a = probability of approval of 32 lots

b = probability that 32 lots would not be approved

($a + b = 100\%$).

X = value of the land with a 32-lot subdivision potential (not more than \$1.3 million).

Y = value of the land with no development (not less than \$490,000).

($aX + bY$) = weighted probability of approval of 32 lots.

R = rate of interest.

t = duration of the delay after December 11, 1979.

c = increased costs of development resulting from the delay.³⁸

Considering each of these cases in isolation may suggest that compensation is entirely fact-specific, and, therefore, not amenable to broader theoretical categorization.³⁹ This takes too myopic a view of the problem. In fact, disagreements over valuation can be arranged around a few central valuation mechanisms that dramatically affect the amount of a property owner's ultimate recovery. The following section identifies nine of these valuation mechanisms and examines their effect on compensation, while providing judicial illustrations of their application.

³⁷ 790 F. Supp. 909 (N.D. Cal. 1991).

³⁸ *Id.* at 916.

³⁹ See *Wallace v. United States*, 566 F. Supp. 904, 910 (D. Mass. 1981) (“[C]ontroversies over valuation are not governed by fixed rules. Thus, a case cannot be decided by selecting some formula as the only correct one, then determining figures to be used in each step of the formula and proceeding through mathematical calculation to the foreordained result.”); cf. *Porter v. Yukon Nat'l Bank*, 866 F.2d 355, 357 (10th Cir. 1989) (“[T]he matrix within which questions of solvency and valuation exist in bankruptcy demands that there be no rigid approach taken to the subject.”). This undoubtedly accounts, at least in part, for the absence of theoretical work in the area.

Although courts are explicit about using fair market value to value takings, the valuation mechanisms identified below are implicit in courts' application of that standard. They come from courts' reasoning about the application of fair market value on the facts of specific cases. To be clear, it is often necessary to look behind the text of courts' valuation decisions to identify generalizable valuation mechanisms because courts seldom acknowledge—or are not aware of—the substantive decisions they are making. Nevertheless, any application of the fair market value standard is inextricably tied up with these valuation mechanisms whether courts admit it or not.

One initial caveat is in order. This Article's explicit focus is on the role of compensation in regulatory takings. Courts, however, are much more likely to discuss compensation in the context of eminent domain proceedings or condemnation actions.⁴⁰ Because the compensation standard for eminent domain and condemnation is also the fair market value of the property taken, these are considered together with regulatory takings cases and are described generically as various forms of governmental action.⁴¹

There is an additional justification for this approach. The power of eminent domain lurks behind much regulatory takings doctrine. Even where courts enjoin local land use restrictions instead of—or in addition to—awarding compensation, a local government can still choose to condemn the property.⁴² Although the condemnation proceeding is formally distinct from the initial regulatory takings claim, the compensation the government must ultimately pay for exercising its power of eminent domain defines, in a very practical sense, the content of a property owner's rights against the government's regulatory power. In this way, compensation turns out to be a medium for incorporating constitutional theory from the regulatory takings context into eminent domain. Eminent domain also calls on courts to define the content of private property rights but, because the government's liability is not at issue, exclusively in the form of compensation. This Article's project can therefore be described either as incorporating eminent domain's compensation analysis into the regulatory takings

⁴⁰ Merrill also uses eminent domain proceedings and condemnation actions when discussing compensation for takings. See Merrill, *supra* note 26, at 120–21.

⁴¹ This Article examines valuation decisions in both regulatory takings and eminent domain cases. While the latter may implicate a different set of concerns, *cf. id.* at 110 (“Valuation techniques that have been developed in the context of formal expropriation may not translate readily to regulations that leave possession undisturbed, but reduce the value or profitability of property.”), they are nevertheless instructive about the range of valuation decisions available to courts. In many eminent domain or condemnation proceedings, valuation is the only issue before the court and those cases often provide the most thoroughgoing analysis of the issue.

⁴² See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987) (“Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.”).

context, or incorporating takings' constitutional theory into eminent domain.

B. The Valuation Mechanisms

1. *Harm Versus Gain*.—The first valuation decision faced by any court is whether to measure the harm to the property owner or the gain to the government caused by the taking.⁴³ Courts have their choice of competing axioms in this regard. One provides that damages are to be measured by the property owner's harm.⁴⁴ But another axiom holds that takings are to be valued by the government's gain and not the property owner's loss.⁴⁵ In many cases, harm and gain will be symmetrical, but this is not always true. Choosing between the two can make a significant difference in the ultimate compensation award. As one court noted, "there is often a substantial gap between value to the owner and value to others—the government, a hypothetical buyer, or the public at large."⁴⁶

There are a number of reasons why harm-based compensation could result in a higher award than valuation based on the government's gain. Even putting aside traditionally non-compensable harms, like consequential damages or lost profits,⁴⁷ some property has a particular use to the property

⁴³ For a discussion of this distinction between valuing takings by harm versus gain, see Serkin, *supra* note 4, at 424–27.

⁴⁴ See, e.g., *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) ("Because gain to the taker, on the other hand, may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation to requite for that deprivation.") (citations omitted); *United States v. John J. Felin & Co.*, 334 U.S. 624, 629 (1948) ("In enforcing [the Fifth Amendment] the question is 'what has the owner lost, not what has the taker gained.'" (quoting Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910))); *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 253 F.3d 576, 583 (11th Cir. 2001) ("The starting point for any inquiry into damages in a takings cases [sic] is to query what has the owner lost?") (internal quotation marks omitted). The Supreme Court most recently reiterated this point in *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 236 (2003).

⁴⁵ See *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 282 (1943) ("[T]he sovereign must pay only for what it takes, not for opportunities which the owner may lose."); see also *Francini v. Town of Farmington*, 557 F. Supp. 151, 157 (D. Conn. 1982) ("[I]t is well-settled that a constitutionally cognizable 'taking' requires the sovereign to pay for what it actually gains, not for what the plaintiff has lost."); *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394, 407 (1984) ("The sovereign must pay for what it takes, not for opportunities the owner loses."). In support of this judicial rule, Benjamin Hermalin has argued: "To induce an agent to act in a socially efficient manner (e.g., invest correctly), the agent's objective must be equivalent, on the appropriate margin, to society's objective. This can be accomplished only by incorporating the social benefit into the agent's reward function." Benjamin E. Hermalin, *An Economic Analysis of Takings*, 11 J.L. ECON. & ORG. 64, 66 (1995).

⁴⁶ *D.C. Redevelopment Land Agency v. Thirteen Parcels of Land in Squares 859, 912, 934 & 4068*, 534 F.2d 337, 338 (D.C. Cir. 1976).

⁴⁷ See *Yuba Natural Res. Inc. v. United States*, 904 F.2d 1577, 1581 (Fed. Cir. 1990) (citing *Kimball Laundry* and *General Motors* and concluding that "[i]t is a well settled principle of Fifth Amendment taking law, however, that the measure of just compensation is the fair value of what was taken, and not the consequential damages the owner suffers as a result of the taking"); see also *Rowland v. United States*, 8 Cl. Ct. 267, 271 (1985) (reviewing cases). In contrast, several states expressly require payment

owner that is not reflected in its fair market value. This will often occur where the property is used by its owner in connection with other neighboring property.⁴⁸ Courts generally prohibit property owners from collecting for that enhanced value, holding that the government is liable only for what it takes, and *not* for the property owner's harm.⁴⁹ A harm-based award permits property owners to recover this enhanced value.⁵⁰

In other situations, however, a gain-based award will result in dramatically higher compensation for a property owner. The government's gain might be difficult to determine as, for example, with environmental or land use regulations whose benefits, while no less real, are difficult to value.⁵¹ In such cases, where gain is not immediately quantifiable, it is common to value takings by the property owner's harm.⁵² But when the purpose of the taking is to create or facilitate a new commercial enterprise, for example, a

of consequential damages for certain eminent domain proceedings. See *Mitchell v. United States*, 267 U.S. 341, 345–46 (1925) (describing state law); *City of Stillwell v. Ozarks Rural Elec. Coop. Corp.*, 166 F.3d 1064, 1071–72 (10th Cir. 1999) (applying Oklahoma law and permitting award for “reintegration costs”); *City of Thibodaux v. La. Power & Light Co.*, 373 F.2d 870, 872 (5th Cir. 1967) (“The city contests the award for consequential damages but the award has an adequate evidentiary foundation, and is clearly in order under the jurisprudence of Louisiana.”); *Ideal Leasing Servs., Inc. v. Whitfield County*, 562 S.E.2d 790, 793 (Ga. Ct. App. 2002) (“The measure of just and adequate compensation for the taking is first, the market value of the property actually taken; second, the consequential damage that will naturally and proximately arise to the remainder of the owner’s property” (internal quotation marks omitted) (citation omitted)).

⁴⁸ This can occur when, for example, property has attendant grazing rights on adjacent lands. See, e.g., David Abelson, *Water Rights and Grazing Permits: Transforming Public Lands into Private Lands*, 65 U. COLO. L. REV. 407, 415–16 (1994) (citing *United States v. Fuller*, 409 U.S. 488 (1973)).

⁴⁹ *Fuller*, 409 U.S. at 500 (“While as condemnor the Government must pay market value, as property owner it may change the use of its property as if it were a private party, without paying compensation for the loss in value suffered by neighboring land.”); *United States v. 57.09 Acres of Land*, 757 F.2d 1025, 1029 (9th Cir. 1985); see also Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 HARV. ENVTL. L. REV. 295, 362 (2003) (noting that some compensation rules “prohibit[] compensation for any value attributable to association of the condemned tract with preexisting or dominant government property rights”); Barnhizer, *supra*, at 367–69. It is interesting to note, however, that severance damages may be an exception to this rule. In the case of a partial taking, severance damages are sometimes awarded for damage done to the owner’s remaining property as a result of the taking. See, e.g., *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999) (“The diminution in value of the remaining property is called ‘severance damages.’” (citation omitted)); *Hendler v. United States*, 952 F.2d 1364, 1383–84 (Fed. Cir. 1991) (“[O]nce a taking is adjudged, plaintiffs will have the opportunity to establish their severance damages, the damages accruing to their retained land as a result of the taking.”). This is at least in tension with a gain-based award and appears to compensate the owner for her harm.

⁵⁰ See *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973) (including expected value of lease renewal as part of fair market value calculation).

⁵¹ Indeed, the costs associated with determining the government’s gain might eclipse the value of the regulation. At the least, those costs might transform a net efficient regulation into an inefficient regulation whose costs are greater than the gains secured.

⁵² See, e.g., *Transcon. Gas Pipe Line Corp. v. 118 Acres of Land*, 745 F. Supp. 366 (E.D. La. 1990). Even where the government’s gain can be readily quantified, the Supreme Court has sometimes awarded harm-based damages. E.g., *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003).

property owner's compensation can be increased if she is allowed to capture at least some of the benefit of the new enterprise.⁵³ Likewise, the government can create value by bundling property that transaction costs would prevent the market from bundling on its own.⁵⁴ Using that higher, bundled value as the basis for compensation also results in higher awards than harm-based valuation. Compensation, then, can respond to the purpose of the government's action and provide for a portion of the government's gain, especially when the taking is for a commercial use.⁵⁵

2. *Allocating Risk: Highest and Best Use.*—It is black letter law that fair market value is based on the value of property as put to its most profitable use, usually referred to as its highest and best use.⁵⁶ In the market, a real buyer and seller would consider the property's highest and best use to arrive at a fair transaction price.⁵⁷ Even if a specific prospective buyer does

⁵³ For example, New York City recently condemned property from several property owners to deed to the New York Times. See generally *West 41st Street Realty LLC v. N.Y. State Urban Dev. Corp.*, 744 N.Y.S.2d 121 (App. Div. 2002). The property owners' compensation would presumably have been far higher if they had been permitted to share in the profits of the New York Times. It is precisely the potential ability of property owners to hold out for a share of a project's gain that is widely cited as a justification for the power of eminent domain. E.g., THOMAS J. MICELI, *ECONOMICS OF THE LAW* 138 (1997).

⁵⁴ See *Brown*, 538 U.S. at 221–23. This is a form of creating value by the government overcoming a tragedy of the anticommons, as described by Michael Heller in his important article. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 623 (1998).

⁵⁵ Cf. *United States v. 0.88 Acres of Land*, 670 F. Supp. 210, 211 (W.D. Mich. 1987) (“[D]amages for the loss of goodwill or loss of the going-concern value of a business are not compensable unless the government has condemned the business property with the intention of carrying on the business.” (emphasis added)); *United States v. 0.38 Acres of Land*, 117 F. Supp. 217, 221 (E.D.N.Y. 1954) (awarding additional \$20,000 to fair market value of property to reflect government's intention to continue to use the property as a film storage facility). Early interpretations of the Takings Clause viewed government actions differently if they involved business entities “clothed with a public interest.” Treanor, *supra* note 19, at 800. This is a suggestion with timely and practical importance. The Supreme Court has recently granted certiorari in *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), cert. granted, 125 S. Ct. 27 (2004), positioning the Court to decide whether a local government is allowed to take property on behalf of a commercial enterprise under the Fifth Amendment's “Public Use” requirement. Instead of treating this as a yes-or-no question, the Court could permit the government to condemn property for commercial uses, but only by paying at least some portion of the resulting gain. See James E. Krier & Christopher Serkin, *Public Ruses*, 2005 MICH. ST. L. REV. 1 (forthcoming).

⁵⁶ See *United States v. 320.0 Acres of Land*, 605 F.2d 762, 781 (5th Cir. 1979) (valuing property by its highest and best use); see also *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 253 F.3d 576, 583 (11th Cir. 2001) (quoting *320.0 Acres of Land*, 605 F.2d at 781). In fact, courts are sometimes required to apply this standard. See, e.g., 43 C.F.R. § 2201.3-2(a) (2004) (requiring, in context of federal land acquisitions, that an “appraiser shall . . . [d]etermine the highest and best use of the property to be appraised”).

⁵⁷ *320.0 Acres of Land*, 605 F.2d at 781 (“[S]ince a hypothetical, ‘reasonable man’ buyer will purchase land with an eye to not only its existing use but to other potential uses as well, fair market value takes into consideration ‘[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future . . . to the full extent that the prospect of demand for such use affects the market value while the property is privately held.’ Thus, ‘just compensation’ is not limited to the value of the property as presently used, but includes any additional market

not intend to put the property to its highest and best use, a seller will still decide on a price at which she is willing to sell by considering the property's value to a buyer who will use it to maximum benefit. The cost of developing a more intensive use is then subtracted from this highest-and-best-use value of the property.

To take a simple residential example, if a swimming pool will add \$10,000 to the value of a house, and cost only \$9000 to install, that extra \$1000 should be included in the present value of the house as part of the property's highest and best use. If, however, as is often true, the value added by installing a pool is equal to its cost, the prospect of adding a pool has no impact on the property's value.

This is a valuation mechanism because applying the highest and best use standard requires an allocation of the financial risk of developing property from its current condition into its highest and best use.⁵⁸ A more sophisticated example illustrates this point. Imagine that the highest and best use of an undeveloped lot near the highway is a new shopping center, and a prospective purchaser would likely buy the property with that use in mind. The present value of the property, then, would be the as-developed value of the shopping center minus the cost of development. But actually developing property is by no means a risk-free proposition. There are risks of permit denials, environmental hazards, cost overruns, unscrupulous contractors, unanticipated pitfalls, and the basic risk that the project will not be a commercial success.⁵⁹ These are risks that can be minimized or insured against to a certain extent, but actions taken to minimize risk are themselves

value it may command because of the prospects for developing it to the 'highest and best use' for which it is suitable." (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)).

⁵⁸ The question of allocating risk only arises where the property is not being put to its highest and best use at the time of the taking. This often occurs where, for example, a local government impermissibly denies building permits preventing a property owner from developing the property's highest and best use. It can also arise whenever the current use is not the highest and best use, although courts have developed a rebuttable presumption that a property's present use is its highest and best use. See *United States v. 69.1 Acres of Land*, 942 F.2d 290, 292 (4th Cir. 1991).

⁵⁹ These risks of development include the following:

Design error; Overrun in design budget; Delay in design; Time and cost overruns due to performance by third parties; Time and cost overruns in design caused by the owner; Acceleration costs to bring the design within the design schedule; Construction defects; Overrun in the construction budget; Construction cost overruns due to estimating errors; Delay in completion of construction; Acceleration costs to bring construction within the construction schedule; Discovery of hazardous materials on site; Force majeure which results in time and cost overruns; Unforeseen site conditions which are not the owner's contractual responsibility; Owners [sic] failure to pay; Indemnification for performance and labor and material payment bonds; Carrying costs associated with fulfilling unwarranted demands of the owner until recovery is obtained; Liability of subcontractors resulting from design defects; Cost overruns resulting from subcontractor or supplier defaults; Insurance obligations; Indemnification obligations in the contract; Fees and expenses for pursuing claims.

Jesse B. Grove, *Risk Allocation from the Contractor's Perspective*, 467 PLU/REAL 41,123-24 (2001).

costly.⁶⁰ The baseline rules about who bears development risks are reflected in the property's fair market value, and therefore affect compensation.

A compensation award can implicitly shift these development risks between the property owner and the government in a number of ways. It is perhaps counterintuitive to think of shifting development risks in valuing takings because the property will not, in fact, be developed into its highest and best use; shifting risk in this context is a purely theoretical exercise where the right to develop the property has been appropriated by the government. Still, expanding and contracting the anticipated development costs that would have been necessary to create the property's highest and best use will shift the burden of those risks of development in a hypothetical transaction between a willing buyer and a willing seller. Including insurance costs and fees associated with permit applications will lower the present value of the property by shifting costs to the property owner.⁶¹ Development costs can even be increased to reflect the possibility of unanticipated problems, like regulatory approvals being denied.⁶²

Most fundamental, but largely unnoticed, is the decision to award compensation based on projections of the as-developed value of the property, discounted only by the costs associated with the actual development.⁶³ Since, by definition, the highest and best use for a property must be commercially feasible,⁶⁴ appraisals of the as-developed property will not include

⁶⁰ In the most general terms, due diligence will minimize certain development risks like the possibility of environmental contamination. Also, developers insure their projects against other risks that are not so easily anticipated, like fire and theft. Neither is costless, however, and shifting those costs between parties can fundamentally alter the value of a property to a specific party.

⁶¹ See *Cooley v. United States*, 46 Fed. Cl. 538 (2000) (allocating development costs to the property owner), *rev'd in part on other grounds*, 324 F.3d 1297 (Fed. Cir. 2003). In *Cooley*, the district court calculated the property's highest and best use by determining the as-developed value of the property, and then reducing that value by (1) "cost of sales, promotion and advertising"; (2) direct development costs; (3) indirect costs including real estate taxes and liability insurance; and (4) holding costs, including interest and financing. *Id.* at 551. The plaintiff objected on grounds that the local market in Minnesota "is comprised of developers who would not have to pay for most of these costs, and these developers would accordingly value the property at a much higher price." *Id.* The Court rejected the plaintiff's argument and allocated all of the development costs to the property owner, including insurance costs. *Id.* at 552.

⁶² See *infra* text accompanying notes 259–266 (describing *Herrington v. County of Sonoma*, 790 F. Supp. 909 (N.D. Cal. 1991)).

⁶³ See, e.g., *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996); see also *infra* text accompanying notes 245–250; see also *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). In *Loveladies*, a claims court entered judgment for the plaintiff in the amount of \$2,658,000 for a denial of a permit by the Army Corps of Engineers to fill in 11.5 acres of wetlands. *Id.* at 1173–74. Plaintiffs had claimed that the highest and best use of the property was as a forty-lot residential development, the gross value of which was estimated at \$3,720,000. *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 155 (Cl. Ct. 1990). The Court of Claims reduced this amount only by hard costs the landowner would have incurred to develop the property. See *id.*

⁶⁴ See, e.g., Stephen Sussna, *The Concept of Highest and Best Use Under Takings Theory*, 21 URB. LAW. 113, 113 (1989) ("Highest and best use can be defined as a use that has the following characteris-

any unpredicted risks derailing the development, or the risk that the contemplated project would not have been a commercial success.⁶⁵ As a consequence, the property owner will receive more than she would have received from an actual purchaser of the undeveloped property. In other words, a real buyer will not usually pay the full value of the as-developed property minus only out-of-pocket development costs, but will further discount that value to reflect development risks and the need to make a profit.

Courts are inconsistent in how they treat the allocation of risk between the parties and the identification of development costs.⁶⁶ Therefore, "highest and best use" does not define a single, objective measure of value but, at best, a broad range of values that courts can still call "fair market value," wherever they fall along this spectrum.

3. *Permissible but Unenacted Regulations.*—The third valuation mechanism turns on where courts draw the line in offsetting the value of permissible regulations.⁶⁷ Property values are affected by applicable regulations. For enacted regulations, this is to suggest nothing more than that property's fair market value reflects the existing regulatory framework.⁶⁸ Just as tax rates are capitalized into property values, otherwise indistinguishable parcels of land are worth very different amounts if they are zoned differently.⁶⁹ Just compensation therefore depends upon pre-existing regulations.

tics: (1) it is legally and physically possible; (2) it is appropriately supported; (3) it is financially feasible; and (4) it results in the highest land value.").

⁶⁵ In fact, at least one court has removed the risk to the plaintiffs that their project would not have been an *above average* success. See *Del Monte Dunes*, 95 F.3d at 1435 (upholding a jury award based upon higher-than-average rates of return reflecting the jury's opinion that the development would have been an above-average success); see also *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1351–52 (11th Cir. 1981) (comparing value of property as regulated with the value of the property as if it had been developed, reduced by landowners equity interest and multiplied by a fair rate of return). *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 253 F.3d 576 (11th Cir. 2001), is also illustrative. Plaintiff's organic waste processing plant was in foreclosure when the city impermissibly rezoned the property, forbidding the plant. *Id.* at 580 n.3. The district court found that plaintiff had not incurred any damages, but the Eleventh Circuit remanded, holding that plaintiff's "precarious financial state and the later foreclosure are relevant only to the extent that they could have affected the property's market value." *Id.* at 585. Plaintiff's own track record demonstrated that the property was not viable as a treatment facility in which case it may have incurred no damages as a result of the taking. *Id.* at 581.

⁶⁶ Compare *Branning v. United States*, 6 Cl. Ct. 618 (1984) (excluding all anticipated profits), with *Del Monte Dunes*, 95 F.3d at 1435 (upholding higher than average rate of return). Both cases are discussed in greater depth in Part III.

⁶⁷ See *Lemmons v. United States*, 204 Ct. Cl. 404, 423 (1974) ("One is not entitled to recover elements of value that the Government . . . might have destroyed under exercise of government authority other than power of eminent domain.").

⁶⁸ In some cases, the value of the property as permissibly regulated can eliminate all damages. See *Yaist v. United States*, 17 Cl. Ct. 246, 259–60 (1989) (finding that plaintiff suffered no compensable taking for value of a dock built on navigable waters because "the erection of the structure was unlawful and the United States could have sought an injunction for the removal of the dock").

⁶⁹ See WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* 40–42 (2001).

Property, however, is also subject to permissible but as yet unenacted regulations, i.e., restrictions the government could impose without paying compensation.⁷⁰ Here the impact on fair market value is slightly more complicated, requiring buyers and sellers to discount the impact of a potential regulation by the chance it will be enacted. While the market is relatively adept at these computations, they pose a particular challenge to courts and offer another valuation mechanism. As a practical matter, differences in the aggressiveness with which courts identify the permissible level of regulation that would not be a taking can dramatically shift a property owner's recovery.

One clear example of the impact of potential regulations on compensation awards is in the body of law that has developed around the taking of fastlands—that is, property above the high-water mark of navigable waters. The Supreme Court has held categorically that because the federal government has a plenary right to regulate navigable waters, the Fifth Amendment does not require compensation for the enhanced value of such property arising out of its location adjacent to navigable waters.⁷¹ Courts valuing such property have therefore relied on comparable sales of non-riparian lands, which are usually worth much less on the open market.⁷² In other words, because the government could permissibly have eliminated all use of the navigable water without paying compensation, just compensation for taking riparian land does not include the value of the use of the navigable water, even though the government had not restricted that use before the appropriation.⁷³

⁷⁰ This insight implicitly motivates the ripeness doctrine in takings law. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), petitioner challenged Rhode Island's denial of a wetlands fill permit on his coastal property. Rhode Island argued, in part, that while it denied an application to fill all of the petitioner's wetlands property, it might not have denied an application to fill only five of the twenty acres. *Id.* at 619. In other words, Rhode Island was asserting a right to deny some level of development and argued that petitioner had an obligation to identify the level of development the State would have permitted before his claim could become ripe. As the Supreme Court observed, "a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." *Id.* at 620.

⁷¹ See *United States v. Rands*, 389 U.S. 121, 123–24 (1967) (holding that the Constitution "permits the Government to disregard the value arising from [the] fact of riparian location in compensating the owner when fast lands are appropriated" (citation omitted)). According to the Third Circuit, "[t]he value of land that arises from its riparian location does not inhere in these parcels, but depends on use of water to which the landowner has no right as against the United States." *United States v. 30.54 Acres of Land*, 90 F.3d 790, 794 (3d Cir. 1996) (quoting *Rands*, 389 U.S. at 124) (internal quotation marks omitted).

⁷² Congress has abrogated this principle on at least one occasion, however, requiring in certain circumstances that compensation should be valued based on the property's riparian location. See *River & Harbors Act of 1970*, 33 U.S.C. § 595a (2000).

⁷³ This is related to, but distinct from, the doctrine surrounding navigation servitudes. According to long-standing common law, the government need not compensate property owners for takings of "riparian, littoral, or submerged lands which, if not for the fact that a waterway is involved, would require compensation under the [F]ifth [A]mendment." *Boone v. United States*, 944 F.2d 1489, 1494 (9th Cir. 1991).

Reducing awards for unenacted but permissible regulations is not limited to resources over which the government has plenary power. Assume, for example, the government could permissibly regulate a factory's emissions by requiring the installation of scrubbers, but that forcing the factory to cease operating entirely would constitute a taking.⁷⁴ How much compensation should the government pay if it chooses the latter course and forces the factory to close? Prior to the regulation, the factory did not possess an unencumbered right to pollute. Therefore, paying the value of the factory at its most noxious—as it presumably existed just prior to the regulation—would grant a windfall to the owner. Instead, in this simplified example, the value of the factory should be reduced by the cost of the scrubbers that the government could have forced the factory to install.

Of course, it is by no means a simple task to value property subject to permissible but unenacted regulations. In the example above, not only could the government have forced the factory to install scrubbers, it could also have required new fire safety equipment, certain beautification of neighboring lands, and even higher pay for its workers. Should these potential compliance costs be deducted from the factory's value? At what point would those potential costs become too high? When they surpass the appraised value of the unregulated factory?⁷⁵ Where courts draw these lines can have a significant impact on compensation.

4. *Benefit Offset and Average Reciprocity of Advantage.*—Valuing regulatory benefits is another mechanism influencing the assessment of fair market value. In the case of a partial taking, compensation is regularly offset by any benefit to the remaining property conferred by the regulation. In the paradigmatic case, damages arising from the condemnation of a sliver of property for a new road are offset by the enhanced value of the owner's remaining property as a result of the road.⁷⁶

This straightforward concept proves particularly difficult to apply because principled lines are hard to draw. What neighboring property is included? How direct does the benefit to the remaining property have to be?

⁷⁴ This might result, for example, from an application of the diminution of value test. See, e.g., *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1569 (Fed. Cir. 1994).

⁷⁵ One can imagine a quantification of this approach that considers only those permissible but unenacted regulations that would have addressed the same purpose as the taking. In the present example, it would offset the value of the taking by the cost of scrubbers but not a new fire system. While such an approach seems desirable in this simplified example, it may become quickly unworkable in the context of real-world takings in part because it may be impossible for courts to identify the purpose of the regulation, or to identify those potential but unenacted regulations that would have addressed the same concern without effectuating a taking. For present purposes, it is enough to acknowledge that line-drawing in this area is imprecise at best.

⁷⁶ See, e.g., FISCHER, *supra* note 1, at 81; see also Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1339 (2002) ("In nineteenth-century railroad eminent domain cases, for example, just compensation for the value of land taken was routinely reduced by the amount of the increase in value that accrued to the remainder of the parcel.").

What range of benefits will a court consider? These are the same issues that appear in the regulatory takings context in the “average reciprocity of advantage” test, traditionally a test for whether or not a regulatory taking has occurred.⁷⁷ According to the Supreme Court in *Pennsylvania Coal Co. v. Mahon*,⁷⁸ a property owner receiving an average reciprocity of advantage from the government serves as an absolute bar to recovery. The Supreme Court has used this reasoning to uphold zoning laws,⁷⁹ and as a compensation rule it makes good sense. A property owner who, on balance, was unharmed by a governmental action should not be entitled to compensation. Viewed through this Article’s compensation lens, reciprocity of advantage is nothing more than a commonsense conclusion under the benefit offset test: property owners who benefit more from a regulation than they are burdened have suffered no damages.⁸⁰

The problem of identifying and valuing offsetting benefits gives courts wide valuation discretion.⁸¹ Some courts have held that benefits must be narrowly drawn to include only those benefits conferred directly from the contested governmental action itself.⁸² But other courts have proposed enlarging the range of benefits they will consider to find a property owner

⁷⁷ See Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 301 n.18 (1990) (identifying the range of interpretations courts have adopted of “average reciprocity of advantage”).

⁷⁸ 260 U.S. 393, 415 (1922) (distinguishing *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914), on grounds that in the prior case no taking had occurred because the property owners had received an “average reciprocity of advantage”). As another court has explained:

When there is reciprocity of advantage, paradigmatically in a zoning case, then the claim that the Government has taken private property has little force: the claimant has in a sense been compensated by the public program adjusting the benefits and burdens of economic life to promote the common good.

Fla. Rock, 18 F.3d at 1570 (internal quotation marks omitted) (citations omitted).

⁷⁹ See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (finding no compensable taking where property owner received reciprocity of advantage); cf. Coletta, *supra* note 77, at 302 (“Governmental regulation of land use is . . . justified by the reciprocal benefits that accrue to the burdened individuals. [Zoning] ordinances do not give rise to a takings challenge either because it is thought that benefits outweigh burdens and the regulations are, therefore, within the penumbra of substantive due process, or, alternatively, that the benefits that accrue from the regulations provide the necessary compensation to satisfy fifth amendment guarantees.”).

⁸⁰ In a footnote, Justice Stevens implicitly rejected one form of this view:

The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.

Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 491 n.21 (1987).

⁸¹ See Coletta, *supra* note 77, at 364–65; Dagan, *supra* note 5, at 768–77.

⁸² See, e.g., *Fla. Rock*, 18 F.3d at 1571 (“[T]rial court[s] must consider: are there direct compensating benefits accruing to the property, and other similarly situated, flowing from the regulatory environment?”).

has received an average reciprocity of advantage.⁸³ Richard Epstein has considered the problem in some detail, arguing for a nuanced and context-dependent approach to including offsetting benefits, what he calls “implicit in-kind benefits.”⁸⁴ In a recent article, Daniel Barnhizer has even proposed a complicated *ex ante* procedure for offsetting anticipatory benefits from coastal and floodplain property in order to separate out from such property the added value (the benefit) attributable to government-provided insurance.⁸⁵

While courts and commentators continue to disagree about the proper application of benefit offset and reciprocity of advantage,⁸⁶ the stakes in the disagreement are clear: the broader the range of benefits a court will consider, the lower the compensation the property owner will receive. The range of possibilities includes anything from an offset for specific benefits from the regulation, to long-term benefits like the abstract benefits of membership in the community.⁸⁷ In terms of an actual dollar value of awards, this can range from no offset to a total offset that is synonymous with a finding that no taking occurred.

5. *Timing of the Valuation.*—Takings are to be valued on the date the property is taken.⁸⁸ This proposition is easy enough to state but another matter to apply. The basic problem arises because the prospect of an imminent government action has an impact on fair market value prior to the action itself. As an example, condemnations do not happen instantaneously. Government planning can give the public years of advance notice before property is actually expropriated for a public project like a park or a new

⁸³ See, e.g., *Keystone*, 480 U.S. at 491 (“The Court’s hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of ‘reciprocity of advantage’ While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.”); cf. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 856 (1987) (Brennan, J., dissenting) (“Allowing appellants to intensify development along the coast in exchange for ensuring public access to the ocean is a classic instance of government action that produces a reciprocity of advantage.”); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 133–34 (1978); Levinson, *supra* note 73, at 1340 (identifying additional cases).

⁸⁴ EPSTEIN, *supra* note 1, at 195–215. Epstein’s views are difficult to summarize briefly, but one pithy quote summarizes the gist of his analysis: “As a first approximation, the formula for sound general legislation is simple: special burdens for special benefits; general burdens for general benefits.” *Id.* at 212.

⁸⁵ Barnhizer, *supra* note 49, at 367–69.

⁸⁶ See, e.g., Dagan, *supra* note 5, at 768 (“Reciprocity of advantage is a familiar concept in takings jurisprudence. Nonetheless, in law—as well as in life—reciprocity is a contested concept that admits of different conceptions.”); see also generally Lynda J. Oswald, *The Role of the “Harm/Benefit” and “Average Reciprocity of Advantage” Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449, 1490–1510 (1997). In Part II.D, this Article proposes one potential resolution to the contested nature of reciprocal benefits.

⁸⁷ See Dagan, *supra* note 5, at 768.

⁸⁸ E.g., *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511–13 (1979).

road.⁸⁹ During that time, the property's marketability will decrease dramatically—who wants to buy property that is about to be condemned?—and its value will drop accordingly. By the time the government actually condemns the property, its fair market value will be significantly less than if the government had never contemplated the project in the first place. This pre-condemnation effect on property values has been appropriately dubbed “condemnation blight.”⁹⁰

Courts have responded to this phenomenon in a variety of ways. Some have simply denied compensation for the loss in value due to condemnation blight, applying the rigid rule that compensation is valued at the date of the actual expropriation of property.⁹¹ Other courts, however, have rolled back the valuation date by finding a *de facto* taking prior to the actual taking.⁹² This has the effect of valuing the property prior to the detrimental impact of a proposed government action. But finding a *de facto* taking has additional consequences, for example, creating liability for the government for any loss in value prior to the formal condemnation, even if it resulted from some other source.⁹³ As a result, still other courts have used the date of the condemnation as the benchmark for compensation but then disentangled the depreciation in market value due to the government's action, and added that back into the total compensation.⁹⁴ The inquiries can become quite complex.⁹⁵

The problem is not unique to condemnations—the same problems arise in most regulatory takings.⁹⁶ For example, land use controls or environmental regulations are not enacted overnight but only after a public process. Accordingly, their impact on property values is felt long before the date of

⁸⁹ Kanner, *supra* note 5, at 767–69.

⁹⁰ *See generally id.*

⁹¹ *E.g.*, Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14–15 (1984); United States v. 3.95 Acres of Land, 470 F. Supp. 572, 574 (N.D. Cal. 1972).

⁹² The leading case is *City of Buffalo v. J.W. Clement Co.*, 269 N.E.2d 895 (N.Y. 1971). *See also* Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966).

⁹³ *Klopping v. City of Whittier*, 500 P.2d 1345, 1351 (Cal. 1972).

⁹⁴ *E.g.*, United States v. 38,994 Net Usable Square Feet of Space, No. 87 C 8569, 1989 WL 152806, at *2 (N.D. Ill. Nov. 21, 1989) (including information about actual losses suffered by the property owner, even though they would not have been known at the time of the taking); *cf.* Vaizburd v. United States, 384 F.3d 1278, 1281 (Fed. Cir. 2004) (discussing the date of the taking resulting from the slow buildup of sand on plaintiff's property, and upholding the district court's compromise result “when the process of accretion had sufficient impact, i.e., impeded the plaintiffs' access to the water, and was sufficiently noticeable and recurring to constitute a taking” (internal quotation marks omitted)).

⁹⁵ In *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 635–36 (1961), the Supreme Court wrestled with the timing problem, holding, “the value of the easement is the nonriparian value of the servient land discounted by the improbability of the easement's exercise. It is to be emphasized that in assessing this improbability, no weight should be given to the prospect of governmental appropriation.” Performing this discounting without regard to the probability of the government taking the property is difficult, to say the least.

⁹⁶ Only unforeseeable regulatory takings do not present this problem. Unexpected permit denials, for example, may not create any form of condemnation blight.

the regulation's ultimate enactment. This is the functional equivalent of condemnation blight, and courts have the same range of compensation choices available to them in the regulatory takings context.

These principles also apply, but in the opposite direction, to government actions that *increase* property values. The so-called "scope of the project rule" provides that the government need not pay for any increase in a property's fair market value resulting from the government action itself.⁹⁷ For example, if a new road will increase property values in an area, so that comparable sales now include a premium attributable to the new road, the government does not need to pay for that increase in value.⁹⁸ This is, in some sense, an inter-temporal version of the benefit-offset principle.

In many of these cases, then, the "as of" valuation date is just prior to any impact on market value resulting from the possibility of some government action.⁹⁹ The problem, of course, is deciding exactly how far back to roll the date of valuation because property values always reflect some capitalized risk of a government action.¹⁰⁰ How is it possible to distinguish this background risk from something more particularized? The inquiry may not be difficult at the extremes; on the one hand is the abstract possibility of a government action that has no discernable effect on a particular property; on the other is a fully formulated government plan to condemn property that will all but destroy the market value of the target property as soon as it is formally enacted. In between these two positions lies a broad and difficult middle ground.¹⁰¹

⁹⁷ *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 477-78 (1973) ("The Government must pay just compensation for those interests probably within the scope of the project from the time the Government was committed to it." (internal quotation marks omitted)).

⁹⁸ *United States v. Miller*, 317 U.S. 369, 376-77 (1943).

⁹⁹ See Abraham Bell, *Not Just Compensation*, 13 J. CONTEMP. L. ISSUES 29, 47 (2003) ("In every case, the likelihood of a taking enters the market at some point, and at that point, the value of the property in the market changes to reflect the new information. Thus, properly, the baseline value of property should never be viewed as incorporating a taking—rather, it should be viewed as the value the property would hold in the market absent the likelihood of taking."); see also Paul R. Scott, *The Double-Edged Sword of Project Influence*, SJ051 ALI-ABA 157, 159 (2004) ("The general rule is that any increase or decrease in fair market value caused by the public project for which the property is acquired, or the likelihood that property would be acquired for the project is to be disregarded in determining the amount of compensation due to the land owner.").

¹⁰⁰ Cf. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 517-19 (1986) (arguing that risk of government actions is capitalized into property values just like any other risk). While Kaplow argues that the compensation requirement inefficiently insulates property owners from the risk of government action, the absence of full indemnification means that at least some risk of government regulatory actions is always included in property values. *Id.* at 537-41.

¹⁰¹ *E.g.*, *Gould v. Land Clearance for Redevelopment Auth.*, 610 S.W.2d 360, 366 (Mo. Ct. App. 1980) ("[T]he rapid decline in Mrs. Gould's property actually did not commence before January 7, 1971, during the plans and surveys period. It commenced rather after January 7, 1971, a date which we may use as a starting point. Until that date, when the detailed plans were approved by the City Council, the project had remained in the pupal stage.").

There is also an even deeper theoretical problem lurking in this inquiry. The value of some property is inextricably intertwined with the possibility of government action. Today, for example, owners of unregulated, environmentally sensitive land know there is a possibility—even a probability—that land use regulations will be enacted, restricting the use of their property. Indeed, many people have observed the perverse incentives this can create to over-invest in developing property.¹⁰² When the predicted regulations are enacted, though, what date should be chosen as a benchmark for valuation? Possibilities include the date the regulations are actually enacted; the date the regulations are proposed; or even the date when scientific findings about the importance of the land make regulation likely. There is no reason in the abstract why one date is “correct” and choosing between them will have a dramatic effect on compensation.

To summarize, when the prospect of government action decreases the value of property, choosing an earlier valuation date will increase compensation. On the other hand, where a government action increases the value of property in an area, choosing a later date will increase compensation. Courts have fallen all along this wide spectrum.

6. *Fees and Expenses.*—Shifting litigation expenses to the government in takings cases constitutes another valuation mechanism. Federal law permits courts to shift attorneys’ fees and other expert fees to the prevailing party in a § 1983 action to enforce the Takings Clause.¹⁰³ Admittedly, not all takings claims are filed pursuant to § 1983; some plaintiffs rely directly on the Fifth Amendment as a basis for relief. In those cases, federal courts nevertheless retain the ability to award attorneys’ fees pursuant to § 1988, effectively permitting an award of fees to any prevailing plaintiff in a takings case.¹⁰⁴

Courts have limited discretion in disallowing fees. The Supreme Court has held that prevailing plaintiffs “should ordinarily recover an attorney’s

¹⁰² *E.g.*, Fischel, *supra* note 69, at 55–56 (quoting a landowner who built several buildings at the edge of Seattle as saying, “If we were to do nothing, we could end up with a wetland and a wildlife area.”); David A. Dana, *Natural Preservation and the Race to Develop*, 143 U. PA. L. REV. 655 (1995).

¹⁰³ 42 U.S.C. § 1988 (2000) provides, in relevant part, “The court, in its discretion, may allow the prevailing party a reasonable attorney’s fee as part of the costs.” This can include expert fees. *See also* 42 U.S.C. § 4654 (2000) (permitting property owner to recover fees against the United States when government abandons a condemnation proceeding); *United States v. Bodcaw Co.*, 440 U.S. 202, 204 (1979) (*per curiam*) (describing availability of litigation costs “when a condemnation action is dismissed as being unauthorized, when the Government abandons a condemnation, or when the property owner has recovered through an inverse condemnation action under the Tucker Act”).

¹⁰⁴ *See N.Y. State Ass’n of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 845 (2d Cir. 1994); *Thorstenn v. Barnard*, 883 F.2d 217, 218 (3d Cir. 1989); *Goss v. City of Little Rock*, 151 F.3d 861, 865–66 (8th Cir. 1998) (awarding attorneys’ fees under § 1988 despite plaintiff’s failure to include § 1983 in the complaint). Some state courts take a different approach and require the complaint to include a demand for fees. *See Burton v. Clark County*, 958 P.2d 343, 358 (Wash. Ct. App. 1998).

fee unless special circumstances would render such an award unjust.”¹⁰⁵ Nevertheless, here too courts exercise more discretion than it may seem, not in whether to award fees at all but instead in choosing how much to award.

Like the broader compensation inquiry, the amount of litigation costs a court awards under § 1988 depends in large part on how it characterizes the fees and expenses at issue. In particular, the extent to which a court will scrutinize the details of attorney billing records will have a significant effect on the total award.¹⁰⁶ Moreover, courts generally award fees only for those aspects of a litigation relating to the merits of the underlying § 1983 action, and courts can draw this line broadly or narrowly.¹⁰⁷

From the government’s perspective, this can amount to greater or lesser compensation, putting more than the fair market value of the property at stake when compensation is due. Of course, from the property owner’s perspective, awarding fees will never place her in a better position than she would have occupied but for the taking; even theoretically it can do no more than restore the pre-regulation state of affairs. Nevertheless, reimbursing litigation expenses can result in the government being forced to pay damages far in excess of the burdened property’s fair market value.¹⁰⁸

7. *Recharacterizing the Property Taken.*—Sentimental attachments, or a unique business enterprise, may prevent the market from accurately reflecting the value of property to its owner.¹⁰⁹ Nevertheless, in a supposedly bright line, but actually porous rule, the Supreme Court has precluded

¹⁰⁵ *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968).

¹⁰⁶ *Frevach Land Co. v. Multnomah County*, No. Cv. 99-1295, 2001 U.S. Dist. LEXIS 22255, at *36–37 (D. Or. Dec. 18, 2001), is an unusually detailed and therefore transparent case. There, the district court examined attorney time records line by line, distinguishing between tasks associated with clerical or secretarial work, even though conducted by an attorney, *id.* at *36–37; filing for land use permits not directly related to litigation, *id.* at *42; and responding to summary judgment where the response was not sufficiently related to a meritorious § 1983 claim, *id.* at *46–47. The district court in that case ultimately awarded \$124,186.80 out of the \$263,999 originally requested by the plaintiff. *Id.* at *1, 105.

¹⁰⁷ *Compare Simi Investment Co. v. Harris County*, 236 F.3d 240, 255 (5th Cir. 2000) (rejecting portion of attorneys’ fees for litigation of state suit arising out of same facts), *with Vecchione v. Wohl-gemuth*, 481 F. Supp. 776, 783–89 (E.D. Pa. 1979) (permitting recovery for aspects of litigation only tangentially related to a § 1983 claim).

¹⁰⁸ Internationally, supercompensation is sometimes explicitly awarded for takings. Australia, for example, awards the fair market value plus a fixed percent as compensation for a taking. *See Tsuyoshi Kotaka et al., Taking Land: Compulsory Purchase and Regulation of Land in Asian-Pacific Countries*, 31 ENVTL. L. REP. 11184 (2001).

¹⁰⁹ *See United States v. 564.54 Acres of Land*, 441 U.S. 506, 514 (1979) (“[I]t is not at all unusual that property uniquely adapted to the owner’s use has a market value on condemnation which falls far short of enabling the owner to preserve that use. Such a situation may often arise, for example, where a family home has been built to the owner’s tastes, but is old and deteriorated, or where property, like respondent’s camps, is exempt from regulations applicable to new facilities.”); *see also* 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 14 (2d ed. 1953) (“[L]oss to the owner of non-transferable values deriving from his unique need for property or idiosyncratic attachment to it . . . is properly treated as part of the burden of common citizenship.”).

awarding just compensation based on the subjective value of the property taken.¹¹⁰ Despite this prohibition, damage awards can implicitly compensate for at least some subjective value by redefining the property taken to include an owner's special use for her property.¹¹¹ Courts' discretion in this regard effectively enables compensation for subjective attachments related, for example, to a building's special use,¹¹² or a particular view.¹¹³ Courts' ability to accept a wide range of characterizations of property is another valuation mechanism because of the impact such characterizations can have on the ultimate fair market value determination.

8. *Net Harm*.—The Supreme Court, in its most recent takings decision, *Brown v. Legal Foundation of Washington*,¹¹⁴ held that compensation for states' Interest on Lawyer Trust Accounts ("IOLTA") programs should be measured by the property owners' net harm.¹¹⁵ IOLTA programs require lawyers to deposit certain client funds in interest bearing accounts with the interest payable to organizations providing legal services to the poor. The Court held that such programs were, in fact, takings, but that no compensation was due because the client funds would not have generated positive *net* interest if deposited on their own (due to fees and other administrative expenses).¹¹⁶

Brown is still of too recent vintage to know how courts will apply the net harm calculation in the future, but it presumably requires offsetting certain fees and expenses that the property owner would have had to bear but for the governmental action. It is difficult to imagine how to draw a principled line around these costs, however, because most fees and expenses will

¹¹⁰ See *United States v. 509 Acres of Land*, 469 U.S. 24, 35 (1984) ("[J]ust compensation must be measured by an objective standard that disregards subjective values which are only of significance to an individual owner."); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) ("The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use.")

¹¹¹ See, e.g., *infra* Part III.D (discussing *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990), in which the court awarded the value of turkeys as breeding turkeys instead of as meat after outbreak of pathogenic Avian Influenza). But see *United States v. 62.50 Acres of Land*, 953 F.2d 886, 890 (5th Cir. 1992) ("Even if the landowner shows that a potential use is profitable and that the property is adaptable for that use, that use is not necessarily the measure of the value of the property. Instead, it is to be considered to the extent the prospect of demand for the use affects market value." (internal citations omitted)).

¹¹² *United States v. 0.38 Acres of Land*, 117 F. Supp. 217 (E.D.N.Y. 1954).

¹¹³ See *Board of Comm'rs v. Crawford*, 731 So. 2d 508 (La. Ct. App. 1999).

¹¹⁴ 538 U.S. 216 (2003).

¹¹⁵ For a discussion of the case and its relationship to fair market value, see generally Serkin, *supra* note 4.

¹¹⁶ *Brown*, 538 U.S. at 237–40.

already be included in the property's fair market value so that deducting them again would be double counting. Nevertheless, to use the extreme example posed by the dissenters in *Brown*, if the government takes someone's paycheck, is just compensation awarded if the value of the check is reduced to reflect taxes that the property owner would have had to pay?¹¹⁷ Although they have not done so yet, courts may seize upon this new net harm rule to further adjust compensation in ways that are difficult to predict.

9. *Replacement Value.*—While takings are generally compensated by the property's fair market value, courts have occasionally used the cost of replacement as an alternative to fair market value.¹¹⁸ Replacement value will usually exceed any measure of the fair market value of the property, although it is still likely to provide something less than the property's subjective value to its owner.¹¹⁹ Despite a general prohibition on awarding replacement value,¹²⁰ a number of courts have carved out exceptions and have awarded replacement value, for example, where market value is not

¹¹⁷ *Id.* at 250 (Scalia, J., dissenting).

¹¹⁸ While no clear rule has developed in federal courts to determine when replacement value is the appropriate measure of damages, certain states have developed relatively bright-line rules. For example, New York courts have recognized that "[w]here property is unique . . . fair market value may not represent adequate compensation. In the case of such 'specialty' property, the measure of damages will be the replacement cost of the property minus depreciation." *Heidorf v. Town of Northumberland*, 985 F. Supp. 250, 261 (N.D.N.Y. 1997) (interpreting New York law). A set of four criteria have been developed in New York to determine whether property is special:

- (1) the improvement must be unique and specially built for the specific purpose for which it is designed;
- (2) the improvement must have been made for a special use and must be so specially used;
- (3) there must be no market for the type of property and no sales of property for such use, and
- (4) the improvement must be an appropriate improvement at the time of the injury and its use must be economically feasible and reasonably expected to be replaced.

Id.

¹¹⁹ See, e.g., *United States v. Koen*, 982 F.2d 1101, 1106 (7th Cir. 1992) ("The building itself was insured for its replacement value—an amount higher than its actual worth."); see also EPSTEIN, *supra* note 1, at 183 ("If the replacement cost lies between the general market value and some higher subjective valuation, then compensation is adequate because it permits the owner to duplicate the condemned facilities and thus regain the subjective component of value from his original activities. Yet the owner has no incentive to speak the truth if his subjective value is lower than replacement cost, which exposes the government to a serious risk that the owner will simply pocket the money instead of acquiring or constructing the substitute facilities.")

¹²⁰ See, e.g., *Snowbank Enters. Inc. v. United States*, 6 Cl. Ct. 476, 495 (considering and rejecting replacement value); see also *United States v. 50 Acres of Land*, 469 U.S. 24, 29–30 (1984) (rejecting replacement value); *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979). In *564.54 Acres of Land*, the United States condemned land for a recreational project from the Lutheran Church which was operating its own nonprofit summer camp on the property. The Church rejected the government's condemnation offer and demanded the property's replacement value. The Church argued that replacement value was substantially higher "because the new facilities would be subject to financially burdensome regulations from which existing facilities were exempt under grandfather provisions." *565.54 Acres of Land*, 441 U.S. at 508. The Court rejected the claim, finding that replacement costs would grant a windfall to the Church.

readily available,¹²¹ or where otherwise uncompensable consequential damages would be extremely high.¹²² More generally, courts can award replacement value when awarding fair market value would result in manifest injustice,¹²³ making the denial of replacement value itself a valuation mechanism because of courts' wide discretion.¹²⁴

C. Categories of Valuation

The valuation mechanisms at courts' disposal can be used to shift dramatically the level of compensation due from case to case. There may even be other mechanisms hiding in the case law.¹²⁵ The list assembled and identified in this Article is not necessarily exhaustive, but it does identify those

¹²¹ See *Yaist v. United States*, 17 Cl. Ct. 246, 260 (1989) (calculating "reproduction cost" where no comparable sales of fishing cabins in the Florida Everglades existed); see also *City of Grand Prairie v. Am. Tel. & Tel. Co.*, 405 F.2d 1144 (5th Cir. 1969) (awarding replacement value); *Am. Tel. & Tel. Co. v. Madison Parish Police Jury*, 465 F. Supp. 168 (W.D. La. 1977) (same).

¹²² See, e.g., *Hedstrom Lumber, Inc. v. United States*, 7 Cl. Ct. 16 (1984). There, a federal moratorium on logging in a newly-protected wilderness was held to be a taking of a timber contract. The Hedstrom Lumber Company owned a sawmill in northeastern Minnesota and entered into lumber contracts to harvest sufficient timber to "keep [its] sawmill in operation all year." *Id.* at 22. Rejecting the plaintiff's claim for lost profits, the court nonetheless "determine[d] that the appropriate standard to be applied . . . is that of replacement value. The plaintiff is to be put in the same position, from a monetary standpoint, as he would have been without the taking." *Id.* The Court concluded that the plaintiff should be entitled to the cost of procuring substitute timber for its mill. This is related to the Federal Circuit's "cost of cure" theory in *Vaizburd v. United States*, 384 F.3d 1278 (Fed. Cir. 2004), in which the Federal Circuit remanded a case to the trial court to determine whether plaintiffs were entitled to the cost of removing sand deposits from their property resulting from a beach reclamation project. The *Vaizburd* court noted that the property had not decreased in value as a result of the sand deposits but that plaintiffs may nevertheless be entitled to restore the property to its original condition.

¹²³ E.g., *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

¹²⁴ In *United States v. 50 Acres of Land*, 469 U.S. 24 (1984), the United States condemned a fifty-acre landfill owned by the town of Duncanville, Texas as part of a flood control project. The federal government offered Duncanville \$199,950 as the property's fair market value. Duncanville argued that it should receive \$1,276,000, representing the cost of developing a new landfill, because "its responsibility for municipal garbage disposal . . . compelled the city to arrange for a suitable replacement facility or substitute garbage disposal service." *Id.* at 34. The Court disagreed and refused to award replacement value. *Id.*; see also *Antoine v. United States*, 710 F.2d 477 (8th Cir. 1983) (refusing to award replacement value for property improperly taken from the plaintiff's great-grandfather in the Rosebud Sioux Tribe); cf. *Schill*, *supra* note 5, at 889 (arguing courts should adopt replacement value as compensation for intergovernmental takings).

¹²⁵ For example, valuing takings of real property may be particularly difficult because there is often no ready market for the property. Courts may admit or exclude evidence of comparable sales depending on whether an identifiable sale really was of comparable property. Such evidentiary rulings can have a profound effect on the valuation evidence a jury will be allowed to hear. Likewise, decisions about whether to exclude valuation evidence including unaccepted offers for the burdened property, or the original sales price, may limit or expand compensation depending on the substance of the evidence. Other valuation mechanisms that could be included in subsequent work include: assemblage, see *Franc v. Bethel Holding Co.*, 807 A.2d 519, 527 (Conn. App. Ct. 2002); separately valuing land and improvements, see *United States v. Merz*, 376 U.S. 192, 196 (1964); valuing the subsequent enlargement of a public project, see *United States v. W. G. Reynolds*, 397 U.S. 14, 17-18 (1970); and severance damages, see *supra* notes 47, 49 (considering awards of consequential and severance damages).

decisions that have the greatest impact on valuation decisions, and therefore roughly sketches the outer boundaries of compensation.

These mechanisms should not be understood as raising or lowering just compensation from some objective or correct fair market value.¹²⁶ Instead, they highlight that compensation necessarily includes a host of background decisions that influence the size of awards. These decisions cannot be ducked. Awarding harm or gain, allocating risk, deciding on the timing of the compensation, identifying background regulations, and benefits to the property owner are not “add-ons” or substitutes to fair market value but are part of any fair market value determination.

II. CONTESTED TAKINGS THEORIES

The previous Part explored the range of valuation decisions affecting compensation for takings claims. At first glance, this might seem like yet one more place where current takings doctrine has failed to develop principled bases for decisionmaking. Indeed, most courts employ these valuation mechanisms reactively and without any apparent awareness of the relationship between their valuation decisions and broader theoretical considerations.¹²⁷ But the compensation question does provide an opportunity for increased consistency. By aligning their underlying goals with appropriate valuation mechanisms, courts can use compensation to advance substantive interests, and at least ensure that valuation decisions are not at odds with the results they are trying to achieve.

If this prescription sounds abstract, it is partly because the underlying goals of the Takings Clause are so contested. Scholars in the field have developed competing theories of the Takings Clause, each with its own implications for distinguishing between permissible and impermissible government regulations. After presenting the central insights of the most important of these different accounts, this Part develops a new taxonomy of the most prominent takings theories. Instead of categorizing them by their prescriptions for when compensation is due—the by-now well-framed takings battleground—this taxonomy focuses on the approach to compensation best suited to each theory’s substantive goals. In other words, this Part seeks to move the inquiry beyond the question of when compensation is due and to examine what valuation mechanisms from Part I are best suited to achieving each takings theory’s particular goals.

¹²⁶ This is not to suggest that the fair market value of certain fungible property cannot be measured with great accuracy. Real property often has a specific market value in an area that can be readily identified, and in many cases such a value will be unquestioningly adopted by the court and by the parties themselves. But even in the heartland of fair market value determinations, at least some of the valuation mechanisms described in Part I.B apply and demonstrate that compensation is subject to a court’s definition of the property at issue, the timing of the valuation, the purpose of the regulation, and offsetting benefits or encumbrances that should be included in determining the ultimate award.

¹²⁷ Courts have almost universally failed to theorize in a sophisticated way about compensation. For just a few examples of such unreflective decisions, see *supra* text accompanying notes 30–38.

Preliminarily, this Part analyzes the traditional economic justification for the Takings Clause with its goal of preventing fiscal illusion. Currently, the most forceful criticism of “inadequate” compensation points to its failure to force government to internalize the costs of its actions when less than full compensation is awarded.¹²⁸ This traditional economic account does not, however, stand on its own as a prescription for takings jurisprudence because it fails to provide any principled basis for distinguishing those regulations requiring compensation from those that do not. The traditional economic account is nevertheless important to explore because its basic insight that forcing the government to pay will influence its appetite for regulation carries over into other, richer conceptions of the Takings Clause.

After analyzing the traditional economic account, Part II classifies the leading takings theories in terms of their broader compensatory goals. This is uncharted territory in the takings literature. Classifying takings theories in this way suggests how remedies can be mapped on to core constitutional values. The valuation mechanisms described in this Article provide the means to operationalize that connection. Finally, this Part concludes by analyzing current criticisms of the traditional economic account and their implications for the compensation analysis.

A. Fiscal Illusion and the Traditional Economic Model

In current scholarship, the intuition favoring a “make whole” principle in just compensation is based primarily upon the traditional economic goal of forcing the government to internalize the costs of its actions.¹²⁹ This straightforward economic account suggests that requiring the government to pay will prevent fiscal illusion. Ideally, compensation forces the government to compare the costs of its actions with the anticipated benefits,

¹²⁸ The Supreme Court has often identified full indemnification as the goal of just compensation. See *Brown v. Legal Found.*, 538 U.S. 216, 236 (2003); *Palazzolo v. Rhode Island*, 533 U.S. 606, 625 (2001); *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984); *Olson v. United States*, 292 U.S. 246, 255 (1934). One source of the intuition that compensation is inadequate may simply be that it is inadequate to achieve this stated aim. But this doctrinal point is hardly a justification for the Takings Clause and does not, without more, provide an independent normative justification for indemnification.

¹²⁹ See, e.g., Abraham Bell & Gideon Parchamovsky, *Givings*, 111 YALE L.J. 547, 580 (2001) (“Under traditional takings analysis, the just compensation requirement effectively forces the government to internalize the cost of its decisions and impose burdens only when the net gain of so doing exceeds the cost.”); Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 MICH. L. REV. 134, 138 (2000) (“Assuming that democratic mechanisms make public officials accountable for budget management, compensation is important to create a budgetary effect that forces governments to internalize the costs that their decisions impose on private resource holders.”); Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 401 (2003) (“Conventional wisdom and legal doctrine have it that government must pay just compensation so that it will internalize the costs of taking property and only choose to take where the benefits of putting that property to public use exceed its value to the condemnee.”); see also Schill, *supra* note 5, at 853 n.91 (suggesting the constitutional framers were also concerned with the incentive effects of requiring compensation).

thereby creating incentives for the government to undertake only efficient actions, i.e., those that create more benefits than compensable costs.¹³⁰

The insight is familiar and easily captured in a simple example. Assume that building a park will impose a cost of \$100 to a private landowner (perhaps in land acquisition), and create a gain of \$75 to the public (perhaps in increased property values or in more abstract enjoyment of the property), resulting in a net harm of \$25. If the government does not have to pay to acquire the property, it may value the park only in terms of the benefit it would produce and is therefore more likely to undertake an inefficient project. If the government is forced to compensate the property owner, however, then it must internalize the cost of the park, forcing the government to evaluate its overall net benefit.

Any discrepancy between the costs imposed by a government action and the amount of compensation due for takings creates an opportunity for the government to undertake inefficient projects. Thus, in order to prevent fiscal illusion, the government must be forced to compensate for all harms inflicted by its action. In the example above, if only \$60 of the \$100 cost imposed by the park is compensable, voters may still approve the (inefficient) park, even if they collectively value it at \$75. While there may be countervailing concerns in the form of administrative costs, under an ideal, albeit highly theoretical, incentive-based theory, the only way to ensure that the government will internalize the true costs of its actions is to require compensation for every governmental action based on a full measure of the property owner's harms.¹³¹

While the traditional economic account has general theoretical appeal—and remains ubiquitous in the takings literature—it does not stand on its own as an independent goal for takings jurisprudence. Virtually every government action benefits some people and harms others, but we do not usually require the winners to compensate the losers in the legislative process. The government would come to a standstill if required to compensate

¹³⁰ Merrill, *supra* note 26, at 131; see also Blume & Rubinfeld, *supra* note 18, at 620 (“In a truly efficient system, decisionmaking bodies must account for the full social costs of their actions. Budgetary outlays should not, in principle, affect the public decision any more than other social costs. However, decisions are often skewed by attempts to avoid monetary expenditures which appear in the budget. Therefore, it is important to consider the possibility that a change in the compensation rule will alter the outcome of the regulatory process.”). There are two primary critiques of this account, even on its own terms. The first comes from public choice theory, and is discussed in greater detail, *infra* text accompanying notes 221–237. The second comes from Daryl Levinson’s recent article challenging the asymmetrical assumption that governments automatically internalize the benefits of their actions, but only internalize their costs if they are forced to pay compensation. See generally Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000). For purposes of the present discussion, I will focus only on the traditional economic account and return to these critiques in Part II.E.

¹³¹ EPSTEIN, *supra* note 1, at 94.

for every harm it imposed.¹³² Unconstitutional takings, in other words, are relatively rare compared to the number of actions governments undertake. Distinguishing governmental actions requiring compensation from those that do not is the central puzzle of the Takings Clause. The traditional economic account, whatever its merits, does not provide an answer to this seemingly intractable problem.

Doctrinally, too, the Supreme Court has frequently rejected efforts to force the government to bear the full costs of its actions, excluding broad categories of harms from compensation awards, such as consequential damages and lost profits.¹³³ Instead of suggesting that the exclusion of certain categories of harms means current compensation practices are inadequate, these cases are more productively read to suggest that the Supreme Court has at least implicitly rejected the traditional economic account as an independent goal of the Takings Clause.¹³⁴ Leading commentators have also pointed out that the demands of economic efficiency are so far removed from existing takings doctrine that viewing the Takings Clause in exclusively economic terms should remain an academic exercise.¹³⁵

Forcing the government to internalize the costs of its actions is, by itself, too thin an account of the Takings Clause to be prescriptively useful. Nevertheless, the normatively richer takings theories discussed in the remainder of this Part rely on its central insight that forcing the government to pay compensation will have some effect on the government's appetite to act in the first place.¹³⁶ This observation is not intended to lump all of the following discussions on one side of the broad and familiar division between economic and fairness-based conceptions of the Takings Clause.¹³⁷ In fact,

¹³² See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."). As Radin has succinctly explained, "The [Takings] issue is pervasive because almost all government actions make some entitlement holders worse off relative to others, yet government could not exist if it were required to undo all of its own actions by compensating everyone adversely affected by any action with distributive effects." RADIN, *supra* note 20, at 146.

¹³³ *E.g.*, *United States v. 50 Acres of Land*, 469 U.S. 24, 33 (1985) (excluding consequential damages); *United States v. 564.54 Acres of Land*, 441 U.S. 506, 514 (1979) (excluding non-transferable values from just compensation).

¹³⁴ *But see* Burney, *supra* note 4, at 793 (suggesting that fair market value represents nothing more than the practical need for a workable rule).

¹³⁵ See Hermalin, *supra* note 45, at 72 ("[T]he first-best outcome can be achieved by using the compensation rule in which the citizen retains her property only if she pays the state."); Jed Rubenfeld, *Usings*, 102 *YALE L.J.* 1077, 1131 (1993) ("[E]conomic analysis would call for a 'rather fundamental overhaul' of established practice. Despite its popularity in a certain scholarly marketplace, this overhaul of compensation law ought to remain an exclusively academic exercise." (citation omitted)); see also BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 69 (1977).

¹³⁶ Although this assumption has been problematized in recent literature, see *infra* Part II.E, it retains its powerful grip on takings literature. See, e.g., Heller & Krier, *supra* note 18, at 1004.

¹³⁷ *E.g.*, Rubenfeld, *supra* note 135, at 1131–39 (describing different currents in takings scholarship generally); see also Levinson, *supra* note 129, at 388 (refining this distinction further to separate the

this Part avoids such categorization, focusing rather on what each theory prescribes for compensation. The resulting taxonomy intentionally departs from the more common categories found in existing literature, grouping takings theories based on their requirements for high compensation, low compensation, or context-dependent compensation.

B. Theories Requiring High Compensation

1. *Hostility to Government Regulations.*—While much of the current takings debate focuses on legal and doctrinal property issues, it is hard to ignore the political subtext underlying many of the arguments on both sides.¹³⁸ The stakes are high and the political implications relatively straightforward. Simply put, advocates of a circumscribed role for government generally favor aggressively identifying regulations as unconstitutional takings for which compensation is due.¹³⁹ Forcing the government to pay, they argue, will make government action more expensive and limit the extent of the government's encroachment on private property. This attitude toward the government is consistent with a preference for the market over political solutions. In particular, deterring governmental action will favor market transfers of property rights over legislated transfers.¹⁴⁰

There are many reasons, including the idiosyncratic, for aversion to governmental interference with private property. Most of the theoretical reasons found in the academic literature focus on pessimistic theories of legislation. For example, under the most cynical version of the public choice theorists' description of the legislative process, governmental actions are often nothing more than a vehicle for rent-seeking from motivated spe-

economic accounts into those that focus on government incentives and those that focus on property owner incentives).

¹³⁸ E.g., Lunney, *supra* note 1, at 769 ("Ultimately, the choice between a more, or less, generous standard of compensation, like the choice between a broader, or narrower, scope to the issue of whether a taking has occurred, will depend on the extent to which one trusts the legislature to distribute the benefits and burdens of civilized society in an even and fair manner.").

¹³⁹ See, e.g., Richard A. Epstein, *Whose Democratic Vision of the Takings Clause? A Comment on Frank Michelman's Testimony on Senate Bill 605*, 49 WASH. U. J. URB. & CONTEMP. L. 17, 23 (1996) ("The sole judicial constraint, one that says 'take and pay,' beats a world of just plain 'take.'"). Politically, this view is consistent with current libertarian attitudes toward private property. See Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 409–10 (2000) ("The libertarian conception of property focuses on shielding the individual from claims of other persons and from the power of the public authority and preserving an untouchable private sphere, which is a prerequisite to personal development and autonomy."); see also Barnhizer, *supra* note 49, at 301 ("[T]he advocates of a tough takings doctrine believe in a package of values that elevate the right of the individual to compete in a competitive free-market economy and reward successful competitors for the contribution made by their individual skills.").

¹⁴⁰ See, e.g., Dagan & White, *supra* note 139, at 408; see also Barnhizer, *supra* note 49, at 301 ("It is not a reach to suggest that the advocates of a tough takings doctrine believe in a package of values that elevate the right of the individual to compete in a competitive free market economy and reward successful competitors for the contribution made by their individual skills.").

cial interest groups.¹⁴¹ Whatever its underlying basis, though, hostility to government interference with property rights has predictable implications for compensation: regulating should be made as expensive as possible for the government. Increasing the cost to the government of burdening private property will systematically reduce the government's appetite for acting in the first place.¹⁴² Although this theory and the traditional economic account share an insight about the incentive effect of making the government pay, it provides its own specific goal: limiting the amount of regulation generally, instead of creating nuanced incentives for economically efficient levels of regulation.

From this perspective, the central purpose of the Takings Clause is to shift the balance of public and private rights to the property owner. Of course, a property rule, when available, provides the fullest measure of protection for owners' right to resist the government.¹⁴³ Nevertheless, even the staunchest advocates of strong private property rights recognize at least the occasional need for the government to be able to regulate, and to condemn property to overcome specific market failures.¹⁴⁴ Moreover, certain governmental actions are irrevocable, making it impossible to return to a pre-regulation state of affairs. In those instances at least, a property rule is no longer available and courts must determine some measure of compensation.¹⁴⁵

A monetary award that functions to deter governmental action will best protect property owners' right to bargain with the government; it serves as

¹⁴¹ See Steven Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 35–41 (1998) (citing sources).

¹⁴² E.g., WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROL* 157–58 (1985); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 58–59 (4th ed. 1992); Louis De Alessi, *Implications of Property Rights for Government Investment Choices*, 59 AM. ECON. REV. 13, 16–22 (1969); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1391 (1993) (“[T]he Takings Clause . . . will serve as a welcome restraint on the appetite of government.”).

¹⁴³ See, e.g., Richard A. Epstein, *A Clear View of the Cathedral*, 106 YALE L.J. 2091, 2099 (1997) (describing a strong baseline preference for property rules). Successful due process challenges to governmental regulation result in the regulation being struck down, thus preventing the governmental action, restoring the pre-regulation status quo, and acting *ex post* as an *ex ante* property rule. This Article does not address the various market failures that might lead to overcompensating the landowner whose rights are protected through a property rule. Such market failures are a reason for adopting a different attitude toward governmental regulation.

¹⁴⁴ See Epstein, *supra* note 139, at 18–19 (“The very acceptance of the power of the government to take property with just compensation is, without more, conclusive evidence that a sensible version of the property rights movement does not move toward any absolute conception of property.”).

¹⁴⁵ Moreover, since *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), damages are often awarded in addition to striking down a regulation and providing property rule protection. Such “temporary takings” present unique challenges to valuation and are reserved for another day.

an *ex post* award approximating an *ex ante* property rule.¹⁴⁶ This amounts to a kind of systemic property rule, minimizing on a large scale the government's incentive to regulate in the first place. Indeed, the proof of this effect is the common objection that too strong a takings regime will over-deter governmental action.¹⁴⁷ If the goal is to make it more expensive for the government to infringe on private property, this not only means finding more actions be to takings but also compensating more for them.

Among the valuation mechanisms identified in Part I, there are four compensation mechanisms available to courts that will advance this goal. The first is simply to shift a greater portion of litigation expenses to the government.¹⁴⁸ Although this award is not supercompensatory from the property owner's perspective, adding significant litigation expenses increases the potential costs associated with any regulation beyond the value of the regulated property and will diminish the government's willingness to risk taking property.

Second is to provide the fullest possible recovery for condemnation blight, or its regulatory equivalent.¹⁴⁹ Compensating for all loss in value resulting from the mere contemplation of a government action effectively creates a zero tolerance baseline for government regulation of private property. Although recreating some ideal pre-regulatory, pure *laissez faire* market condition may be an entirely theoretical exercise, because no such market ever existed, attempting such a re-creation shifts the full impact of the regulatory state back to the government. It is also interesting to note that courts explicitly compensating for condemnation blight usually do so only after finding that the government acted in bad faith.¹⁵⁰

The third appropriate valuation mechanism is to place all development risks onto the government when computing property's highest and best use.¹⁵¹ This is particularly well-suited to deterring government actions, be-

¹⁴⁶ See Dagan, *supra* note 14, at 15; Richard Craswell, *Instrumental Theories of Compensation: A Survey*, 40 SAN DIEGO L. REV. 1135, 1144, 1173 (2003) ("[D]amages in a regime of property rules are designed for deterrence rather than for compensation: They are designed to deter the wrongdoer from taking someone else's property without first securing the property holder's consent.").

¹⁴⁷ See, e.g., Courtney Harrington, *Penn Central to Palazzolo: Regulatory Takings Decisions and Their Implications for Environmental Regulation*, 15 TUL. ENVTL. L.J. 383, 397 (2002) (criticizing recent Supreme Court cases on grounds they deter environmental regulation); cf. Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 116 (2001) (finding that vast majority of city and town planners in California were aware of important takings cases); John D. Echeverria, *A Turning of the Tide: The Tahoe-Sierra Regulatory Takings Decision*, 32 ENVTL. L. REP. 11235, 11240 (2002) (describing the Supreme Court's recent decision in *Tahoe-Sierra* as endorsing land use planning and regulation).

¹⁴⁸ See *supra* Part I.B.6.

¹⁴⁹ See *supra* Part I.B.5.

¹⁵⁰ E.g., *Klopping v. City of Whittier*, 500 P.2d 1345, 1349–50 (Cal. 1972) (requiring compensation for damage resulting from precondemnation announcements when the condemnor acts unreasonably by excessively delaying eminent domain action or by other oppressive conduct).

¹⁵¹ See *supra* Part I.B.2.

cause shifting all risk to the government implicitly encourages the government to try the market before resorting to its regulatory power.¹⁵² A real buyer in the market would be able to negotiate the allocation of risks between buyer and seller; this damage award simply allocates all of those risks to the government.¹⁵³

Finally, where the government is taking property to create or facilitate a new commercial enterprise, forcing the government to disgorge its anticipated gain from the regulation will also deter the government from acting.¹⁵⁴ Like allocating risks to the government, valuing a regulation by the benefit to the government will generally make the government better off acting in the open market and negotiating for some division of a new enterprise's anticipated gain with the present owner than if it had to repay the full benefit of the new enterprise.¹⁵⁵ This will only be untrue when the government's non-commodifiable gains are higher still.

2. *Just Compensation as Just Deserts.*—A deserts-based takings theory is not represented in current takings scholarship. Nevertheless, some readers might object that the discussion so far has ignored the intuition that property owners have some independent right to the “full” value of their property, independent of any incentive-based theory. The intuitive appeal of this suggestion is only superficial.

¹⁵² There are, obviously, reasons why the government cannot act like any other private purchaser. See, e.g., William A. Fischel, *The Political Economy of Just Compensation*, 20 HARV. J.L. & PUB. POL'Y 23, 40 (1996) (describing the economically perverse incentive effect created when owners know in advance that their property will be taken); Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1558 (1999) (describing government's bilateral monopoly problem). These, however, are reasons to not adopt an anti-regulation perspective in certain situations, and do not undermine the theoretical basis for this valuation award.

¹⁵³ This has an interesting side effect of diminishing the moral hazard problem that normally accompanies a robust takings regime. See, e.g., Levinson, *supra* note 129, at 389 (“Developer must decide whether to invest \$1 million in building an office tower on her land. At the time of her decision, the city council is debating whether to route a new highway through Developer's land or through a neighboring parcel If Developer knows she will be fully compensated for the value of the office tower in the event her land is taken . . . she will not discount the benefits of the building project by the probability of the taking.”). Expanding upon Levinson's example, if that property is taken after the developer builds her project, the government will have to pay the full \$1 million. The developer's profits will be \$1 million minus the expenses already invested in the development (e.g., \$250,000, where development costs were \$750,000). However, if the government takes the property before the project is built, the government will now only have to pay \$250,000 under the highest and best use standard. The developer will actually prefer the latter award because she will not have had to take the risks associated with actually developing the property. Her interests, then, may once again align with the government's, as the government will also prefer to take undeveloped property.

¹⁵⁴ See DAGAN, *supra* note 14, at 18 (explaining, in the restitutionary context, that an award based on the defendant's gain protects the plaintiff's control over her resource because it removes the defendant's incentive to expropriate the resource).

¹⁵⁵ This may also be expressed as an award based on the higher of the owner's harm or the government's gain, creating a strong disincentive to regulate. See DAGAN, *supra* note 14, at 21; Heller & Serkin, *supra* note 14, at 1390 & n.11.

For better or worse, property theory has come a long way from Blackstone's conception of private ownership as that "sole and despotic dominion" over property.¹⁵⁶ Historically, there is evidence that even the constitutional framers did not share an absolutist conception of property.¹⁵⁷ The phrase "just compensation" differs noticeably from the earliest compensation clauses in this country, which provided for payment of "an equivalent in money,"¹⁵⁸ and "full compensation,"¹⁵⁹ following more closely the Massachusetts approach of requiring "reasonable compensation."¹⁶⁰

In the modern state, there is no real doubt that private ownership is subject to at least some measure of governmental regulation, and sometimes even limited, non-consensual public use. Owning property does not automatically include the right to store hazardous waste,¹⁶¹ or to exclude strangers during a storm.¹⁶² It also does not include the right to resist government takings of the property, so long as the government pays just compensation. To suggest that a property owner is necessarily entitled to full indemnification for all of her losses in the event of a taking is, in some sense, to assume away this insight and to revert to an absolutist conception of property. While individuals may indeed feel compensation for takings is inadequate, this is no different from other areas of law that fail to indemnify fully injured parties.¹⁶³ In short, some additional normative account is required to

¹⁵⁶ See 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2 (Cavendish Publ'g 2001) (1765-1769).

¹⁵⁷ See Treanor, *supra* note 19, at 824 ("[E]arly compensation practices reflect a distinctly republican attitude towards property. It was a state creation and its scope was appropriately set by the state.")

¹⁵⁸ See *id.* at 829 (quoting the Vermont State Constitution).

¹⁵⁹ See *id.* at 831 (quoting the Northwest Ordinance of 1787).

¹⁶⁰ See *id.* at 830. Louisiana's constitution provides a similar example from the other direction. In 1921, Louisiana amended its compensation requirement which had provided a property owner "just and adequate compensation" to provide compensation "to the full extent of his loss." See Tracy Lee Howard, *Compensating an Owner to the Full Extent of His Loss: A Reevaluation of Compensable Damages in Louisiana Expropriation Cases*, 51 LA. L. REV. 821, 821 (1991).

¹⁶¹ See 42 U.S.C. § 6925 (2003).

¹⁶² See *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908).

¹⁶³ See C. Boone Schwartzel, *Is the Prudent Investor Rule Good for Texas?*, 54 BAYLOR L. REV. 701, 838 (2002) ("In most other areas of the law, states continue to measure consequential damages by interest and do not allow the recovery of lost profits even though as a result plaintiffs arguably are not thereby fully compensated for their losses."); Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1542 (1984) ("An injury often has aspects that are difficult to prove, as when property with sentimental value is destroyed or a business venture is disrupted before it becomes profitable. Proof is so difficult with subjective and speculative injuries that they are often excluded from damages, causing a bias toward undercompensation."); Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 637 (1988) ("[E]xpectation damages as awarded in law often fall short of a truly compensatory measure due to the exclusion of such items as attorneys' fees, unmeasurable subjective losses, and 'unforeseeable' damages."); Gil Lahav, *A Principle of Justified Promise-Breaking and Its Application to Contract Law*, 57 N.Y.U. ANN. SURV. AM. L. 163, 187 n.62 (2000) (citing sources); see also STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 243 (2004) (comparing international treatment of nonpecuniary losses).

justify an entitlement to full indemnification.¹⁶⁴

C. Theories Requiring Low Compensation

1. *Deference to Government Regulations.*—On the flip side of hostility to government is a more optimistic model of legislation. Civic republicanism, for example, suggests that legislators are able to rise above the political pressure presented by rent-seeking special interest groups and to legislate based on their views of the public good.¹⁶⁵ Faith in the government's good intentions and ability to legislate in the public's best interest are consistent with accepting legislative solutions to issues like environmental protection, zoning, and other public concerns impacting private property.¹⁶⁶ This approach does not eliminate the need for a takings doctrine. The government can make good faith efforts to secure the public interest and nevertheless impose an undue burden on a particular property owner that requires compensation. Still, this conception of government directly affects how the Takings Clause should be interpreted.

Unlike libertarians or public choice theorists who seek to limit governmental interference with private property, the civic republican view of legislative decisionmaking seeks to clear a wider space for legislative solutions to public problems. Lower compensation for takings will reduce the economic risk of legislating.¹⁶⁷ This does not imply that legislation is valuable in itself: more legislation is not necessarily better. However, confidence that the government is subject to internal constraints preventing legislative abuses requires minimizing the risk of over-detering desirable legislation by awarding relatively less compensation for takings.

There are several valuation mechanisms consistent with this attitude toward regulation. The broader the government's power to regulate, the more conditions there are that attach to private ownership. In other words, underlying a deferential stance toward the government's power to regulate are implicit limitations on private ownership. Moreover, as property rights are protected and, in a sense, conferred by the government, the government

¹⁶⁴ See Craswell, *supra* note 146, at 1137 (“[I]f compensation consists of restoring the victim to some position he had a right to occupy, a substantive theory of rights is needed to define the baseline position.”); *cf. id.* at 1178 (“The goal of compensation may tell us to restore the value of that which is lost, or something along those lines, but possible measures of ‘value’ are a dime a dozen. And as long as compensation is taken as a brute *premise* of corrective justice, there is no further goal behind that premise to which we can look for a more specific answer.”).

¹⁶⁵ *E.g.*, Croley, *supra* note 141, at 78 (“[T]he theory contemplates that [participants in regulatory decision making] exhibit a certain amount of public-spiritedness.”).

¹⁶⁶ See *supra* note 147.

¹⁶⁷ See Heller & Krier, *supra* note 18, at 999 (“If the government were free to take resources without paying for them, it would not feel incentives, created by the price system, to use those resources efficiently. A likely consequence would be the movement of some resources from higher to lower valued uses.”).

may not need to pay as much as a private party to reacquire them.¹⁶⁸ Aggressively identifying permissible but unenacted regulations that attach to property as background encumbrances appropriately reduces the overall compensation for takings due to property owners.¹⁶⁹ Similarly, choosing a valuation date that post-dates some condemnation blight takes into account the government's background right to impose at least a certain level of regulation without paying compensation.¹⁷⁰

Because these valuation mechanisms can sometimes be difficult to apply in practice, deference to the government can also be expressed through partial compensation as a proxy for the property's value offset by regulations that the government could legitimately have imposed but did not. Although partial compensation is never expressly authorized as an award, computing the highest and best use by allocating all of the risks of development to the property owner achieves the same goal.¹⁷¹

Awarding the lower of either a harm or gain-based award also amounts to a form of partial compensation.¹⁷² This would limit compensation to the owner's harm when the governmental action has created a large benefit, or, more commonly, limit compensation to the government's gain when the property had some added value to the owner that is not reflected in the market price. Depending on the factual situation, then, limiting a property owner's recovery to the value of the property to the government can represent a deferential attitude toward the governmental action.

2. *Insurance Theory.*—In addition to creating legislative incentives, just compensation has an effect on property owners' investment incentives.¹⁷³ A conception of the Takings Clause as a form of public insurance against governmental actions is primarily concerned with these incentives. In their important contribution to the field, Blume and Rubinfeld have pointed out that an improperly calibrated takings regime risks creating a moral hazard problem and inefficient *overinvestment*.¹⁷⁴ If property owners

¹⁶⁸ In describing early compensation practices, under state constitutions, William Treanor notes: "[Property] was a state creation and its scope was appropriately set by the state." Treanor, *supra* note 19, at 824.

¹⁶⁹ See *supra* Part I.B.3.

¹⁷⁰ See *supra* Part I.B.5.

¹⁷¹ See *supra* Part I.B.2.

¹⁷² This is closely analogous to valuing restitution by the lower of the plaintiff's harm or the defendant's gain. See DAGAN, *supra* note 14, at 21. This has the effect of encouraging expropriation or, in the present context, of encouraging governmental regulation. See Heller & Serkin, *supra* note 14, at 1407–08.

¹⁷³ See Blume & Rubinfeld, *supra* note 18, at 618–19; Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 285 (1992) ("Government compensation for takings creates a potentially serious moral hazard problem of its own."); see also ACKERMAN, *supra* note 135, at 45.

¹⁷⁴ See Blume & Rubinfeld, *supra* note 18, at 590–92; see also Eric Kades, *Avoiding Takings "Accidents": A Tort Perspective on Takings Law*, 28 U. RICH. L. REV. 1235 (1994). This insight has more

expect to receive full indemnification in the event their property is taken, then they will improperly ignore the risk of governmental action, even where a particular action can be reasonably anticipated.¹⁷⁵ Something less than full indemnification is therefore necessary to eliminate or reduce moral hazard.¹⁷⁶ This same principle explains why private insurance usually requires an insured to pay a deductible in the event of loss.¹⁷⁷

Of course, compensation that is too low will create inefficient incentives for property owners to *underinvest* in their property.¹⁷⁸ The amount of compensation necessary to create efficient investment incentives depends on the risk aversion of the affected property owner: the more risk averse the property owner is, the higher the expected compensation will have to be to prevent underinvestment.¹⁷⁹ A properly calibrated insurance regime will force a property owner to internalize at least some of the risk of a detrimental regulation so that she will not overinvest in her property, but it will also

traction than it might seem. Threats of governmental action can have a dramatic effect of property values and, therefore, investment decisions. *See generally* Kanner, *supra* note 5.

¹⁷⁵ *See* Dagan & White, *supra* note 139, at 408; *see also* Kaplow, *supra* note 100, at 531 (“It is socially desirable for investors to take into account the prospects for government reform; compensation eliminates this incentive by insulating investors from an important element of downside risk.”). Levinson provides a simple demonstration of this principle:

Suppose that Developer is choosing between two sites for construction of an office building, north and south. If Developer builds on the north parcel of land, the completed building will be worth \$1 million; if she builds on the south parcel, which costs exactly the same amount as the north parcel, the building will be worth \$2.2 million. Developer knows that there is a 50 percent chance that, after construction of the building has been completed, government will rezone or impose an environmental regulation on the south parcel such that the building, if located there, would be rendered worthless. There is no chance that the government will rezone or regulate the north parcel. If Developer is risk neutral, she will choose to develop the south parcel, for the expected value of the building there ($0.5 \times \$2.2 \text{ million} + 0.5 \times \$0 = \$1.1 \text{ million}$) is greater than the certain value of the building on the north parcel (\$1 million). If Developer is risk averse, however, she will discount the expected value of building on the south parcel by some risk premium. If this premium exceeds \$100,000, Developer will choose to develop the north parcel instead.

Levinson, *supra* note 130, at 391.

¹⁷⁶ *See* Dagan, *supra* note 5, at 749 (“Efficiency requires that every investor take into account the prospects of real risks, including the risk that the value of an investment may be destroyed or reduced by a new public need. Hence, when there is uncertainty about the government’s needs, a full-compensation rule provides incentives for excessive private investment, including improvements that will be of no use in the event that the land in question is subjected to public use.”); *see also* Craswell, *supra* note 146, at 1154 (describing moral hazard problem).

¹⁷⁷ *See, e.g.,* Kades, *supra* note 174, at 1245; George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1548 (1987) (“[M]arket insurance universally incorporates deductibles and coinsurance where the extent of the loss can be influenced by insureds’ *ex ante* or *ex post* decisions.”).

¹⁷⁸ Joseph W. Trefzger, *Efficient Compensation for Regulatory Takings: Some Thoughts Following the Lucas Ruling*, 23 REAL EST. L.J. 191, 194 (1995).

¹⁷⁹ Farber, *supra* note 173, at 283 (suggesting that compensation should track the risk aversion of property owners).

insure her against losses that are so substantial that they would deter efficient investments.¹⁸⁰

From the perspective of an insurance-based takings theory, property owners should be compensated for their loss minus a deductible designed to force them to internalize some of the risk of regulatory action. Preliminarily, the blanket prohibition against awarding consequential damages automatically builds some risk internalization into all compensation regimes.¹⁸¹ But takings law can operate more efficiently as a form of insurance if it is calibrated, at least in some measure, to the risk aversion of property owners.¹⁸² An individual homeowner may sufficiently internalize the risks of governmental regulation if consequential and subjective damages are excluded. She is unlikely, for example, to discount inefficiently the risk of governmental regulation when deciding when and where to add on to her house because of the non-compensable damages she would nevertheless suffer in the event of a taking.¹⁸³ A less risk-averse corporation or developer, on the other hand, may need to internalize more of the risks of development in order to prevent inefficient overinvestment. In fact, in some situations, zero compensation would be appropriate to force the developer to internalize the risk of government action sufficiently to prevent moral hazard.¹⁸⁴ This would be synonymous with a finding of no taking at all.

¹⁸⁰ Taking the traditional economic model at face value, compensation calibrated to create efficient legislative incentives may conflict with compensation necessary to create efficient investment incentives. See Merrill, *supra* note 26, at 132 (“[R]equiring the government fully to internalize all costs of takings would provide no incentives to property owners, but requiring property owners fully to internalize the costs of using their property in ways inconsistent with future government takings (that is, denying all compensation) would provide no incentive to the government.”).

¹⁸¹ See Epstein, *supra* note 139, at 19 (“I have heard too many stories of individuals who have been wiped out when their property has been taken *with* payment of compensation that is anything but just: no compensation for appraisal fees, litigation expenses, lost good will, moving expenses, anticipated renewal rights, and so on. The absolutist position guards against these risks which now routinely form a part of property ownership in the United States. And any rule that has that beneficial consequence cannot be all bad.”); see also Merrill, *supra* note 26, at 111 (observing that “just compensation means incomplete compensation” because it ignores consequential and other damages).

¹⁸² See Blume & Rubinfeld, *supra* note 18, at 601–03 (describing the efficient relationship between risk-aversion and insurance payments).

¹⁸³ It should be noted, however, that homeowners’ insistence on rebuilding in flood plains, despite the absence of compensation for subjective harm, might provide empirical evidence to refute this claim. See, e.g., Saul Levmore, *Coalitions and Quakes: Disaster Relief and Its Prevention*, 3 U. CHI. L. SCH. ROUNDTABLE 1, 7–8 (1996). However, it is also possible that those particular property owners would suffer even higher subjective harm from building in a new location. Without more information about their motivations, the challenge posed by this counterexample is not insurmountable.

¹⁸⁴ Levinson has suggested that an insurance theory of takings should endorse paying compensation “only to the class of risk-averse property owners.” Levinson, *supra* note 130, at 392. This would amount to charging the full value of the loss, i.e., not paying compensation at all, for property owners who are not risk averse. Others have suggested a more broadly applicable “zero compensation” rule. See Kaplow, *supra* note 100, at 536–50 (arguing that state compensation should be eliminated in favor of private insurance that only risk averse property owners would be likely to purchase).

An appropriate valuation mechanism to advance insurance-based concerns will decrease compensation proportionately with the risk aversion of the property owner. While risk aversion may not be possible to measure directly,¹⁸⁵ economists agree that, in general, it varies proportionately with wealth.¹⁸⁶ Therefore, compensation under this approach should decrease as the wealth of the property owner increases.

None of the valuation mechanisms accomplish this directly,¹⁸⁷ but a flexible application of the benefit-offset test becomes an appropriate valuation mechanism to advance an insurance-based regime if the benefits a court will consider expand as the wealth—and, hence, risk neutrality—of the property owner increases. Even an inflexible application of a benefit-offset test that includes as a benefit the ability to extract long-term concessions from the government will approximate this result because these more abstract benefits will often correlate with wealth.¹⁸⁸ Including a greater range of offsetting benefits when regulations burden the wealthy will further limit their compensation, to the point of a zero compensation award.¹⁸⁹

There is no doubt that the benefit-offset rule, as courts apply it today, is too blunt to track wealth, let alone risk aversion, with any precision. But it operates in the right direction. It will decrease compensation by the property owner's long-term or abstract benefits from the government which, in turn, tend to increase proportionately with wealth. The end result: a valua-

¹⁸⁵ See Blume & Rubinfeld, *supra* note 18, at 603 (“Measurement of the degree of risk aversion is a methodologically difficult and controversial subject. In fact, there is no general measure of risk aversion which economists find satisfactory for describing individual attitudes toward risk and insurance.”).

¹⁸⁶ “The general view held by economists is that absolute risk aversion declines with wealth.” *Id.* at 604; see also Daniel Farber, *Economic Analysis and Just Compensation*, 12 INT’L REV. L. & ECON. 125, 127 (1992) (“[T]he wealthy should be less willing to insure against losses of the same size than the poor, since a smaller portion of their total wealth is at risk.”). While there are additional measures of risk aversion, see Blume & Rubinfeld, *supra* note 18, at 603, this Article will focus on the most straightforward: absolute risk aversion.

¹⁸⁷ Hanoch Dagan has suggested provocatively that the traditional diminution of value test will achieve this result, but only with the blunt instrument of determining whether a taking has occurred. See Dagan, *supra* note 5, at 781–85. In other words, the diminution of value test he proposes can only determine whether someone receives compensation and not how much compensation she should receive.

¹⁸⁸ See, e.g., Lunney, *supra* note 5, at 159 n.7. This is not a perfect correlation. As Dagan acknowledges, there is a strong argument to be made that small property owners are actually more politically powerful than large developers and big landowners who “tend to be politically weak, because their ‘constituents’ are non-resident home-buyers who do not vote in municipal elections.” Dagan, *supra* note 129, at 137 n.8 (citing the views of Professor Roderick Hills); see also Farber, *supra* note 186, at 130. While Hills’s proposal of an inverse relationship between power and wealth may well apply in certain situations, in the paradigmatic and most frequent land-use planning decisions, and other regulations, power and wealth are directly correlated.

¹⁸⁹ Saul Levmore has proposed a similar analysis for determining when a taking has occurred. He argues that where regulatory burdens are placed on groups able to extract long-term concessions from the government then they are not takings. See Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 311–12 (1990). His useful analysis can be further refined, however, by inserting an element of compensation. See also Dagan, *supra* note 5, at 771–78 (providing a sophisticated account of reciprocity of advantage).

tion mechanism that decreases compensation as the wealth of the burdened property owner increases.

D. Theories Requiring Context-Dependent Compensation

1. *Redistributive Approaches to Just Compensation.*—Property is not just a status conferred on certain rights and things but also exists in a social space, creating relative levels of wealth in society. How the government protects private property has corresponding consequences for the distribution of wealth. Rigid protection of existing property rights prioritizes the status quo. Permissive or more flexible conceptions of property allow for greater redistribution. Some theorists have therefore focused on enforcement of the Takings Clause as a potential source for a progressive redistribution of property.¹⁹⁰ In fact, some historical evidence suggests that the constitutional framers viewed property redistribution as a central function of government and believed that the Takings Clause should not be interpreted to prevent such redistribution.¹⁹¹

Many people have expressed an intuition, supported at least by anecdotal evidence, that governments are more likely to burden the relatively less well off when choosing where, and on whom, to impose burdens created by governmental action.¹⁹² Analogously, the environmental justice movement suggests that people in poor neighborhoods are often forced to bear the brunt of pollution.¹⁹³ The Takings Clause, and specifically approaches to compensation, can provide a countervailing pressure. Although the best way to achieve this goal remains contested in the literature, focusing on compensation clarifies some aspects of the disagreement.

A progressive takings regime would provide more protection for property belonging to members of a disfavored group than to property belonging

¹⁹⁰ See generally T. Nicolaus Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714 (1988); see also Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFFALO L. REV. 735, 816–29 (1985) (arguing the public use requirement should be interpreted to allow redistribution of property from the rich to the poor); Dagan, *supra* note 5, at 787–88 (“[T]akings doctrine is not necessarily an inappropriate locus for egalitarian concerns. On the contrary . . . there is no obstacle to or fault in allowing our distributive ideals to step in. In fact, their presence is even commendable.”); cf. STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 421–22 (1990) (“[I]f redistribution is sometimes legitimate, and if takings can redistribute, then one cannot rule out certain takings simply on the footing that they aim to redistribute income or wealth.”).

¹⁹¹ See Treanor, *supra* note 19, at 847 (describing James Madison’s understanding of the purpose of the Takings Clause).

¹⁹² Heller & Krier, *supra* note 18, at 999 (arguing that the Takings Clause can “constrain governmental inclinations to exploit politically vulnerable groups and individuals”); Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1335 (1991); Levmore, *supra* note 189, at 306–07; Treanor, *supra* note 19, at 873–74 (discussing environmental justice movement and citing sources).

¹⁹³ Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1 (1998); Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994); see generally UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR (Robert D. Bullard ed., 1994).

to the privileged. A separate normative account would be needed to explain who belongs in each of these categories. But most likely, a progressive regime will favor those people with the least wealth and political power. In order to provide greater protection for the politically and economically disadvantaged members of society, courts can make it less expensive for the government to burden the private property of the wealthy and powerful.¹⁹⁴ Under a redistributive approach, the same regulation or government action that works a taking on a disadvantaged group would cost the government more than when the burden is placed on an advantaged group. This would create a countervailing pressure to offset the political influence of the wealthy and powerful members of society who might otherwise seek to shift burdens away from themselves.

This intuition, however, may not be so straightforward. Glynn Lunney, for one, has argued that decreasing compensation to the wealthy and powerful might actually increase the vigor of their political opposition and lead to increased burdens on the disadvantaged.¹⁹⁵ Compensation could have the perverse effect of staving off political opposition.¹⁹⁶ According to Lunney, it is the politically powerful who need the highest compensation in order to dull their opposition to governmental interference with their property.¹⁹⁷

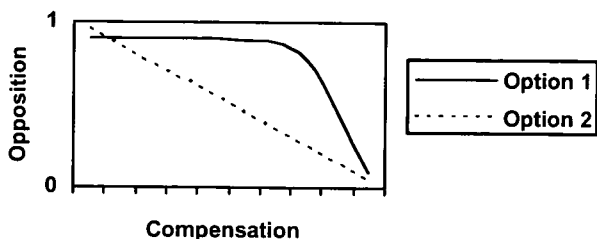
Contrary to Lunney's suggestion, it is unlikely as an empirical matter that political opposition will increase meaningfully as compensation incrementally decreases. In other words, the relationship between political opposition and compensation is unlikely to be linear. Where the choice is between full compensation and no compensation, Lunney might be right. But adding a compensation dimension to Lunney's practical criticism undermines its persuasiveness. Property owners' opposition to a taking of their property will be at or near 100% if compensation provides anything less than full indemnification. In fact, it is more likely that opposition to a government action would only decrease significantly with compensation that included indemnification for subjective harms. A graph expresses two possible relationships between compensation and political opposition:

¹⁹⁴ See Dagan, *supra* note 5, at 788 (“[A] compensation regime that is not sensitive to the relative political and economic power of the parties involved is both regressive and inefficient. Its inefficiency (as well as its regressivity) derives from its allocational consequences, which, in turn, spring from the incentives this regime generates for both public authorities and private landowners.”).

¹⁹⁵ See Lunney, *supra* note 5, at 165.

¹⁹⁶ See FISCHER, *supra* note 1.

¹⁹⁷ Lunney, *supra* note 5, at 165.



If the only choices were between full compensation and no compensation—i.e., a taking or no taking—then political opposition would either exist or not, as Lunney suggests. But for Lunney’s criticism to apply outside of this binary world, opposition must be inversely related to compensation, as illustrated by Option 2 above. The curve represented by Option 1, however, seems far more likely because of people’s deep sense of entitlement regarding their property.¹⁹⁸ The Option 1 curve shows a steady and high level of opposition up to a certain threshold level of compensation, at which point opposition diminishes to near zero. While the degree of opposition is inversely related to compensation at or near that threshold point, anything short of full indemnification will yield the same or similar level of political opposition. In other words, short of full indemnification, the property owner will object as strenuously as if the government were offering no or very limited compensation.

This might seem like an implausibly strong claim. Objecting to a governmental action includes its own costs and, at a certain point short of full indemnification, it will cost a property owner more to object to a governmental action than to accept it and the inadequate compensation. There are two competing factors at work, however. First, subjective damages may so far outstrip any compensable damages so as to trivialize the difference between zero compensation and fair market value. Second, property owners may object on principle to anything less than full indemnification. Although economically irrational, property ownership—especially real property ownership—comes with strong Blackstonian intuitions and property owners may be willing to fight to the mat to prevent government encroachment on their property, even if it will cost them more in litigation expenses than they could ever hope to recover as just compensation.

It would require additional empirical work to determine whether, and under what conditions, these relationships between political opposition and demoralization costs apply. Presumably, the relationship will depend on the psychology of the particular property owner as well as the nature of the

¹⁹⁸ Cf. Carol Rose, *Takings, Federalism, Norms*, 105 *YALE L.J.* 1121, 1143 (1996) (“There is just something about land that makes you think that when you own it, it is really, really yours.”).

governmental action. But, at least in many instances, a property owner's objection to a taking of her property will not respond to compensation for the range of values representing less than full indemnification. Expanding the range of compensation values from all or nothing calls into question Lunney's assumptions about political opposition. Providing limited compensation to the wealthy and the powerful may not increase their opposition to a governmental action. In the face of consistent political opposition, making it more expensive to impose burdens on the politically disadvantaged would at least create some counterbalance to the political forces already at work.

The compensation that will best achieve this goal is awarding relatively lower compensation to the wealthy and politically powerful, and to award relatively higher compensation to the poor and politically disadvantaged. Under this progressive approach, compensation is dependent upon a contextual inquiry into the wealth and political power of the burdened property owner and a normative determination whether this is the kind of person deserving greater protection. Assuming the progressive account is concerned primarily with redistributing wealth—or that wealth is at least an adequate proxy for other progressive concerns—then, like the insurance rationale, a progressive takings theory demands compensation that varies inversely with the wealth of the property owner. Again, the benefit-offset test approximates this result and is appropriate both here and under an insurance-based rationale.¹⁹⁹

This is a surprising conclusion, but the possibility of a deep connection between public takings insurance and distributive justice is not as outlandish as it may seem. Mandatory insurance regimes serve as a form of risk-spreading that benefits people who are more risk-averse.²⁰⁰ Critics of an insurance-based justification for takings note that many people would choose to opt out, if given the opportunity.²⁰¹ This desire by the risk neutral to opt out is precisely the source of the redistributive pressure; any compensation regime under this view charges risk neutral property owners more than they would choose to pay in order to offer protection to the risk-averse. Of course, the redistributive pressures inherent in any mandatory governmental insurance scheme are further increased when their pay-out depends on the wealth of the insured.

¹⁹⁹ See *supra* Part I.B.4; Part II.C.2.

²⁰⁰ See Calandrillo, *supra* note 5, at 516–17; cf. Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 125–26 (1993) (describing move towards mandatory insurance as embodying redistributive principles); Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381, 397 (1992).

²⁰¹ See Calandrillo, *supra* note 5, at 503 (describing the problem of adverse selection in insurance theory); see also Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 307 (2001) (assuming people would be required to purchase takings insurance for it to be functional).

2. *Personality Theory*.—Whereas the previous approach entails an inquiry into the political and economic status of the property owner, Margaret Jane Radin has advanced another non-incentive based account of the Takings Clause that requires an inquiry into the type of property impacted. Radin has argued that takings law should be responsive to a contextual inquiry into the personhood of the property taken.²⁰² There is no need to reprise the important and well-developed scholarship in this area except to note Radin's suggestion that judicial enforcement of the Takings Clause should acknowledge that some property "is normatively important to the freedom, identity, and contextuality of people."²⁰³ Personality theory requires a compensation regime that is sensitive to whether the property impacted by a government action is entitled to heightened protection.²⁰⁴

Radin suggests a number of changes to existing takings law to accommodate this category of deeply personal property. Fair market value, she suggests, is inherently inadequate to vindicate the personal connection people may have with this kind of property.²⁰⁵ She thus proposes restricting the government's power to condemn—or, perhaps, even to regulate—such property. "[A] few objects may be so close to the personal end of the continuum that no compensation could be 'just.' That is, hypothetically, if some object were so bound up with me that I would cease to be 'myself' if it were taken, then a government that must respect persons ought not to take it."²⁰⁶ In other words, she proposes substituting property rule protection for the current regime of liability rule protection.

In light of Radin's account, fair market value seems like a particularly inadequate measure of compensation for this class of deeply personal property. First, and most simply, to the extent that takings of deeply personal property cause significant non-market based harms, a fair market value standard will allow the government to escape internalizing these unmodified costs. This feeds back into the traditional economic account and suggests that legislative incentives will not be calibrated properly if the government can impose these costs without having to pay for them.

²⁰² See RADIN, *supra* note 20, at 146–65. In the chapter of her book discussing takings, Radin identifies cases in which courts appear responsive to the nature of the property taken. *Id.* at 154 & n.26. As she succinctly argues: "Exactly what has been taken, and from whom, matters." *Id.* at 154.

²⁰³ *Id.* at 137. Radin also suggests that takings doctrine should be responsive to the nature of the property owners and the character of the governmental action. Radin's insights and interests are much broader than her treatment of certain highly personal property, but it is precisely her discussion of property implicating its owner's personhood that is important for the present discussion, which is limited to this aspect of her work.

²⁰⁴ For lack of a better and less ambiguous phrase, this Article will refer to such property as "deeply personal property."

²⁰⁵ Cf. RADIN, *supra* note 20, at 154 ("[Market value] is the dominant legal standard for determining compensation, but it can seem quite wrong in cases where property interests are apprehended as personal and incommensurate with money.").

²⁰⁶ RADIN, *supra* note 20, at 1005.

More fundamentally, assigning value to these deep personal connections may work an independent harm.²⁰⁷ According to Radin, the act of monetizing the human body, for example, functions to devalue it.²⁰⁸ Fair market value therefore seems doubly inadequate both because it provides less than full indemnification and because it uses the vocabulary of the market to arrive at compensation.²⁰⁹ This same criticism has been leveled against tort damages for personal injury,²¹⁰ but there, at least, jurors are usually instructed about the difficulty of assigning monetary values to such harms.²¹¹ In takings there is no recognition of any problem of incommensurability: compensation for takings is measured by the market value of the property taken. The fungibility of property is deeply ingrained in the compensation standard.²¹²

Injunctions are not the only answer, however. Alternatives to a hard-and-fast property rule would also address some of Radin's concerns. For example, restitutionary as opposed to damage-based awards would shift the focus of the compensation inquiry from commodifying what the property owner has lost to valuing what the government has gained instead. Alternatively, compensation that is sufficiently punitive could function systematically to encourage the government to bargain for the property owner's consent.²¹³ While this might result in much higher costs to the government,

²⁰⁷ As Radin again notes, "In such cases it may be difficult to decide whether compensatory justice requires higher compensation or whether no compensation should be paid because the problem is outside the scope of compensatory justice." RADIN, *supra* note 20, at 154.

²⁰⁸ *Id.* at 201.

²⁰⁹ As Radin explains, "These cases are suspect because their implicit assumption that forced transfers at the market price justly compensates owners treats personal property as fungible." *Id.* at 141.

²¹⁰ See Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 62–68 (1993).

²¹¹ See Pattern Civ. Jury Instr., 5th Cir. § 15.4 (1995) ("You may award damages for any bodily injury that the plaintiff sustained and any pain and suffering, [disability], [disfigurement], [mental anguish], [and/or] [loss of capacity for enjoyment of life] that the plaintiff experienced in the past [or will experience in the future] as a result of the bodily injury. . . . You are not trying to determine value, but an amount that will fairly compensate the plaintiff for the damages he has suffered. There is no exact standard for fixing the compensation to be awarded for these elements of damage.") (brackets in original); see also New York Pattern Jury Instr. 2:277 (Comment) ("Aside from their general experience, there is no legal criterion to guide the jurors in translating into money values such intangibles as pain, suffering and shock"); Wash. Pattern Jury Instr. 30.06 (Comment) ("Noneconomic damages are not susceptible of precise measurement, and evidence that assigns an actual dollar value to the injury or that fixes the amount of damages with mathematical certainty is not required.").

²¹² There is a sense, of course, in which Radin's theory proves too much in the takings context. After all, people regularly sell homes in which they have longstanding, personal and sentimental attachments. We, as a society, do not object to these transactions the way we object to prostitution and the sale of one's body. Radin's objection is therefore not to the sale itself but rather to the forced sale. While Radin may want to problematize what counts as a voluntary transaction, she cannot seriously dispute that there is a price at which an individual would be willing to sell the family homestead.

²¹³ There is precedent for punitive damages in a similar context. See Epstein, *supra* note 143, at 2114–15 ("[T]he compensation rule under the Mill Acts called for the payment of some premium, here of fifty percent, over the market value. . . . [I]t probably had the greater advantage of offering a modi-

finite but super-compensatory awards would leave the government with a backstop to prevent truly extortionate demands arising out of rent-seeking holdouts, while exerting a strong pressure on the government to negotiate with the property owner.

Radin's underlying concerns would also be addressed through compensation based on the owner's subjective harm. Compensating for subjective harm would vindicate, and indeed respect, the personal nature of the property taken, and recharacterizing the property sometimes allows courts to award at least part of the property owner's subjective value.²¹⁴ Since recharacterizing the property is not always possible, and subjective harm is difficult to measure directly, valuation geared toward preventing the governmental action in the first place will permit the property owner to hold out for her reservation price.²¹⁵ As with general hostility toward the government, compensating the burdened owner becomes secondary to creating a systemic pressure that acts as an *ex ante* disincentive for the government to regulate "personal" property at all.²¹⁶ In those situations, the super-compensatory awards described in the context of hostility to the government also provide appropriate remedies for takings of deeply personal property.²¹⁷

Replacement value may also provide adequate protection, depending on the property and the nature of the damages suffered. While a new, comparable house may not adequately compensate for sentimental attachments, replacement value for a church, clubhouse, or even funeral parlor, may

cum of protection for those elements of value that are sometimes hard to quantify in an objective setting. For farmland, the rule seemed to go beyond that objective by giving the landowner some portion of the gain that came from the venture in which his land was conscripted. . . . The premium was a proxy for that large net advantage.")

²¹⁴ See *supra* Part I.B.7.

²¹⁵ Recent arms-length, third party offers for the property that the owner *rejected* may at least provide a baseline for subjective value, i.e., the property must have been worth more to the owner than the offer price or the owner would have sold. Alternatively, a recent article proposes a system in which property owners are invited to self-report the extent of their damages for so-called derivative takings—impacts on property that are the result of regulations of others' property. See Bell & Parchomovsky, *supra* note 201, at 281–83. Under this proposal, the government would have the ability to sue for false reporting and this, the authors claim, would have a sufficient deterrent effect to ensure that self-reported damages were not overstated. Such a system might also be available for awarding subjective damages, except that false-reporting would be much harder to test in subsequent suits because of the abstract nature of subjective value.

²¹⁶ In fact, this may be the more appropriate measure of recovery, at least where the act of valuing the taking commodifies the burdened property in a way that may inherently undermine its personal value. See, e.g., Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1485 (1989). Although this is similar to the valuation employed by the general anti-regulation perspective, it reflects a very different normative goal embodying a very different level of protection. Cf. Hermalin, *supra* note 44, at 72 ("What must be remembered, however, is that what matters is not the total amount of the citizen's compensation, but rather how her compensation varies on the relevant margin.")

²¹⁷ See *supra* Part II.B.1.

compensate the property owner for her actual use of the property, even if its market value would have been lower.²¹⁸

But why look to compensation at all instead of relying on the injunctive relief Radin endorses? Using valuation mechanisms to approximate forms of property rule protection may seem like an unnecessary second-best option. Injunctive relief is not always possible, however, and courts cannot always return the parties to a pre-existing state of affairs.²¹⁹ Doctrinal constraints in existing law also prevent courts from creating broad property rule protection.²²⁰

At the end of the day, too, Radin's proposal is an admitted departure from current takings doctrine. Compensation, on the other hand, provides courts with a means of vindicating Radin's core interests without revising existing law. Perhaps even more importantly, courts may be more willing to award higher damages than to enjoin a government action. Awareness of appropriate valuation mechanisms may actually expand courts' willingness to protect core personhood interests, even if the scope of the protection is something less than Radin herself advocates. In other words, a carefully crafted approach to compensation can fill in when injunctive relief is either impossible or unpalatable.

E. The New Economic Model: Compensation and Political Power

In assigning particular valuation mechanisms to existing takings theories, the preceding discussion has relied at least implicitly on the assumption that forcing the government to pay compensation will have some deterrent effect on its willingness to act.²²¹ Recent public choice theory scholarship has challenged this longstanding assumption by suggesting that compensation can function perversely to insulate government actors from paying the political costs for their actions.²²²

Traditionally, the paradigmatic conception of the Takings Clause is as a form of countermajoritarian backstop: forcing the government to pay when it takes property will prevent a majority from imposing an undue bur-

²¹⁸ Replacement value is expressly approved as an award for so-called special use property. See, e.g., *Grammercy Boys' Club Ass'n v. City of New York*, 529 N.Y.S.2d 476 (App. Div. 1988) (awarding replacement value for clubhouse); *City of Rochester v. Ryan & McIntee, Inc.* 393 N.Y.S.2d 137 (App. Div. 1977) (funeral parlor); *Congregation of Sons of Israel v. State*, 387 N.Y.S.2d 738 (App. Div. 1976) (synagogue).

²¹⁹ See text accompanying notes 144–145.

²²⁰ In fact, limitations on the public use requirement are almost nonexistent giving the government's nearly limitless authority to condemn property so long as it pays compensation. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984). But see *Kelo v. City of New London*, 125 S. Ct. 27 (2004) (granting certiorari on public use case).

²²¹ As Fischel has pointed out, "governments required to pay for regulations can quickly change their minds about the need for regulation." FISCHEL, *supra* note 1, at 151.

²²² For a general description of public choice theory, see Croley, *supra* note 141, at 34–41. For a discussion of public choice theory's implications for takings, see generally Farber, *supra* note 173.

den on a small minority.²²³ As the Supreme Court has frequently observed, the Takings Clause is designed to prevent the majority from imposing on a minority costs that, in fairness, should be borne by everyone.²²⁴ This is entirely consistent with the traditional cost-internalization rationale for compensation.

The effect of compensation is quite different, however, when a highly mobilized special interest group uses its political power to force through some inefficient government action. Here, the problem is not a majority group unfairly burdening a small minority but just the opposite: a small special interest group burdening the majority. This is far more consistent with public choice theorists' description of the legislative process.

At its most basic level, public choice posits that legislators are not perfect agents for the collective will of their constituents but have their own self-interested motivations that contribute to their decisions.²²⁵ What follows is that governments do not internalize costs the way private actors do.²²⁶ Public choice theorists argue, as a descriptive matter, that small, mobilized special interest groups have a relative advantage in the political process.²²⁷ This is especially likely where the voting constituency is large and information and organizational costs are high.²²⁸

When a taking occurs as a result of special interest group rent-seeking, compensation threatens to serve a particularly pernicious purpose. In fact, providing high compensation for takings may actually silence the one person (or group) that would otherwise have been sufficiently mobilized to oppose an inefficient governmental regulation: the burdened property

²²³ See Treanor, *supra* note 19, at 825 ("Because of faith in majoritarian decisionmakers, the early state constitutions did not contain substantive protections of property rights. They simply contained procedural protections—land could be taken only with the consent of the individual *or* of the legislature.").

²²⁴ *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 *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656 (1981) (citing other cases).

²²⁵ Daniel A. Farber & Philip P. Frickey, *Public Choice Revisited*, 96 MICH. L. REV. 1715, 1717 (1998) (book review) ("What holds this diverse movement [of public choice] together is a common methodology based on the concept of rational decisionmaking: simply put, political actors, like economic ones, make rational decisions designed to maximize the achievement of their preferences.").

²²⁶ Levinson, *supra* note 130, at 347–52.

²²⁷ See, e.g., Croley, *supra* note 141, at 35 (citing George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971)); see also MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 53 (1965) (arguing that smaller groups enjoy a relative political advantage over larger groups).

²²⁸ NEIL KOMESAR, *LAW'S LIMITS* 61 (2001) ("Interest groups with small numbers but high per capita stakes have sizeable advantages in political action over interest groups with larger numbers and smaller per capita stakes, because higher per capita stakes mean that the members of the interest group will have greater incentive to expend the effort necessary to recognize and understand the issues. In the extreme but not uncommon case, the members of the low per capita stakes losing majority (often consumers or taxpayers) do not even have the incentive to recognize that they are being harmed.").

owners.²²⁹ Perversely, the higher the compensation paid, the lower the likely resistance to the governmental action. Since the costs of the action are spread across all taxpayers, any increase in compensation to the burdened property owner will minimize her opposition, while only marginally increasing the cost of the action to the special interest group behind the governmental action.

Because of this insight, Daniel Farber has suggested that any mandatory compensation requirement will be detrimental to efficient legislative incentives.²³⁰ By preventing compensation or perhaps by awarding only partial compensation, adversely affected property owners will have more reason to fight to stop the taking.²³¹ At the least, this will pit two discrete and motivated interest groups against each other. Public choice theorists argue that the political process is more likely to function properly in this situation than when a mobilized interest group can impose costs on a diffuse, generally disinterested general public.²³²

The appropriate answer to this problem, however, is not necessarily to award zero compensation. First, and most importantly, most empirical work does not support public choice theorists' descriptive claims about the political process.²³³ More substantively, too, Farber's critique is deeply context-dependent. Indeed, both Farber and Levinson acknowledge that the effect of compensation is dependent on the political power of the affected groups.²³⁴ Where takings are not motivated by special interest group capture, but more genuinely reflect the desire of a politically mobilized majority, compensation will at least function in the right direction for creating efficient government incentives.²³⁵

More generally, Farber's concern that compensation will silence political opposition to a government action may underestimate how much com-

²²⁹ *Id.* at 94–95; Farber, *supra* note 173, at 290 (“The effect of the compensation requirement is to buy off the landowners and shift the cost of the project to other groups.”).

²³⁰ Farber, *supra* note 173, at 293 (“Assuming that the dispossessed will usually be a stronger political force than the alternative cost-bearers, a compensation requirement will lead to more rent-seeking (pork barrel) projects than an anti-compensation rule.”).

²³¹ For a fictional but humorous example, watch *THE CASTLE* (Miramax 1999).

²³² See Farber, *supra* note 173, at 293. As Farber goes on to explain, requiring compensation “will buy off the group otherwise most likely to bring costs forcefully to the attention of the legislators.” *Id.*

²³³ Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 *TEX. L. REV.* 873, 895 (1987) (“Most of the empirical evidence supporting the economic theory of legislation is, in fact, quite unconvincing.”); Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 *U. CHI. L. REV.* 63, 88 (1990) (citing empirical studies).

²³⁴ Farber, *supra* note 173, at 293 (distinguishing the effects of compensation in a variety of situations); Levinson, *supra* note 130, at 415 (“Depending on the model of the political process employed as an exchange mechanism between financial and political costs, and on numerous contextual variables, the deterrence effects of compensation on government behavior seem as likely to be perverse as beneficial.”).

²³⁵ Komesar, *supra* note 228, at 93–99 (discussing the effect of compensation given majoritarian and minoritarian bias); Farber, *supra* note 173, at 288.

compensation is required to overcome opposition to government interference with people's private property. Consistent with the intuition expressed in the redistributive approach, private property owners' assent to a government action may not come cheaply.²³⁶ Many current forms of compensation will fail to silence the group best situated to object to a government action, leaving the political interests properly aligned.

Of course, here too the story is context-dependent. Even if compensation is not linearly related to political opposition, it may still blunt more political opposition by property owners than it creates in the general taxpaying public, which will have to pay the compensation. To put it simply, any government that takes property will necessarily bear some political cost for having to outlay money, because that money must be raised either through increased taxes or cutting back on other services. Spread over a large enough or disinterested enough constituency, the political cost might be minimal, but even Farber does not deny it exists. On the other hand, paying compensation decreases the political cost imposed by the burdened property owner and her sympathizers. Ultimately, then, whether or not compensation minimizes the political costs of any particular governmental action depends on how responsive the property owner and the taxpayers are to compensation.

This critique goes to the heart of the takings debate. Much of the preceding compensation analysis relies at least implicitly on the assumption that requiring the government to pay more money will generally result in less government action. If that basic assumption does not hold—or, does not necessarily hold—then the specific prescriptions in each of the preceding sections need to be modified. Substantial additional work, far outside the scope of this Article, will need to be undertaken before conclusions can be drawn about when, and under what conditions, this correlation is unlikely to be true. For example, it may well be the case that the deterrent effect of compensation tracks the level of government doing the taking, or the specific nature of the government action. But this is a question best saved for another day. For now, this Article follows the decades of scholarship in assuming that increased compensation will decrease the government's appetite for regulating private property.

Leaving aside this recent critique of the traditional economic account, the table below summarizes the appropriate valuation mechanism for each of the takings approaches discussed in Part II.²³⁷

²³⁶ See *supra* text accompanying note 198.

²³⁷ Like the list of valuation mechanisms, the list of substantive approaches to takings considered in this Article is not exhaustive. Other theories could be accommodated in subsequent work by identifying the valuation mechanisms that are best paired with their explicit or implicit goals.

TAKINGS THEORY	APPROPRIATE VALUATION MECHANISMS
Hostility to the Government	(1) Recharacterizing the property; (2) Highest and best use—allocating risk to the government; (3) Higher of gain or loss; (4) Compensating for condemnation blight
Deference to the Government	(1) Reducing compensation by permissible but unenacted regulations; (2) Highest and best use—allocating risk to the property owner; (3) Lower of gain or loss; (4) Compensating for no condemnation blight
Insurance and Distributive Justice	(1) Benefit Offset
Personality Theory	(1) Recharacterizing the property (or other valuation mechanisms reflecting hostility to the government); (2) Replacement value

TABLE: TAKINGS THEORIES AND APPROPRIATE VALUATION MECHANISMS

This Part has identified the valuation mechanisms that are best suited to advance the goals of the various takings theories. While technical rules limit, for example, when courts can apply replacement value instead of fair market value,²³⁸ this overarching framework at least identifies the interests promoted by the different compensation rules. Instead of a random assortment of fact-specific rules, applied in an ad hoc and indefensible manner, the consistent application of valuation mechanisms can actually advance the core interests that underlie various takings regimes.

III. CASES OF VALUE

The preceding sections have developed a theoretical translation scheme between the nine different valuation mechanisms and the leading approaches to the Takings Clause.²³⁹ This Part moves from theory to practice, identifying and analyzing in depth cases that can be interpreted consistently with this translation scheme. The collection of cases presented below is by no means intended to reflect a representative sample of takings cases, nor to suggest that even these particular courts have developed the kind of nuanced, context-dependent approach to compensation articulated in Part II. But interpreting actual cases in a manner consistent with this Article's prescriptions demonstrates how existing doctrine can accommodate an ap-

²³⁸ See *supra* Part I.B.9.

²³⁹ Net harm was omitted from this discussion because it is so new; we have yet to see how courts will apply it in practice and what effect it might have on compensation. Presumably, if used at all, it will be used to limit compensation, but how, and to what extent, remains to be seen.

proach to compensation that is in step with the Takings Clause's different normative justifications.

In order to propose a fit in existing case law between valuation mechanisms and underlying takings theories, it is first necessary to attribute specific takings theories to real world cases.²⁴⁰ This is no simple task. Despite the rich scholarly takings literature, courts seldom follow one particular academic approach, but rather wrestle individually with each case presented. Accordingly, the interpretations that follow face two distinct challenges: they must both identify the specific valuation mechanisms used by the court and suggest what underlying takings theory was appropriate on the facts of the case.

To advocates of the various takings theories, it may seem like a strange project indeed to identify factual conditions that act as triggers for the various takings theories. Taken on their own terms, they are not factually contingent. This is true enough, but the analysis here is more normative than descriptive. Rather than suggesting that a court was actually motivated by a specific constitutional theory, this Part gathers cases that implicate substantive interests reflecting the core concerns of a particular takings theory. Ultimately, this Part can do no more than use hindsight to propose interpretations of various cases that are consistent with this Article's new theoretical framework. But the payoff is still substantial. By identifying factual conditions under which a substantive takings theory seems particularly appropriate, it is possible to demonstrate how courts' actual valuation decisions can be interpreted to reflect that specific theory.

The normative claim here is more limited than it may seem. This Part does not argue that courts should adopt different substantive approaches to the Takings Clause depending on the facts of a given case, but only that certain factual situations implicate the same sets of concerns that animate one or another of the takings theories. Identifying where these concerns overlap is the preliminary project of each section in Part III. Because courts may not be—or at least may not admit to being—motivated by one particular takings theory, the best way to provide examples of this Article's normative prescriptions in practice is to focus on cases that raise concerns consistent with a particular takings theory.

More often than not, courts' valuation decisions are inconsistent with their specified goals.²⁴¹ Accordingly, this Part does not pretend to bring order to the entire body of takings cases. But by focusing on those cases where courts' valuation decisions were consistent with the takings theory

²⁴⁰ The analysis in this Part could have proceeded in the reverse order. Instead of first extracting courts' underlying motivation and then examining whether they adopted appropriate valuation mechanisms, it would also be possible to identify the valuation mechanisms in various cases first and then identify whether they are used in a manner consistent with the courts' underlying goals. Either analysis would reveal real-world applications of this Article's normative prescriptions.

²⁴¹ A few of those cases are identified and discussed *supra* text accompanying notes 30–38.

imputed to them, this Part not only demonstrates the opportunity to implement the Article's approach to compensation, but also shows how such prescriptions could play out in practice. Recognizing instances of even inadvertent consistency in the existing case law is the first step toward encouraging more consistency in the future.

A. Cases of Hostility to the Government

This Article has described hostility to governmental action largely in terms of public choice theory, suggesting the deep political disagreements at the heart of the Takings Clause. And indeed, many courts' approaches to compensation can perhaps be explained by individual judges' background political beliefs, although the impact of such political views can be more or less apparent in any given case.²⁴² There are, however, fact-specific reasons why a court would be hostile to a governmental action in a particular case. For example, courts are naturally more hostile where the government has acted in bad faith,²⁴³ perhaps regulating in lieu of exercising its power of eminent domain in an effort to avoid paying any compensation at all, or where the action is so grossly inefficient that it appears to be the product of political capture by a special interest group.²⁴⁴ In these cases, courts are often especially ready to find a taking and, through damage awards, make such regulations particularly expensive for the government.

In *Del Monte Dunes at Monterey v. City of Monterey*,²⁴⁵ numerous broken promises by the City of Monterey gave rise to a strong appearance of bad faith.²⁴⁶ Plaintiffs sought to create a residential development of 344

²⁴² One case in which the judges' political points of view appear descriptively powerful is *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). There, the Court of Appeals upheld a claims court judgment allocating all development risks to the government and permitting plaintiff to recover the full pre-regulation value of the property despite the fact that it retained some residual value after the taking. The three judge panel in *Loveladies* included at least two very conservative judges: Judge Rader, appointed to the federal judiciary in 1990 by President Bush, served exclusively as chief counsel to Senator Orrin Hatch from 1981–1986; Judge Plager, who wrote the opinion, was also a Bush appointee. See 2 ALMANAC OF THE FEDERAL JUDICIARY (2004). He has written other noteworthy opinions upholding private property rights against governmental regulations. See, e.g., *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (holding that Rails-to-Trails Act converting railroad easement into bicycle paths constituted a taking); *Brown v. United States*, 73 F.3d 1100 (Fed. Cir. 1996) (holding that low level military overflights constituted a taking even if the owner's actual use of the property was not impaired).

²⁴³ Distrust may also come from disagreement with the legislative goals being pursued. For example, some judges may be antagonistic to environmental regulations, others to pro-business regulations. These kinds of goal-based concerns are their own form of pre-legal political judgments and are not discussed further.

²⁴⁴ Joseph Sax has recommended that governmental purpose is relevant to the taking question, arguing that compensation is due when the government operates like a private party or an enterprise organization. See Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

²⁴⁵ 95 F.3d 1422 (9th Cir. 1996).

²⁴⁶ Other examples of courts awarding higher compensation in the face of governmental bad faith include *United States v. Bodcaw Co.*, 440 U.S. 202, 203 n.2 (1979) (per curiam) (distinguishing prior

units on their property. The City of Monterey's city planners denied the site plan, but "stated that a proposal for . . . 264 units, would be received favorably."²⁴⁷ The plaintiffs then submitted a site plan for 264 units, but were denied again. "At that time, the city planners stated that a proposal for 224 residential units would be favorably received. A revised proposal for 224 units was submitted."²⁴⁸ The commission denied this too and the process continued through two more iterations.

Upholding a finding that a taking had occurred, the Ninth Circuit focused on the tortured history of the plaintiff's permit applications. The numerous broken promises give rise to a strong appearance of bad faith on the part of the City of Monterey. The court ultimately adopted a valuation mechanism consistent with this hostility, allocating all the risk of the plaintiff's development to the government by upholding a jury award including interest at a higher than average rate of return.²⁴⁹ Not only did this award remove the risk to the plaintiffs that their project would not have been completed as planned, but it also removed the risk to the plaintiffs that their project would not have been an *above average* success.²⁵⁰

Courts have also shifted substantial litigation costs to the government in the face of bad faith. In *United States v. Lee*,²⁵¹ the Fifth Circuit awarded the costs of conducting a land survey to the plaintiff as part of the compensation award. In *United States v. Bodcaw*,²⁵² the Supreme Court rejected a broad reading of *Lee* but refused to overturn the case because *Lee* "involved misrepresentation on the part of the Government . . ."²⁵³ In other words,

case awarding fees to property owner because the earlier case "involved misrepresentations on the part of the Government as to the amount of land to be taken"); *City of Pheonix v. Magnum*, 912 P.2d. 35, 38 (Ariz. Ct. App. 1996) (awarding compensation in excess of fair market value due to government's bad faith).

²⁴⁷ *Del Monte Dunes at Monterey v. City of Monterey*, 920 F.2d 1496, 1502 (9th Cir. 1990).

²⁴⁸ *Id.* at 1502.

²⁴⁹ *Dreier*, 95 F.3d at 1435. Although jury awards themselves are beyond the scope of this Article, there is a strong intuition that jurors might award higher damages when the government has intentionally abused its power.

²⁵⁰ See also *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981). In *Wheeler*, the city of Pleasant Grove withdrew a building permit to the vendor and developer of an apartment complex after a public outcry against the development. The court ordered the permit to issue and awarded damages for the temporary taking by comparing the value of the property as regulated with the value of the property *as if it had been developed*. It ultimately reduced this figure by the equity interest the landowners would have had in the property and then multiplied the equity stake by a fair rate of return over the duration of the taking. *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1351-52 (11th Cir. 1990); cf. *Osprey Pac. Corp. v. United States*, 41 Fed. Cl. 150 (1998) (valuing a leasehold by the full value of the underlying property after the United States improperly seized a boat from the plaintiff and donated it to the Boys & Girls Club of South San Francisco).

²⁵¹ 360 F.2d 449 (5th Cir. 1966).

²⁵² 440 U.S. 202 (1979).

²⁵³ *Id.* at 203 n.2; see also *Hinesburg Sand & Gravel Co. v. Chittenden Solid Waste Dist.*, 959 F. Supp. 652, 658-59 (D. Vt. 1997) (discussing "misrepresentation exception" to general rule that litigation costs are not imposed on the government in a condemnation case).

the government's misrepresentations justified awarding extra litigation expenses to the burdened property owner.

Interestingly, Congress has embodied this idea in a statutory entitlement for property owners to recover attorneys' fees in certain condemnation actions. In particular, where a property owner successfully defeats a condemnation action, or where the government voluntarily withdraws a condemnation claim, property owners are statutorily entitled to recover their legal fees.²⁵⁴ The primary basis on which a property owner can defeat a condemnation action is to prove that the government was not taking the property for public use.²⁵⁵ Property owners rarely succeed on these claims, but the situations in which they do correlate strongly with the government acting on behalf of special interest groups.²⁵⁶ In fact, these situations are almost paradigmatically what public choice theorists have in mind when they discuss special interest groups' rent-seeking behavior. Removing all discretion in shifting litigation expenses to the government is an appropriately super-compensatory award in these circumstances.²⁵⁷

B. Cases of Deference to the Government

Deference to the government's regulatory power is on the opposite end of the same spectrum. In the context of a particular regulation, courts may be particularly deferential where government has acted in good faith, or where there is a specific reason to trust the government, despite its regulatory overreaching. This increased deference may arise from the purpose of the government's action²⁵⁸ or the facts of a specific case.

Examples of courts adopting appropriate valuation mechanisms in the presence of governmental good faith are easy to find. In *Herrington v. County of Sonoma*,²⁵⁹ plaintiffs John and David Herrington sued after the County of Sonoma found their proposal to build a thirty-two-lot subdivision on their property inconsistent with the general plan.²⁶⁰ The Court agreed that the Herringtons' proposal was impermissible under the general plan because "the proposed density [was] inconsistent with the preservation of

²⁵⁴ See 42 U.S.C. § 4654 (2000).

²⁵⁵ See Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. REV. 49, 59–68 (1999) (describing history of public use limitation on eminent domain). One example of such a challenge can be found in *Bickerstaff Clay Products Co. v. Harris County*, 89 F.3d 1481, 1490 (1996).

²⁵⁶ The public use requirement is essentially coextensive with the scope of the government's powers. See *supra* note 220. Consequently, states must be operating outside their extremely broad police powers to violate the public use requirement.

²⁵⁷ See *supra* Part I.B.6.

²⁵⁸ For example, courts have often been willing to defer more broadly to the government in the context of military decisions. See, e.g., Margaret A. Garvin, *Civil Liberties During War*, 16 CONST. COMMENT. 691, 705–10 (1999); *Korematsu v. United States*, 323 U.S. 214 (1944).

²⁵⁹ 790 F. Supp 909 (N.D. Cal. 1991).

²⁶⁰ *Id.* at 911.

agricultural and timber resources on the Herringtons' parcel."²⁶¹ The Ninth Circuit nevertheless held that the County had violated procedural due process by making certain key land use decisions without the Herringtons' participation. In other words, the County's substantive motives were not suspect, but only the procedures that the County implemented to effectuate its general plan.

The *Herrington* court adopted an award consistent with the County's good faith. Due to procedural intricacies not relevant here,²⁶² the Ninth Circuit first refused to find a permanent taking but remanded to the district court to value a temporary taking for the temporary denial of the plaintiffs' building permit.²⁶³ The Ninth Circuit further instructed that the Herringtons were not entitled to value their property based on the full thirty-two-unit development plan because "the approval of a 32-lot subdivision by the County was speculative."²⁶⁴ Instead, the district court held that it had to "determine what valid restrictions could be placed on plaintiffs' land" in order to set the upper boundary of the award.²⁶⁵ In other words, the district court declined to base its award on the highest and best use sought by the plaintiffs, but instead reduced it by the value of the permissible but unenacted regulations that could have been imposed on the Herringtons' property.²⁶⁶

²⁶¹ *Herrington v. Sonoma County*, 834 F.2d 1488, 1492 (9th Cir. 1987).

²⁶² The Ninth Circuit struck down the County's permit denial and required new procedural protections for landowners. The court did not, however, instruct the County to issue the plaintiff's building permit. Instead, the Ninth Circuit held that a temporary taking had occurred between the time of the original denial of the building permit and the time it was struck down.

²⁶³ See *Herrington*, 790 F. Supp. at 911 (describing the procedural history). In essence, the Ninth Circuit held that plaintiffs had abandoned their permanent taking claim and narrowly confined the district court's discretion on remand.

²⁶⁴ *Id.* at 912 (citing *Herrington*, 834 F.2d at 1504).

²⁶⁵ See *id.* at 914. In fact, the district court determined that it should "award market rate computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction." *Id.* (internal quotation marks omitted). This required the court to determine a permissible level of regulation in order to determine the "after" value of the property. See *id.*

²⁶⁶ See also *Foster v. United States*, 2 Cl. Ct. 426 (1983). In *Foster*, the court awarded the lease value of mining rights instead of the fair market value of the dolomite deposits that were taken. This compensation award is entirely consistent with a presumption of governmental good faith, an appropriate presumption here because the property was taken to activate Camp Cooke, an Army camp to train armored and infantry divisions. The flip side of awarding low compensation when the government has acted in good faith, is awarding low compensation when the property owner has acted in bad faith. This would explain the court's holding in *Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577 (Fed. Cir. 1990). In *Yuba*, the court refused to award lost profits or any of the property's owner real but subjective damages. Yuba owned a gold mine that had been inactive for almost a decade. When Yuba decided to explore the possibility of mining the property again, the Army Corps of Engineers informed Yuba, incorrectly, that the United States had a valid interest in portions of Yuba's land. Yuba nevertheless commenced negotiations with a mining company, *Yuba*, 904 F.2d at 1579 ("At that time Yuba lacked both the money and the expertise to conduct mining operations alone."), ignoring the govern-

Similarly broad deference to the government is also represented by *Branning v. United States*,²⁶⁷ involving the value of an avigation easement for military aircraft.²⁶⁸ Specifically, the court in *Branning* had to decide the value of the easement over property that was never fully developed because of military overflights.²⁶⁹ Evidence showed that the landowners had originally contemplated a medium-density residential-recreational project, that the highest and best use of the property was a high-density development, and that the highest and best use of the property with the avigation easement was a low-density development. Courts have traditionally demonstrated broad deference to the government in military matters, and the valuation mechanism adopted by the *Branning* court is no exception.²⁷⁰

In order to value the taking, the court compared the value of the property prior to the easement with the value of the property after the easement.²⁷¹ First, however, the court found that plaintiff's experts' assessment of the property's value without the easement failed to take into account the military overflights that had occurred prior to the taking.²⁷² This implicitly acknowledged that a certain number of military overflights would not have effectuated a taking and that the value of the property before the taking had to be reduced by the cost imposed by the permissible level of those flights.

Second, the court rejected a value of the property that included \$1 million in anticipated profits from the high density development, holding that an award of profits would have shifted the risks of the development to the government.²⁷³ While it is indeed true that compensating fully for anticipated profits shifts the risks of the project to the government, denying all

ment's claimed valid interests. Yuba ultimately prevailed, but the court awarded relatively low compensation.

²⁶⁷ 6 Cl. Ct. 618 (1984).

²⁶⁸ *But see* Bell & Parchomovsky, *supra* note 201, at 280–81 (arguing that so-called derivative takings, which include paradigmatically overflights, are conceptually distinct from regulatory takings).

²⁶⁹ The evidence specifically showed that a nearby airbase was used for pilots to practice take-offs and landings in conditions that simulated an aircraft carrier. This involved "F-4 aircraft follow[ing] one another almost nose-to-tail in an unvarying loop . . . at an altitude of 600 feet above ground level, with noses up and tails down, and with the near-maximum power and noise associated with low speed." *Branning*, 6 Cl. Ct. at 620.

²⁷⁰ *See* *Korematsu v. United States*, 323 U.S. 214 (1944); *Herrington v. Sonoma County*, 834 F.2d 1488, 1492 (9th Cir. 1987).

²⁷¹ The actual value assigned to each of these uses was deeply contested, and several expert witnesses provided conflicting testimony. *See generally* *Branning*, 6 Cl. Ct. at 618.

²⁷² The existing overflights were not permissible but *unenacted* regulations because they had already been imposed on the property owner. Nevertheless, the reasoning is closely analogous; the court reduced the total compensation by that amount of regulation—or here, governmental interference—that would not have been a taking.

²⁷³ The court explained, "In view of the financial risks that would have been involved in the future development of the plaintiff's property, even absent any avigation easement, it hardly seems reasonable to assume that the hypothetical 'willing buyer' would have agreed to pay in cash to the 'willing seller' a price that would include all the profit which the 'willing buyer' expected to derive from the future development of the property, if all went well." *Branning*, 6 Cl. Ct. at 626.

profits presumes that a willing buyer would discount anticipated profits by 100%. This extremely conservative assumption shifts all of the risks of the development to the Brannings.²⁷⁴ This valuation mechanism is an appropriate award to express courts' general deference to the government in military matters, for better or worse.

Perhaps most importantly, in its recent decision *Brown v. Legal Foundation of Washington*,²⁷⁵ the Supreme Court reviewed Washington State's Interest on Lawyer Trust Accounts ("IOLTA") program, requiring attorneys to deposit client funds in interest-bearing accounts with the interest payable to charitable organizations providing legal services to people with low income.²⁷⁶ Nationwide, states' IOLTA programs provide over \$200 million annually in legal services for the poor. The Supreme Court held that Washington's IOLTA program was a taking of clients' funds, but that just compensation was zero.²⁷⁷ Specifically, the Court held that takings are to be valued by the property owners' net harm which, in *Brown*, meant the net value of the interest that clients could have made if their funds had been deposited in non-IOLTA accounts.

I have previously argued that the Court's net harm rule should be interpreted as a species of fair market value, but also acknowledged the line-drawing problem of deciding which fees and administrative expenses to include in the market value calculation.²⁷⁸ If governmental good faith influences where those lines are to be drawn, then *Brown* is perhaps more justifiable as an example of judicial deference to an important government program.

In dissent, Justice Scalia accused the majority of creating a new rule of deference for "Robin Hood Takings," i.e., takings of which the Court approved.²⁷⁹ But is this really so surprising? Why is the governmental purpose irrelevant to takings doctrine? Justice Scalia seems to assume that it will result in unprincipled decisionmaking, allowing the Court to uphold laws it likes and strike down those it does not. But his dissent assumes, without reasoning, that takings are to be viewed entirely from the perspective of their impact on the property owner. In fact, the government's motivation and conduct can influence how courts will evaluate a regulation's impact on private property. Is it so surprising, then, that the Court would adopt a more deferential approach in the face of governmental good faith?

²⁷⁴ Cf. *United States v. 62.50 Acres of Land*, 953 F.2d 886 (5th Cir. 1992) (rejecting plaintiff's claim that the property could be best used for clam shell mining or for a camp site, valued at \$899,075 and \$266,000, respectively, and holding that the land was best used as an undeveloped recreational facility, valued at \$54,000).

²⁷⁵ 538 U.S. 216 (2003).

²⁷⁶ *Id.* at 220. *Brown* involved a challenge to Washington State's IOLTA program, but the Court's ruling could have applied to every state's IOLTA program.

²⁷⁷ *Id.* at 240.

²⁷⁸ See Serkin, *supra* note 4, at 430.

²⁷⁹ *Brown*, 538 U.S. at 252 (Scalia, J., dissenting).

Instead of an unprincipled new valuation rule, the Court's net harm calculation in *Brown* appears to be an appropriate application of the fair market value standard.

C. Cases of Insurance and Distributive Justice

The appropriate measure of compensation for both the insurance and distributive justice approaches to takings is an application of the benefit-offset test, where the range of benefits a court will consider varies proportionately with the property owner's wealth. Courts adopting either of these approaches should be more willing to offset a broader range of benefits when a property owner is wealthy and less willing when the property owner is not. The results can be anywhere from no set-off to a full set-off, i.e., zero compensation or a finding that no taking occurred because the property owner received an average reciprocity of advantage from the government. There are representative cases all along this spectrum.

In *Hendler v. United States*,²⁸⁰ plaintiff sued for a permanent physical occupation when the government installed pollution monitoring wells on his land. The court viewed the wells as part of a program of pollution remediation and held that they provided a "special benefit" to the plaintiff, the value of which should be offset against the harm imposed by the presence of the monitoring wells. The opinion notes, however, that California was to bear the costs of fixing the groundwater pollution.²⁸¹ By offsetting this benefit, the court was, in effect, including something generally like the benefit of membership in the community to minimize the compensation due for the taking claim.

*Laughlin v. United States*²⁸² is an example of the benefit-offset test used to preclude any compensation by expanding the range of benefits even further. Plaintiff in that case owned 320 acres of farmland in the Mohave Valley near the Colorado River.²⁸³ Five consecutive years of heavy rains, from 1983 to 1987, led to flooding of the plaintiff's property as a result of dams on the Colorado River, including the Hoover Dam. Plaintiff argued that the federal government's system of dams effectively deprived him of any economic use of his land for those five years. The Court of Claims disagreed, in part because the plaintiff received a benefit from the dams that outweighed the harm he suffered during the five years his property was unusable.²⁸⁴ The court focused on the historical fact that little property in the Mohave Valley was used for farmland before the construction of the Hoo-

²⁸⁰ 38 Cl. Ct. 611 (1997).

²⁸¹ See *id.* at 617 (construing defendant's argument as accepting responsibility to abate the groundwater pollution).

²⁸² 22 Cl. Ct. 85 (1990).

²⁸³ *Id.* at 94-95.

²⁸⁴ *Id.* at 112 ("In analyzing relative benefits, a court must balance the overall benefits and detriments of the Government's conduct in relationship to their impact on a claimant's property.').

ver Dam. Therefore, according to the court, “[w]ithout the flood control system, plaintiff’s land in its natural state largely would have been unusable for farming purposes. Thus, Hoover Dam and its successor improvements directly benefited plaintiff’s land by providing a stable source of irrigation water and by greatly reducing the likelihood of surface flooding”²⁸⁵ In other words, the general benefits to the plaintiff’s property conferred by the dams more than offset the harms they imposed.

What is striking about *Laughlin*, however, is how the court construed the nature of the challenged governmental action. While the plaintiff’s theory of causation included the government’s development of the dams, he pointed more specifically to the placement of an extensive marsh just south of his property that the government maintained with artificially high water levels because it had become “an important wildlife refuge.”²⁸⁶ The court did not identify any specific benefit from the marsh to the plaintiff’s property. Ultimately, then, the court took a broad view of the benefits accruing to the plaintiff as a result of the government’s general regulation of the Colorado River. This is a broader range of benefits than the court needed to consider and includes the kind of long-term benefits appropriate for larger, less risk-averse property owners. It is also indistinguishable in its result from the reciprocity of advantage test.

Perhaps the most extreme example of a court considering a broad range of benefits when evaluating the takings claim of a wealthy property owner is *Shanghai Power Co. v. United States*.²⁸⁷ Shanghai Power Company owned and operated a power plant confiscated by the People’s Republic of China (“PRC”) in 1950. Shanghai Power sued pursuant to the Foreign Claims Settlement Commission, seeking \$54 million. In 1979, however, President Carter settled the plaintiff’s claims against the PRC, without plaintiff’s consent, in the process of establishing diplomatic relations with that country.²⁸⁸ Shanghai Power sued the United States, arguing that the settlement was a taking of its legal claim against the PRC. The Court of Claims rejected plaintiff’s takings challenge, reasoning, in part, that plaintiff had benefited from normalization of diplomatic relations with China:

[L]ike all other persons in the United States, plaintiff is an incidental beneficiary of the normalization because it may now engage in profitable trade with the PRC and take advantage of goods imported from the PRC by others. Plaintiff also shares with other U.S. nationals the benefit of enhanced security that presumably resulted from normalization of relations.²⁸⁹

²⁸⁵ *Id.* at 113.

²⁸⁶ *Id.* at 90.

²⁸⁷ 4 Cl. Ct. 237 (1983). For additional discussions of this case, see Dagan & White, *supra* note 139, at 413–14; Levinson, *supra* note 76, at 1340–41.

²⁸⁸ The facts of the case are set forth at *Shanghai Power*, 4 Cl. Ct. at 239.

²⁸⁹ *Id.* at 246 & n.16.

These are broadly drawn benefits, indeed, and they resulted in denying compensation altogether for a large power company.

D. Cases of Higher Protection for Special Property

Identifying cases consistent with a personality theory of property requires examining the nature of the property taken.²⁹⁰ A takings regime attuned to protecting deeply personal property may find the same regulation to be a taking where it impacts a person's home, and to be a permissible regulation when imposed upon a commercial development. In other words, in protecting "personal" property, courts should focus on the burdened property and determine whether it falls within the core space identified by this takings regime. While it poses line-drawing problems in practice, substantial theoretical work has identified and examined these kinds of core personhood interests.²⁹¹

Courts have, in fact, been willing to provide heightened protection for paradigmatically "personal" property, both in finding takings and in valuing them, although such cases are sometimes difficult to identify.²⁹² Two cases are representative. The first is *Board of Commissioners v. Crawford*,²⁹³ in which the Texas Levee District condemned part of plaintiff's farm to construct a new levee. The court noted that the Crawfords had farmed the land for the past thirty years.²⁹⁴ The Crawfords objected to the government's proposed compensation for the condemnation of their land and the court agreed.

The *Crawford* court used a number of different valuation mechanisms to arrive at a substantially higher award than the market value of the con-

²⁹⁰ Cf. DAGAN, *supra* note 14, at 44 ("[T]he more closely a resource is connected with personhood—i.e., the closer it is to the personal, rather than the fungible, pole of the continuum just described—the stronger its possessor's entitlement."). Using his own technical language, Dagan demonstrates that restitutionary rules will often protect people's "control" over personal resources, and merely their "well-being" with regard to fungible commodities.

²⁹¹ See, e.g., RADIN, *supra* note 20, at 965; Rao *supra* note 20, at 387–90; see also Craig A. Arnold, *The Reconstitution of Property*, 26 HARV. ENVTL. L. REV. 281, 326 (2002) ("[P]ersonhood theory calls for a perpetual and nonwaivable guarantee of habitability by the landlord to the tenant because one's apartment or other leased residence is one's home in the sense of a sanctuary needed for personhood.") (internal quotation marks omitted); Eric H. Reiter, *Personality and Patrimony*, 76 TUL. L. REV. 673, 674 (2002) ("Clothes, cars, houses, food, even such trivial objects as designer fountain pens mark and categorize people socially and culturally as surely as do their looks or their accents. Indeed, property can be seen as essential to personhood: our possessions are the outward manifestation of our selves, and without them true self-development is impossible.").

²⁹² See *infra* Part II.D. These cases are difficult to identify in part because of the Supreme Court's prohibition on awarding subjective value. Courts therefore will never admit they are awarding subjective harm, but will nevertheless sometimes find ways around the prohibition. But see RADIN, *supra* note 20, at 66 (stating that "one might expect to find that a special class of property like a family home is protected against the government by a 'property rule' and not just a 'liability rule.' . . . [T]his general limitation has not developed").

²⁹³ 731 So. 2d 508 (La. Ct. App. 1999).

²⁹⁴ *Id.* at 512.

demned property. First, the court determined that the property's highest and best use was as a riverside campsite, despite the fact that the property had been used exclusively as farmland for over thirty years. The court made the questionable finding that campsites have no development costs associated with them, and so the Crawfords were permitted to recover the full value of the property as if it were already suitable for commercial use as a campground.²⁹⁵ Next, the court allowed the Crawfords to recover for the reduced aesthetic value of their remaining property, and in particular for the loss of foliage as a result of the new levee.²⁹⁶ Finally, the court awarded both attorneys' fees and the expert appraiser's fees to the Crawfords.²⁹⁷ Taken together, these various awards increased the cost to the government of its actions and may have even allowed the Crawfords to recover more than they ever could have made selling their property on the market.²⁹⁸

*Yancey v. United States*²⁹⁹ provides an example of a court recharacterizing the nature of the property taken. The Yanceys were owners of a small farm for breeding turkeys. After an outbreak of pathogenic Avian Influenza, the USDA imposed a moratorium on all turkey sales. While the agency reimbursed poultry owners who had to slaughter their infected livestock, the Yancey's turkeys were not actually infected. Nevertheless, the quarantine imposed such a financial burden that the Yanceys slaughtered their birds and sold them as meat, even though the flock was raised as more expensive breeder stock.³⁰⁰ Economic hardship did not trigger the legal reimbursement provisions, so the Yanceys sought, and were granted, compensation for the USDA's regulatory taking. While the turkeys themselves would not have implicated the Yancey's core personhood interests—there is no contention that the 3000 birds were family pets—the Yanceys were small farmers in Virginia and the government's taking went to the heart of their turkey breeding operation. Although the individual turkeys were not deeply personal property, the farm itself was and the government's quarantine threatened its existence.³⁰¹

²⁹⁵ *Id.* at 514.

²⁹⁶ *Id.* at 515 ("The loss of foliage justifies an award of severance damages.").

²⁹⁷ *See id.* at 516–17.

²⁹⁸ *See also* *Yaist v. United States*, 17 Cl. Ct. 246, 261 (1989) (awarding replacement value for a fishing cabin in the Everglades, including the additional costs associated with "effort and time because the island [where the cabin was located] is accessible only by small water craft"). Replacement value is frequently awarded in state courts. *See, e.g.*, *Fla. Dep't of Agric. & Consumer Servs. v. Pompano Beach*, 829 So. 2d 928, 931 (Fla. Dist. Ct. App. 2002); *Mass. Port Auth. v. Sciaba Constr. Corp.*, 766 N.E.2d 118, 125 (Mass. App. Ct. 2002); *State ex rel. Dep't of Highways v. Constant*, 369 So. 2d 699 (La. 1979).

²⁹⁹ 915 F.2d 1534 (Fed. Cir. 1990).

³⁰⁰ *Id.* at 1536.

³⁰¹ *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), provides another case of an invasion of property implicating the plaintiff's core personhood interests. There, Richard Nixon sued the federal government for taking his presidential papers after Congress passed the Presidential Records and Materials Preservation Act. The D.C. Circuit concluded that President Nixon had suffered a compensable

When it came to valuing the turkeys, the court permitted the Yanceys to recover the full value of the turkeys as breeders, allowing recovery based on their intended use for the birds instead of the price that a willing buyer would have paid.³⁰² There is no evidence the birds themselves were more valuable as meat than any other turkeys; their increased value came only from the Yancey's entire breeding operation. The court, therefore, implicitly recharacterized the nature of the taken property, allowing the Yanceys to recover at least a portion of their subjective harm.

Even Congress has approved a form of super-compensation for takings of one class of personal property. The pithily named Uniform Relocation Assistance and Real Property Acquisitions Act of 1970 entitles certain property owners to moving expenses when HUD forces them to relocate.³⁰³ This, again, puts more than the fair market value of the property at stake when the government takes people's homes. In this limited circumstance, at least, Congress has adopted a compensation award consistent with the personality theory.

CONCLUSION

Looking for consistency in takings cases is a little bit like finding shapes in the clouds: you can see them if you look hard enough, but they say more about the observer than the clouds themselves. For every case interpreted in Part III, it would be possible to construct alternative interpretations that would make the court's valuation decision inappropriate under this Article's normative framework. Instead of a case about a small farm, for example, *Yancey* could just as easily be about the government acting in good faith to preserve the nation's health, in which case recharacterizing the turkeys as breeding turkeys would have been inappropriate. With so much doctrinal confusion in the law of takings generally, any attempt to bring order to the chaos is bound to be controversial. At the end of the day, however, the availability of alternative interpretations of each of these cases

taking but only noted in passing the difficult valuation decision involved in the case and remanded to the district court to make a preliminary determination of damages. *See id.* at 1287 ("In remanding to the District Court, we recognize that difficult questions regarding the measure of damages remain. Those questions, though, were not before this court, and we leave them for the District Court to address in the first instance."). On remand, the district court rejected the government's arguments that Nixon should not be entitled to any compensation because the value of his papers had been created by the fact of his public office, and that the constitution's "Emolument Clause" prohibited compensation. *See Griffin v. United States*, 935 F. Supp. 1, 8 (D.D.C. 1995). The court held that the proper measure of valuation was the fair market value of the papers. While the court saved the actual valuation of the papers for another day—a day that appears never to have arrived because no further opinions were written in this matter—it would have been appropriate for the court to ensure that the fair market value of the papers included a measure of supercompensation because of the nature of the property taken.

³⁰² *See Yancey*, 915 F.2d at 1536.

³⁰³ 42 U.S.C. § 4623 (Supp. 1973). This statute is discussed briefly in Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 737 n.195 (1992).

does not undermine the fundamental purpose Part III is meant to serve: providing examples of ways in which courts can introduce a measure of consistency to their compensation analyses.

But why, some might ask, should courts use valuation mechanisms to achieve substantive goals when the goals themselves remain so contested? Compensation might seem like a second order concern, and the valuation mechanism is nothing more than an opportunity for the valuation tail to wag the takings dog. The purpose of this Article's analysis, however, is not to suggest that compensation should become a new locus of takings disputes. Instead, it is to reveal that valuation of takings claims is already deeply contested and entails its own substantive choices. Valuation should work in tandem with takings law generally so that compensation advances, rather than interferes with, the substantive values at stake. Applied consistently with the content of those substantive values, monetary valuation can advance the goals of the Takings Clause. Applied blindly, valuation can undermine substantive constitutional commitments and leave one more area of takings law desperately in need of coherence.

Courts and commentators have for too long ignored the role of compensation in takings law. As a result, the connection between takings theories and compensation is under-theorized and courts' damage awards are frequently inconsistent. In fact, compensation in this context has a constitutional dimension that maps directly on to the competing conceptions of the Takings Clause. The underlying takings debate may not be resolved any time soon, but understanding the implications of that debate for compensation can lead to more transparent and principled decision-making in the future.

Properly construed, valuation methodologies for regulatory takings claims reflect more than a disconnected hodgepodge of fact-specific rules. Instead, they participate in the overarching property theories motivating various approaches to takings. How courts value takings claims is a central component in the protection of private property and making sense of those valuation decisions reveals a new dimension in the otherwise well-developed takings scholarship. By examining the critical role of those identified valuation mechanisms in advancing takings theories, this Article has demonstrated a framework for understanding the meaning of valuation decisions, both in takings law and beyond.