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Compensation for Takings: How Much Is Just

Glynn S. Lunney Jr
Texas A&M University School of Law, glunney@law.tamu.edu

ARTICLES

COMPENSATION FOR TAKINGS: HOW MUCH IS JUST?

Glynn S. Lunney, Jr. *

Once a court has determined that the government has "go[ne] too far"[1] in changing or restricting existing property rights, and that a "taking" has, therefore, occurred, the Fifth Amendment requires that the government provide "just compensation" to the individual whose property it has taken.[2] In defining the measure of compensation mandated by the Constitution, the

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1. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). The context of the opinion and the Supreme Court's early jurisprudence suggest that Justice Holmes intended this phrase to cover situations in which the government went too far by "regulating" the property rights of one person to solve a problem facing another person, or facing society generally. Justice Holmes probably did not intend the phrase to suggest that the government goes too far when it diminished the value of the regulated property too much. As Professor Sax has noted, the diminution in value interpretation is "historically unsound, has never in fact been acceptable to the Court, and wasn't even followed by Holmes himself." Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964); *see also* Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1928-29, 1930-31 (1992); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1190 n.53 (1967). In addition, in the context of the immediately surrounding language in the *Pennsylvania Coal* decision, Justice Holmes tied the "goes too far" language to his point that the state of Pennsylvania had gone too far in enacting the Kohler Act because the statute attempted to shift the expense of solving the subsidence problem from the surface owners to the coal companies. *Pennsylvania Coal*, 260 U.S. at 415-16.

2. The Fifth Amendment to the United States Constitution provides, in relevant part: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Supreme Court has applied the Fifth Amendment's just compensation requirement to the states through the due process and equal protection language of the Fourteenth Amendment. *See* Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 417 (1896) (holding that the taking of private property is forbidden absent compensation by the due process language of the Fourteenth Amendment); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 381 (1894) (holding that the taking of private property is forbidden by the equal protection language of the Fourteenth Amendment in the absence of compensation).

Supreme Court has consistently explained that an individual is entitled to "a full and exact equivalent" for the taken property,[3] and to be "put in as good [a] position pecuniarily as he would have been if his property had not been taken."[4]

Yet, behind the facade of these seemingly clear legal standards lurks an underlying division between those who would require the government to provide a more generous measure of compensation and those who would require the government to provide less.[5] As has been the case with respect to the issue of whether a taking has occurred, the Court has tried to pretend that its decisions regarding the proper measure of compensation are consistent with one another—a suggestion that, despite the frequency with which

3. Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893); *see also* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473 (1973) (plurality opinion); United States v. Miller, 317 U.S. 369, 373 (1943); Olson v. United States, 292 U.S. 246, 254-55 (1934); United States v. New River Collieries Co., 262 U.S. 341, 343 (1923).

4. Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304 (1923) (citation omitted); *see also* United States v. 564.54 Acres of Land, 441 U.S. 506, 510 (1979) [hereinafter Lutheran Synod]; United States v. Virginia Elec. & Power Co., 365 U.S. 624, 633 (1961); United States v. General Motors Corp., 323 U.S. 373, 379 (1945); *Miller*, 317 U.S. at 373; *Olson*, 292 U.S. at 255.

5. *Compare Almota Farmers*, 409 U.S. at 474, 477-78 (plurality opinion) (the market value of reasonable expectations in compensation award) *with* United States v. Fuller, 409 U.S. 488, 492 (1973) (the market value of reasonable expectations need not be included in compensation award); *see also infra* text accompanying notes 63-138. Ironically, some of the Justices who have, in recent years, supported the broadest interpretation of when a taking has occurred, such as Chief Justice Rehnquist, have supported a less generous measure of compensation. At the same time, some of the Justices, such as Justice Brennan, who have supported the narrowest interpretation of when a taking has occurred, have supported a more generous measure of compensation. Compare, for example, then-Justice Rehnquist's position in United States v. Rands, 389 U.S. 121, 125 (1967), where he joined Justice White's majority opinion holding that the value of the land reflecting its use as a port cannot be considered in determining just compensation because the federal government can control the use of the land as a port under its navigational servitude, with his position in Kaiser Aetna v. United States, 444 U.S. 164, 191 (1979), where he stated that if the federal government exercises its navigational servitude to require that a private marina on navigable waters be open to the public, just compensation would be required. If a court must refuse to consider the value of the property reflecting its use as a marina of any sort, as is seemingly required by *Rands*, it is hard to see what compensation should be awarded for converting a private marina into a public marina.

it is made,[6] is no more plausible here than it is when made with respect to the Court's rulings on whether a taking has occurred.[7]

This continuing uncertainty on whether compensation should be required, and if so, how much compensation is due, can be traced to a continuing tension between two competing views of the constitutional compensation requirement. The first view sees the compensation requirement as a necessary and desirable check on the potential misuse by the legislature of its authority over property rights.[8] Proponents of this view generally argue for a broader interpretation of whether a taking has occurred, and a more generous measure of compensation that seeks to ensure equitable treatment for the individual whose property the government has taken.[9] The second view sees the compensation requirement as an unnecessary obstacle that, if enforced too often, would act to block or overturn desirable government action.[10] Propo-

6. *See Fuller*, 409 U.S. at 491. In distinguishing *Almota Farmers*, which was decided on the same day, then-Justice Rehnquist, writing for the majority, explained that whether a willing buyer would consider an element of value in deciding how much to pay for the property on the open market "is not the end of the inquiry." *Id.*; *see also* Kimball Laundry Co. v. United States, 338 U.S. 1, 12-15 (1949) (requiring compensation for loss of goodwill because the taking was temporary, rather than permanent); *General Motors*, 323 U.S. at 379-80 (explaining that "[w]e are not to be taken as departing" from the well-established rule that damages for a consequential injury are not recoverable as part of just compensation).

7. For example, in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), Justice Scalia explained that the only real difference between the Court's early decision in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), and its later decision in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), was some confusion over which " 'property interest' " the diminution in value should be measured with respect to. *Lucas*, 112 S. Ct. at 2894 n.7. The suggestion is, at best, implausible. The difference in the outcome of the two cases is not the result of a disagreement over the proper "denominator," as Justice Scalia suggested, nor is it the result of any material difference in the facts, as Justice Stevens suggested in his *Keystone* opinion, 480 U.S. at 484-85. Rather, the difference is the result of a radical shift in our perspective on the appropriate role of government in our society. *See* Lunney, *supra* note 1, at 1935-38. Before the 1930s, the paternalistic impulse to permit government to save us from ourselves was not recognized as legitimate, and therefore, the state of Pennsylvania did not have the authority in 1922 to save the surface owners from their own bargains. *Pennsylvania Coal*, 260 U.S. at 415-16. After the 1930s, however, we began to permit, and even expect, the government to save us from ourselves. As a result, by the 1980s, it presented no bar to the state's authority to act that the surface owners had created the subsidence crisis by their own actions in buying surface properties subject to the coal companies' right to remove the support coal. *Keystone*, 480 U.S. at 485-92.

8. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 655-58 (1981) (Brennan, J., dissenting); *see also* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-35 (1987); *Pennsylvania Coal*, 260 U.S. at 415-16; Lunney, *supra* note 1, at 1943-45.

9. *See, e.g.*, Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893) ("[W]hen [a property owner] surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.").

10. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915); Charles River Bridge v. Warren Bridge, 36 U.S. 420, 423 (1837); *see also* John J. Costonis, *"Fair" Compensation and the Accommodation Power:*

nents of this view generally argue for a narrower interpretation of whether a taking has occurred, and a less generous measure of compensation that "balances" the individual's constitutional compensation right against society's desire to pay as little as possible to achieve its goals.[11]

Because these competing views of the compensation requirement suggest different answers to the questions of when compensation should be required, and if so, how much should be provided, courts have had trouble providing a consistent answer to either question. This Article focuses on how courts have and should answer the second question: if compensation is required, how much is just?[12]

Section I will begin the discussion by setting out the basic rules the Supreme Court[13] has established for determining the appropriate amount of compensation. While the basic rules will appear relatively straight-forward, this appearance is deceptive, as some aspects of the issue have proven difficult for courts to resolve consistently. Section II will introduce and discuss two aspects of the calculation of compensation that have proven particularly troublesome: (1) how the interaction of government authority, property rights and value should affect the determination of just compensation; and (2) whether a property owner's reasonable expectations, even if not recognized as formal property rights, should be considered in measuring compensation. On each of these issues, courts have reached somewhat inconsistent conclusions.

These inconsistencies are not, however, simply the result of careless reasoning or inadequate advocacy. Instead, they reflect a fundamental dispute over the proper role for, and the true purpose behind, the constitutional compensation requirement. Identifying the appropriate answer in each case requires, therefore, a more thorough understanding of the purpose that is served by the compensation requirement—an examination undertaken in Section III. In view of the purpose behind the compensation requirement, Section IV identifies the appropriate standards by which just compensation

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Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, 1032 (1975).

11. United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950) ("What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?"); *see also* United States v. 50 Acres of Land, 469 U.S. 24, 33 (1984) [hereinafter Duncanville Landfill]; Lutheran Synod, 441 U.S. 506, 512 (1979).

12. I have set out in a previous Article, my general position that courts should require compensation (*i.e.*, find a taking) if, and only if, the government has changed, limited, or modified the property rights of the very few for the benefit of the very many. *See* Lunney, *supra* note 1, at 1948-55, 1965.

13. Because of the audience and space limitations, this Article will focus solely on the compensation decisions of the United States Supreme Court.

should be measured and applies those standards to suggest the proper resolution of the two gray areas discussed in Section II.

I. The Basic Rules

In determining the amount of compensation that is just, courts have established the market value of the taken property as the central guide.[14] In fact, the market value of the taken property must be used as the measure of just compensation unless it cannot reasonably be determined or when application of the market value standard would be unjust.[15] The value of the taken property is to be determined as of the date of the taking,[16] and if the government does not provide compensation contemporaneously with the taking, the landowner "is entitled to interest thereon sufficient to ensure that he is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation."[17]

A. Market Value as the General Standard

Courts have defined "market value" as the price a willing buyer would pay a willing seller for the property interest in a fair and open market.[18] In determining this market value a court should consider, as a general rule,[19]

14. Olson v. United States, 292 U.S. 246, 257 (1934); *see also Duncanville Landfill*, 469 U.S. at 25 n.1; *Lutheran Synod*, 441 U.S. at 511; United States v. Miller, 317 U.S. 369, 374 (1943); *cf.* Boom Co. v. Patterson, 98 U.S. 403, 407-08 (1878) ("In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties.").

15. *Duncanville Landfill*, 469 U.S. at 29; United States v. New River Collieries Co., 262 U.S. 341, 344 (1923).

16. The Court has developed several rules for determining the date of the taking. First, if the government acquires the property through a "straight-condemnation" proceeding, the taking occurs when the government tenders payment for the property interest taken. Kirby Forest Indus. v. United States, 467 U.S. 1, 11-12, 16 (1984). Second, outside of this context, the taking occurs when the government acts in a way that unduly interferes with the individual's property rights. *Id.* at 13-16.

17. *Id.* at 10 (citations omitted); *see also* Phelps v. United States, 274 U.S. 341, 344 (1927); Seaboard Air Line Ry. v. United States, 261 U.S. 299, 306 (1923). As the Court properly pointed out in *Phelps*, the additional component of the award reflecting the time between the taking and the payment of compensation is not technically interest. Rather, it is the added value necessary to place the individual in the same position pecuniarily as if payment had been made at the time of the taking—an added value that can, in some circumstances, be conveniently measured by adding interest to the original award. *Phelps*, 274 U.S. at 344.

18. *See, e.g.*, *Duncanville Landfill*, 469 U.S. at 25 n.1; *Lutheran Synod*, 441 U.S. at 511; United States v. Virginia Elec. & Power Co., 365 U.S. 624, 633 (1961); United States v. Miller, 317 U.S. 369, 373 (1943). *But see* United States v. Fuller, 409 U.S. 488, 491 (1973) ("To say that this element of value would be considered by a potential buyer on the open market, and is therefore a component of 'fair market value,' is not the end of the inquiry.").

19. *See infra* text accompanying notes 138-43 (discussing an exception to the general rule).

any aspect of the property that would affect the price a reasonable buyer would be willing to pay.[20]

As a result, the market value should reflect not only the present use being made of the property, but also other legal[21] uses for which the property is suitable.[22] A higher valued use of the property must be considered if the property is suitable for such use, and the property could reasonably be devoted to that use in the near future.[23] Under this approach, it is not enough that the property could possibly be devoted to a higher valued use; instead, the likelihood that the property will be devoted to the higher valued use must be sufficient to persuade a reasonable buyer that she ought to pay more for the property today given the possibility that the property could be devoted to the higher valued use in the future.[24] If the property could be devoted to such a higher valued use, then the use "is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held."[25]

In addition, while the Supreme Court has, on a number of occasions, remarked that the subjective value of the property to its current owner should

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20. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973) (plurality opinion); *Virginia Electric*, 365 U.S. at 635-36; Olson v. United States, 292 U.S. 246, 260 (1934); Mitchell v. United States, 267 U.S. 341, 343 (1925); Boom Co. v. Patterson, 98 U.S. 403, 407-08 (1878).

21. If the law purporting to make a use illegal is itself an unconstitutional taking, then the use can be considered in determining value. *See* Florida Rock Indus. v. United States, 791 F.2d 893, 905 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 156 n.5 (1990).

22. *Olson*, 292 U.S. at 255.

23. *Id.*

24. *Compare Boom Co.*, 98 U.S. at 408 (holding that the value of land reflecting use as a boom to catch cut timber being floated down the Mississippi river must be included in compensation award because such a use is sufficiently likely to affect the price a buyer would pay for the land) *with Olson*, 292 U.S. at 260 (stating that the value of land reflecting use as a reservoir must not be included in compensation award because such a use is not sufficiently likely to affect the price a buyer would pay for the land). *See also* New York v. Sage, 239 U.S. 57, 61 (1915). In *Sage*, the Court held that if the most profitable use requires uniting land with other parcels, the value of such use can be reflected in a just compensation award only if the possibility of such union is sufficient to increase the price a willing buyer would pay for the land in the market. *Id.*; *cf.* Boston Chamber of Commerce v. Boston, 217 U.S. 189, 194-95 (1910) (stating that if rights with respect to the land are divided between easement holder and owner of fee, each is entitled to compensation reflecting their interest on its own; the higher value of the two interests combined is not to be awarded except to the extent that such combination is sufficiently likely to affect the market price for the interests individually). *But see* United States v. Rands, 389 U.S. 121, 124-26 (1967) (holding that the owner was not entitled to value reflecting use as a port even if such use is sufficiently likely to affect the price a buyer would pay for the land in the market).

25. *Olson*, 292 U.S. at 255 (citations omitted).

not be considered in determining an award of just compensation[26] under the market value standard, such subjective value must be considered if that value would affect the price that a reasonable buyer would be willing to pay for the property in the open market.[27] In other words, an element of value, even a subjective element, should be considered unless it is idiosyncratic to the present owner in that it would not be reflected in the price a reasonable buyer would pay for the property.

Given this understanding of "market value," courts have permitted a party to employ three[28] principal valuation techniques to establish the price that a willing buyer would be willing to pay for the property. These three techniques are:

(1) the price at which comparable properties[29] have been sold (the "comparable sales" approach);

(2) the value of the property based on the discounted present value of the property's projected net income[30] (the "capitalization" approach); or

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26. *See* Lutheran Synod, 441 U.S. 506, 511-12 (1979); United States v. Miller, 317 U.S. 369, 375 (1943).

27. *See* Mitchell v. United States, 267 U.S. 341, 343 (1925) (holding that a landowner was entitled to the value of the land that reflected that the land was "especially adapted to the growing of [corn of a special grade and quality]" because a reasonable buyer would consider this use in determining the price she was willing to pay for the land). *Cf.* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 477-78 (1973) (plurality opinion) (holding that the government must pay compensation based upon a company's reasonable expectation that lease would have been renewed because a reasonable buyer would have paid more for the property given this expectation).

28. A fourth valuation technique, acquisition or original cost analysis, is used extensively in determining the return that must be provided a regulated industry to prevent a rate regulation from taking private property. *See* Missouri *ex rel.* Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 301-02, 306-07 (1923) (Brandeis, J., concurring) (arguing that the amount prudently invested to create the utility should serve as the basis for rate regulation); Smyth v. Ames, 169 U.S. 466, *modified*, 171 U.S. 361 (1898). In one early case in which there were no comparable sales, the Court permitted a jury to rely on the original cost, along with other evidence, in determining just compensation. Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 589-90 (1923). In a more recent case, however, the Court referred to the standard derisively as the " 'false standard of the past.' " United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 403 (1949) (footnote omitted). Even in that case, however, the Court left open the possibility that such evidence could be used if it accurately reflected the price a willing buyer would pay a willing seller for the property at the time of the taking. *See id.*

29. A sale will be comparable if it: (i) concerned the same type and size property interest as was taken; (ii) took place in the same geographic area as the taking; and (iii) occurred around the same time as the taking. *Toronto, Hamilton & Buffalo*, 338 U.S. at 403-05.

30. In some industries, parties to a transaction will estimate the property's value as a multiple of present cash flow, rather than net income. *See, e.g.*, Henry D. Jacoby & David G. Laughton, *Project Evaluation: A Practical Asset Pricing Method*, ENERGY J., April 1992, at 19 (using cash flow instead of net income to value oil and gas properties). Presumably, if a

(3) the cost to reproduce or replace the taken property in today's market, less depreciation (the "reproduction cost" approach).[31]

While the Court has permitted a party to introduce evidence on the issue of market value based on any one of these three techniques, it has preferred that a party establish market value through the comparable sales approach. The Court considers the prices paid by willing buyers and accepted by willing sellers for comparable property on an open market to be the best evidence of the taken property's market value.[32] Indeed, if the taken property is of a kind regularly traded on an established market, the Court has held that the prevailing market price is the *sole* measure of just compensation.[33]

If such an established market does not exist, or alternatively, if sales in the market are not comparable,[34] a party may establish market value[35] based on either the present worth of the property's future net income stream or by showing the cost, less depreciation,[36] to reproduce the taken property in today's market.[37] Whichever approach a party decides to use, the evidence must provide a reasonable basis for determining the price a reasonable buyer

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method of ascertaining value is sufficiently reliable for those who trade in the property, courts will permit a party to rely on the method to establish the value of taken property.

31. *See* 4 JULIUS L. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 12B.03[2], at 12B-7 n.2 (1993); H. Dixon Montague, *The Wonderful World of Eminent Domain: A Factual Analysis of a Fantasy World's Determination of Just Compensation*, *in* INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 12-1, 12-29 to 12-30 (Carol J. Holgren ed., 1992).

32. *See* Lutheran Synod, 441 U.S. 506, 513-14 (1979); *Toronto, Hamilton & Buffalo*, 338 U.S. at 402-03.

33. United States v. New River Collieries Co., 262 U.S. 341, 344-45 (1923).

34. *See supra* note 29 (defining comparable).

35. The Court sometimes refers to these techniques as a method of determining market value, see Duncanville Landfill, 469 U.S. 24, 36 n.24 (1984), and other times refers to them as a method of determining the value of the property in the absence of a market value. *See Lutheran Synod*, 441 U.S. at 513.

36. To the extent that the property taken has depreciated since its original construction, replacing the old facility with a new facility will give the owner a windfall if the new facility is more valuable than the old. *See Duncanville Landfill*, 469 U.S. at 34-35; *Lutheran Synod*, 441 U.S. at 514-15. Therefore, if the reproduction cost standard is used, the reproduction cost figure must be reduced (or depreciated) to reflect the "used" nature of the property taken. *Cf. Duncanville Landfill*, 469 U.S. at 35-36 (discussing the need to consider depreciation if the reproduction cost standard is used).

37. *See* Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 589-90 (1923) (stating that where there were no comparable sales, the jury properly considered evidence of acquisition cost, reproduction cost, and price negotiated for the sale of the canal); *cf.* United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 403 (1949) (holding that the jury can consider acquisition cost, reproduction cost, and potential earnings, if these are relevant to the amount a reasonable buyer would pay for the property taken).

would have been willing to pay for the property interest in the market at the time the taking occurred.[38]

B. Market Value Standard Not Applied

While the Court has relied extensively on market value as a "working rule" to determine the appropriate measure of just compensation, it has also emphasized that market value is not a "fetish" and that the market value standard "may not be the best measure of value in some cases."[39] More specifically, the Court has suggested that the market value standard should not be used "when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public."[40]

First, a court should not apply market value when there have been "so few sales of similar property that we cannot predict with any assurance that the prices paid would have been repeated in the sale we postulate of the property taken."[41] In this situation, "there is 'no market' for the property in question."[42] As a result, market value cannot serve as an adequate basis for determining just compensation, and parties will need to rely on the alternative valuation techniques discussed above, or other competent evidence,[43] in order to establish the property's value.[44]

Second, the Court has recognized that the market value standard might be unfair in particular cases to either the owner or the public. For example, the Court has suggested that it might be unfair to use market value as the measure of just compensation if the market value of the property "deviates significantly from the make-whole remedy intended by the Just Compensation

38. *Toronto, Hamilton & Buffalo*, 338 U.S. at 403; United States v. John J. Felin & Co., 334 U.S. 624, 640 (1948) (holding that in determining just compensation for lard and pork products, replacement cost was not the appropriate measure because of the difficulties of apportioning the costs between the products taken by the government and the by-products produced in the process of making the products taken by the government).

39. United States v. Cors, 337 U.S. 325, 332 (1949).

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

41. *Toronto, Hamilton & Buffalo*, 338 U.S. at 402.

42. *Id.*

43. The adjective "competent" does not refer necessarily to the persuasive force of the evidence, but to whether the evidence was admissible under the rules of evidence. *See* Sharp v. United States, 191 U.S. 341, 348-49 (1903) (noting that evidence of value based on offers to purchase the property was not competent because such evidence was hearsay); *cf.* Duncanville Landfill, 469 U.S. 24, 36 n.24 (1984) ("The admissibility of such evidence [seeking to establish market value by showing reproduction cost] must be evaluated under the generally applicable rules of evidence." (citation omitted)).

44. *Toronto, Hamilton & Buffalo*, 338 U.S. at 402-04 (relying on isolated sales of roughly similar properties as evidence of property's value); *see also* Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 589-90 (1923) (relying on original cost, reproduction cost, and negotiated sales price as evidence of value).

Clause."[45] In practice, however, individuals have not been able to convince the Court that their facts call for an alternative standard.

In *Duncanville Landfill*,[46] the Court considered whether the Just Compensation Clause mandated the use of a reproduction cost, rather than market value, standard when the United States condemned a fifty acre parcel of land.[47] The city of Duncanville owned the parcel, and had historically used it as a sanitary landfill. The city argued that, because it had a legal obligation to replace the landfill, the indemnification principle reflected in the Just Compensation Clause mandated an award based on reproduction cost.[48] The Court refused to accept the city's argument. While the Court left open the possibility that reproduction cost might be the appropriate standard in another case,[49] it held that the city had not established that an award based upon the market value standard would be manifestly unjust under the circumstances presented.[50]

Alternatively, the Court has held that the market value standard would be unfair if the market value had been "affected, adversely or favorably, by the imminence of the very public project that makes condemnation necessary."[51] If, for example, the market value of property decreases as a result of preliminary regulations imposed by a government on the property in anticipation of taking the property later, a court should not consider the decrease in market value caused by the preliminary regulations in determining just compensation when the government eventually takes the property.[52] On the other hand, if speculation[53] that the government will eventually take certain property and "be compelled to pay [the higher price] as compensation,"[54]

45. *Duncanville Landfill*, 469 U.S. at 37 (O'Connor, J., concurring).

46. 469 U.S. 24 (1984).

47. *Id.* at 26.

48. *Id.* at 34.

49. *Id.* at 37 (O'Connor, J., concurring). The Court also suggested that reproduction cost might be relevant to a determination of the facility's market value. *Id.* at 36 n.24 (majority opinion).

50. *Id.* at 35-36; *see also* Lutheran Synod, 441 U.S. 506, 514-16 (1979) (rejecting application of the reproduction cost standard when government condemned property used for church summer camps).

51. United States v. Reynolds, 397 U.S. 14, 16 (1970) (footnote omitted).

52. *See, e.g.*, Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622 (Fla. 1990).

53. Questions remain as to whether, in any particular case, the increase in property's value is attributable to "speculation" with respect to the government's project or simply to increased demand for the property at issue. *Compare* United States v. Cors, 337 U.S. 325 (1949) (5-4) (holding, over a vigorous dissent, that any increase in price caused by government's demand for property at issue should not be considered in award of just compensation) *with* Olson v. United States, 292 U.S. 246, 256 (1934) ("And, to the extent that probable demand by prospective purchasers or condemners affects market value, it is to be taken into account." (citation omitted)).

54. United States v. Miller, 317 U.S. 369, 377 (1943).

causes the market value of the property to increase, this increase should not be considered in determining just compensation.

C. *Summary of the Basic Rules*

An award of just compensation should put the property owner in as good a position pecuniarily as she would have been if the government had not taken her property. The Court has ruled that, generally, an award based upon the price a willing buyer would have paid a willing seller for the taken property in the market will satisfy this standard.[55] This "market" value should not be used, however, if the taken property is not regularly traded, and as a result, a market value cannot be determined. Additionally, a court should not use the market value if it would be manifestly unjust, in that the market value would seriously under- or over-compensate the property owner for her pecuniary loss.

II. Some Trouble Spots

While the market value standard seems to provide a relatively straightforward approach to determining the amount of just compensation that a government must pay when it takes private property, the standard can prove difficult to apply under a number of circumstances. In some cases, for example, the market value standard will present *factual* difficulties because the market value of a particular property interest may depend almost entirely on uncertain future events, such as the rate of increase in mineral or land prices, or the amount of a mineral that one can recover from a particular mine.[56]

The following sections discuss two cases in which application of the market value standard is complicated by *legal* difficulties. First, how has the market value standard been applied in cases in which a substantial part of the existing market value of the property reflects government permission to make a certain use of the property? Second, how have courts applied the standard in cases in which a substantial part of the existing market value is a function of expectation, rather than formal legal entitlement?

While these are not the only interesting legal issues raised in determining the appropriate measure of compensation,[57] these cases will serve as exam-

55. United States v. New Rivers Collieries Co., 262 U.S. 341, 345 (1923).

56. *See, e.g.*, United States v. 620.00 Acres of Land, 101 F. Supp. 686 (W.D. Ark. 1952); United States v. 13.40 Acres of Land, 56 F. Supp. 535 (N.D. Cal. 1944); State *ex rel.* State Highway Comm'n v. Nunes, 379 P.2d 579 (Or. 1963); *see also* United States *ex rel.* TVA v. Powelson, 319 U.S. 266, 274-75 (1943) (noting that plaintiffs sought to establish the market value of a four-dam hydroelectric project based on assumptions of initial cost, annual electrical output, production cost for electrical output, and selling price for output).

57. The following two areas raise similar legal issues. First, can the government reduce the compensation award by identifying offsetting benefits created by the government action?

ples to focus attention on the underlying disagreement over whether the government should have to provide a more or less generous measure of compensation.

A. Property Rights, Government and Value: "The Burden of Common Citizenship"[58]

To a considerable degree, the value of virtually all property held in this country reflects the social presence of our government, its laws and accompanying institutions. From time to time, this reflection leads some to suggest that, if a court insists on finding a taking when the government restricts certain individual's property rights, it should award compensation based upon the difference between the value the property has as regulated in our civilized society, and the value the property would have outside our society.[59] The point of this argument seems to be that we are always better off with government and its many restrictions and regulations than without it. After all, while particular regulations may decrease the value of an individual's property to some degree, the value is certain to remain higher than it would have been in the absence of any rules at all.[60]

While the Supreme Court has never gone quite that far,[61] it has, in at least some cases, suggested that the government need not compensate for that part of the market value that reflects a use of the property that the government could have controlled or prohibited without having to pay compensa-

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See, e.g., McCoy v. Union Elevated R.R., 247 U.S. 354, 366 (1918) (holding that benefits flowing directly from the public works project can offset the compensation owed even if equally shared with "all in the neighborhood"). *See generally* Charles M. Haar & Barbara Hering, *The Determination of Benefits in Land Acquisition*, 51 CAL. L. REV. 833 (1963) (discussing whether the benefit created by the project to part of a piece of land should be offset against the loss incurred when another part is taken). Second, how should a court measure damages for a temporary regulatory taking? *See, e.g.*, Wheeler v. City of Pleasant Grove, 896 F.2d 1347 (11th Cir. 1990); Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987).

58. The "burden of common citizenship" or the "burden of civilized society" are the Court's hallmark expressions when it decides not to compensate. *E.g.*, Omnia Commercial Co. v. United States, 261 U.S. 502, 508-09 (1923).

59. *Cf.* Paul Burrows, *Getting a Stranglehold with the Eminent Domain Clause*, 9 INT'L REV. L. & ECON. 129, 144 (1989) ("If the formation of a society, by facilitating gains from trade and economies of scale from specialization in production, creates a surplus over and above what subgroups can create, then this surplus is available for redistribution by the state.").

60. *See id.* ("Private property is not of great value in a state of nature, even if first possession can be established, and it is the use of the property in a developed economy that generates high scarcity value.").

61. Justice Stevens has, on occasion, been willing to take a position almost this extreme. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2921-22, 2925 (1992) (Stevens, J., dissenting) (suggesting that a taking that caused a complete deprivation of value was simply one of the burdens of living in a civilized society).

tion.[62] The general extent of the government's ability to affect the measure of compensation by a regulation that is not itself a taking of property,[63] can be illustrated by discussing two situations in which the issue arises.

First, if part of a property's value reflects a use of the property that the owner is making based upon a "revocable license"[64] from the government, does the government have to pay for that portion of the value if it takes the owner's property? Second, if the government has imposed price controls, does the "controlled" market value establish the measure of just compensation?

1. The Value of a Use Undertaken with the Government's Revocable Permission

With respect to the issue of whether the government must pay for that portion of the market value that reflects a use of property that can be undertaken only with the government's permission, it should be noted at the outset that it is difficult to draw a precise boundary around this category. After all, the value of essentially all property in this country reflects, at least in part, potential uses of the property that the government could prohibit without implicating the just compensation requirement.[65] Nevertheless, in an

62. *See, e.g.*, Lutheran Synod, 441 U.S. 506, 514 (1979) (stating that government does not have to compensate an owner for that part of the market value which reflects more stringent regulations for new construction); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 251-51 (1897) (holding that when the government appropriates an easement for a public road across the railroad's tracks, it must compensate for the land interest taken, but need not compensate the railroad for the expense of installing crossing guards).

63. If the measure is itself a taking, then courts should not consider the reduction in market value caused by the measure in awarding compensation. *See supra* note 21.

64. The phrase "revocable license" incorporates two elements. First, the use can be undertaken only with an express grant of authority from the government. Second, the government can revoke or withdraw the grant of authority without the action being a taking. *Cf.* United States v. Fuller, 409 U.S. 488, 495 (1973) (Powell, J., dissenting) (describing the nature of revocable grazing permits).

65. Thus, if land currently used as a farm is worth $100,000 as a farm, but has a market value of $400,000 because of the demand for land to be developed for residential use, the current takings jurisprudence would almost certainly permit local government to restrict further development of the land under a general zoning ordinance, without the regulation being considered a taking. *Cf.* Agins v. City of Tiburon, 447 U.S. 255 (1980) (holding that a zoning ordinance which restricted plaintiff's land so that it could only be developed in five acre parcels was not a taking); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (finding that a historic preservation ordinance which permitted plaintiff to continue existing use, but prohibited development of office tower worth over $20 million on the land, was not a taking). Nevertheless, if a government were to condemn the land in the absence of such a zoning ordinance, the "highest and best use" standard would require the government to pay the higher residential use value. In other words, a court would not reduce the value awarded simply because the local government *could have* restricted the development of the land. In reaching this conclusion, therefore, courts have implicitly rejected the position that what the government could have done determines the proper measure of compensation.

attempt to narrow the scope of the discussion, this section will focus more specifically on those cases in which part of the market value of the property reflects a use that can be undertaken only with an affirmative grant of permission from the government. The question becomes whether the government must compensate the property owner for that component of the market value if it takes the property.

While several cases have addressed the issue,[66] this Article will focus on two: *Monongahela Navigation Co. v. United States*[67] and *United States ex rel. TVA v. Powelson*.[68] In both of these cases the federal government physically appropriated property owned by the plaintiffs. In *Monongahela Navigation*, the federal government appropriated a lock and dam owned by the plaintiff on the Monongahela, a navigable river in Pennsylvania.[69] In *Powel-*

66. *See Fuller*, 409 U.S. at 488 (denying compensation for component of value that reflects use of taken land in combination with adjacent federal lands) (discussed *infra* text accompanying notes 138-43); United States v. Rands, 389 U.S. 121 (1967) (denying compensation for the component of value that reflects the use of the land as a port); United States v. Twin City Power Co., 350 U.S. 222 (1956) (denying compensation for the component of value that reflects the use of the land for hydroelectric power generated by navigable waters); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) (same).

67. 148 U.S. 312 (1893). Later cases have discussed the *Monongahela Navigation* opinion principally with respect to the issue of whether a taking occurred. *See* Omnia Commercial Co. v. United States, 261 U.S. 502, 513-14 (1923) (distinguishing *Monongahela Navigation* in determining that a taking had not occurred); Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251, 264-65 (1915) (same); Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 86-87 (1913) (same). These three cases limit *Monongahela Navigation* to its facts on the taking issue by suggesting that the *Monongahela Navigation* Court found the government's actions to be a taking, notwithstanding the dominant federal interest in navigable waters, solely because Monongahela Navigation had constructed the lock and dam "at the instance and implied invitation of Congress." *Blue Point Oyster*, 229 U.S. at 89, *quoted in Greenleaf-Johnson*, 237 U.S. at 265; *cf. Omnia Commercial*, 261 U.S. at 513-14 (distinguishing *Monongahela Navigation* based on the "estoppel" interpretation given the case in *Blue Point* and *Greenleaf-Johnson*). Because the Court concluded in all three of these cases that the government action was not a taking, none of them addressed the issue of how much compensation should be paid—the issue for which this Article discusses *Monongahela Navigation*.

68. 319 U.S. 266 (1943).

69. *Monongahela Navigation*, 148 U.S. at 312-13, 315.

son, the federal government appropriated 12,000 acres of land along the Hiwassee, a non-navigable[70] river in North Carolina.[71]

In both cases one component of the taken market value reflected a use, or potential use, of the property in connection with the adjoining waterway—a use that was made possible by an express grant of authority from the state government. In *Monongahela Navigation*, the state had expressly granted the plaintiff the authority to collect tolls from the steamboats and other river traffic that used the lock.[72] The district court determined that the market value of the taken property would exceed $450,000 if this authority to collect tolls were considered.[73] If it were not considered, the value of the taken property was only $209,000.[74]

In *Powelson*, the state had expressly granted the plaintiffs the power of eminent domain so that the plaintiffs could acquire the land necessary to construct a four-dam hydroelectric project on the river.[75] While the plaintiffs owned or controlled about half of the land that would be necessary for their project, it was unlikely that the plaintiffs would have been able to acquire the additional land they would need in the absence of the power of eminent domain.[76] The market value of the taken land was less than $200,000 if the land could not be used for hydroelectric purposes.[77] The plaintiffs were reasonably likely, however, to have been able (but for the taking) to use their lands for hydroelectric generation because the state had granted the plaintiffs the power of eminent domain in connection with their hydroelectric project. The court of appeals found that the market value of the land reflecting the possibility of such hydroelectric use was just under one million dollars.[78]

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70. If the river had been navigable at this point, the value of the land reflecting its use for hydroelectric generation would not have been compensable because of the federal government's plenary control over navigable waters. *Chandler-Dunbar*, 229 U.S. at 53 (holding that an owner is not entitled to compensation for the component of value that reflects the use of the land for hydroelectric power generated by navigable waters); *see also Twin City Power*, 350 U.S. at 222 (same). The *Powelson* Court suggested that the waterpower value on the non-navigable portion of a river would be similarly non-compensable if the flow had "a direct and immediate effect upon the navigable portion of the river farther downstream." *Powelson*, 319 U.S. at 273. The Court assumed that the proposed hydroelectric project would not have such an effect, and proceeded to decide the case assuming that the "rights in the 'flow' of a non-navigable stream created by local law are property." *Id.*

71. *Powelson*, 319 U.S. at 268-70.

72. *Monongahela Navigation*, 148 U.S. at 341.

73. *Id.* at 319.

74. *Id.*

75. *See Powelson*, 319 U.S. at 274.

76. *Id.*

77. *See id.* at 270-71.

78. *Id.* at 271.

The central issue for the Supreme Court in both cases was whether the government had to include, as a component of the compensation award, the additional market value of the taken property that reflected the use made possible by the state grant of authority. In both cases, the federal government advanced two arguments as to why it should not have to compensate for this component of the property's market value. First, the government argued that because the state could have revoked its grant of authority without having to pay compensation, the federal government should be allowed similar leeway.[79] Second, the government argued that the lost value reflected a mere expectation, not a cognizable legal right, and as such it need not be compensated under the doctrine of "consequential injury."[80]

The *Powelson* Court accepted both of these arguments.[81] The *Monongahela Navigation* Court rejected them.[82] While it is reasonably fair to say that *Powelson*, as the more recent decision, establishes the "law" with respect to these issues,[83] the *Powelson* Court was careful to limit its holding to the precise facts before it.[84] The Court left intact the general rule that courts do

79. *Id.* at 277-79; Monongahela Navigation Co. v. United States, 148 U.S. 312, 341 (1893).

80. *Powelson*, 319 U.S. at 281-83; *Monongahela Navigation*, 148 U.S. at 343. For a general discussion of the doctrine of consequential injury, see *infra* text accompanying notes 108-15.

81. *Powelson*, 319 U.S. at 278, 280-81 (agreeing that the federal government could abrogate the state grant of authority without paying compensation and that the lost value was a consequential injury). In finding the lost value to be a consequential injury, the Court described the power of eminent domain held by the plaintiffs as nothing more than "a promise of a gratuity"! *Id.* at 281.

82. *Monongahela Navigation*, 148 U.S. at 341, 343.

83. The *Powelson* Court did not, however, expressly overrule *Monongahela Navigation*. *Powelson*, 319 U.S. at 281. Instead, the Court chose to distinguish the earlier case, relying on the "estoppel" interpretation of *Monongahela Navigation* reflected in Omnia Commercial Co. v. United States, 261 U.S. 502, 513-14 (1923). *Powelson*, 319 U.S. at 281. Unfortunately for the Court, *Omnia Commercial* provides only superficial support for its attempt to distinguish *Monongahela Navigation*. As discussed, *Omnia Commercial*, and the two cases upon which it relies, Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915), and Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913), adopt the "estoppel" reading of *Monongahela Navigation* in the context of whether a taking had occurred. *See supra* note 67. None of these three addressed *Monongahela Navigation* in the context of how much compensation is due—the context presented in *Powelson*. Yet, a cursory citation to *Omnia Commercial* is the only basis the *Powelson* Court provides for distinguishing *Monongahela Navigation*.

84. As the *Powelson* Court explained:

> The United States no more than a state can be excused from paying just compensation measured by the value of the property at the time of the taking merely because it could destroy that value by appropriate legislation or regulation. But we have here a unique situation. . . . We merely hold that the United States, in absence of a specific statutory requirement, need not make compensation for the loss of a business opportunity based on the unexercised privilege to use the power of eminent domain where the state need not do so were it the sponsor of the public project and the taker of the lands.

not ascertain the value of taken property based upon what the government could permissibly have done, but rather upon what the government has done, or is reasonably likely to do.[85] For purposes of this Article, the more interesting point, however, is the sharp contrast in the role the two opinions assign to the Just Compensation Clause.

In *Monongahela Navigation*, the Court began its opinion with a four page discussion of the importance of the Just Compensation Clause, recognizing its lofty origins in one of "[t]he first ten amendments to the constitution."[86] The Court went on to explain that the Just Compensation Clause, along with the other guarantees provided in the Bill of Rights,

> w[as] adopted in order to quiet the apprehension of many that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.[87]

Thus, for the *Monongahela Navigation* Court, the Just Compensation Clause—like many of the other rights granted in the Bill of Rights—represented an essential guarantee of the rights of individual citizens against the potential abuse of government power.

In contrast, Justice Douglas, writing for the majority[88] in *Powelson*, made no mention of the purpose behind the Just Compensation Clause until he was more than two-thirds of the way through his opinion.[89] Even at that point, Justice Douglas did not acknowledge the compensation requirement's place in the Bill of Rights as one of our essential guarantees against govern-

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Powelson, 319 U.S. at 284.

85. As with other possibilities that would affect the price a reasonable buyer would pay a reasonable seller for the property in the market, the possibility must be taken into consideration that the government will regulate existing property rights, and thereby reduce the property's value. *See id.* at 284 ("While such a change [in a person's property rights] will not be presumed, the possibility or probability of such action, so far as it affects present values, is a proper subject for consideration in valuing property for purposes of a condemnation award." (citation omitted)). The *Powelson* Court's sole authority for its position that the possibility of government action restricting existing property rights should be reflected in the compensation award is Reichelderfer v. Quinn, 287 U.S. 315 (1932). Yet, *Reichelderfer* dealt with the consequential injury doctrine, discussed below, and held that, in the absence of a change in property rights, a diminution in the value of the property alone does not require compensation. *Id.* at 319-20. Aside from the obvious reason that both rules reduce the government's duty to compensate under the Just Compensation Clause, it is not obvious how the *Reichelderfer* rule ("property" has not been taken unless the government takes a property right) justifies the proposition for which it is cited by the *Powelson* Court, that is, if the government takes property, the compensation award can be reduced to reflect the risk that the government could have regulated the property and reduced its value.

86. *Monongahela Navigation*, 148 U.S. at 324.

87. *Id.*

88. *Powelson* was a five-to-four decision. *Powelson*, 319 U.S. at 268, 286.

89. *Id.* at 280.

ment power. Instead, Justice Douglas articulated his belief that the Clause served only to strike a balance "between the people's interest in public projects and the principle of indemnity to the landowner."[90]

Given these disparate understandings of the reasons behind the constitutional right to compensation, the disparate results reached in the two cases should come as no surprise. Consistent with its view of the compensation requirement as an essential guarantee against the potential abuse of government authority, the *Monongahela Navigation* Court adopted a more generous standard of compensation. On the other hand, consistent with its concern that too strict a standard of compensation would interfere with "the people's interest in public projects,"[91] the *Powelson* Court adopted a less generous standard of compensation.

2. *The Value of Property Subject to Price Controls*

Even when the government has acted to regulate the rights of a property owner and has thereby reduced the property's value, the Supreme Court has not always been completely comfortable allowing the government to appropriate the property at the lower value. For example, when the government has enacted regulations that establish the maximum price for which a commodity can be sold—an action that would not, itself, be a taking even though it changed the seller's legal entitlements with respect to the commodity[92]—the Court was slow to accept the government's position that the government need only pay the regulated price if it appropriated such a commodity.

In its first discussion of the issue in *L. Vogelstein & Co. v. United States*,[93] the Court agreed that the plaintiff was bound to accept the regulated price for the taken property (roughly twelve and a half million pounds of copper), but only because the regulated price had been set through a process of negotiation among the government and representatives of the regulated industry.[94] In reaching this decision, the Court suggested that if the government fixed the regulated price by "fiat," it might have been an inappropriate measure of just compensation.[95] On the facts presented, however, the Court concluded that the regulated price did not represent government fiat, given that the plaintiff had "cooperated with others having copper to sell in put-

90. *Id.*

91. *Id.*

92. *See* Lunney, *supra* note 1, at 1902, 1905, 1914 (imposing rent control on apartments changes the apartment owner's legal entitlements with respect to the apartment, but is not a taking).

93. 262 U.S. 337 (1923).

94. *Id.* at 338-39. Indeed, Vogelstein "placed in nomination the persons who were chosen at [a meeting of copper producers] as members of a committee to act for the copper producers in carrying out the agreement" fixing the market price for copper. *Id.* at 339.

95. *Id.* at 340.

ting into effect and maintaining that price."[96] As a result, the Court concluded that the regulated price was a just measure of the compensation required.[97]

The question arose again in *United States v. John J. Felin & Co.*[98] After the government had appropriated the plaintiff's property (certain pork products), the plaintiff argued that it should receive as just compensation the reproduction cost, rather than the regulated price, for the pork products appropriated by the government.[99] While the Court, in the prevailing plurality opinion,[100] eventually rejected the plaintiff's arguments because of perceived flaws in the process by which the plaintiff had determined its reproduction costs,[101] the Court suggested that it would permit a plaintiff to recover compensation in excess of the regulated price if the plaintiff could show that the properly determined reproduction cost had exceeded that price.[102]

Finally, in *United States v. Commodities Corp.*,[103] the Court held that the taken property's actual market value in excess of its regulated price reflected a mere expectation of profit.[104] After ruling that this excess value reflected only an "expectation," and not "property," the Court excluded recovery for the value under the general rule, discussed in the next section, that such a "consequential injury" was not compensable under the Fifth Amend-

96. *Id.* at 339-40.

97. *Id.*

98. 334 U.S. 624 (1948).

99. *Id.* at 630-31.

100. The Chief Justice and Justice Burton joined Justice Frankfurter's plurality opinion. *Id.* at 625. Justices Black and Murphy joined Justice Reed in asserting that the regulated price was "just compensation" given the wartime conditions under which the price controls were enacted. *Id.* at 642 (Reed, J., concurring). Justice Rutledge concurred separately asserting that a compensation award based upon reproduction costs, rather than the regulated price, would compensate the plaintiff for a non-compensable consequential injury. *Id.* at 648-49 (Rutledge, J., concurring). Justices Jackson, joined by Justice Douglas in dissent, argued that a compensation award based upon the regulated price did not satisfy the requirements of the Just Compensation Clause. *Id.* at 651-52 (Jackson, J., dissenting).

101. *Id.* at 632-33. Because the process of making pork chops from a live pig will invariably produce a number of other products, such as lard and sausage, the costs of the process can be allocated among the resulting products in various ways. Under some accounting schemes, some of these products will appear to lose money, while others will earn a profit. Rearranging the cost allocation could change how the profits and losses on the various items were distributed. However, so long as a producer's combined earnings for all of the products from the process reflected a profit, the Court concluded that any loss on a particular product was "evidence merely of bookkeeping losses." *Id.* at 641.

102. *Id.* at 641.

103. 339 U.S. 121 (1950) (5-2 decision).

104. *Id.* at 128-30 ("In the final analysis all [plaintiff's] arguments rest on the principle that the Government must pay Commodities for potential profits lost because of war and the consequent price controls. We cannot hold that the Fifth Amendment requires the Government to give owners of requisitioned goods such a special benefit.").

ment.[105] In reaching its decision, however, the Court left open the possibility that awarding compensation based upon the regulated price might not be just if the price regulation was not "generally fair and equitable," or if even though "generally fair and equitable," the regulation inflicted an "unfair hardship . . . on a particular [owner]."[106]

3. *The Effect of Potential and Actual Government Control of Property on the Measure of Compensation*

While it is difficult to draw any clear conclusions from these cases, which seem to reach contradictory results, a few general rules emerge. First, the compensation award should reflect the value of the property under the legal rules in place immediately before the taking, putting aside any loss or gain in value attributable to the possibility of the taking.

Second, while the award should reflect the risk of adverse government regulation, the award should not be based on the degree of regulation the government could permissibly impose on the property, but rather on the degree of regulation that the government has imposed, or is reasonably likely to impose. As an exception to this general rule, if a component of the value reflects a use of the taken property over which the government holds a dominant and preceding interest, such as the federal government's navigation servitude, a court can reduce the compensation award to reflect not only the degree of regulation actually imposed by the government, but also the government's authority to forbid the activity entirely.

Third, if previously enacted regulations reduced the value of the taken property, the property owner is generally entitled to receive as just compensation the reduced (or regulated) value of the property unless the regulation is not "generally fair and equitable"[107] or imposes an unfair hardship on the particular owner at issue.

B. Reasonable Expectations and Consequential Injury

As a general rule under the United States Constitution,[108] if government action devalues an individual's property, but does not interfere with, or

105. *Id.*

106. *Id.* at 128 (citation omitted).

107. *Id.*

108. Some state constitutions provide that "[p]rivate property shall not be taken or *damaged* for public use without just compensation." *E.g.*, ALASKA CONST. art. 1, § 18; ARIZ. CONST. art. 2, § 17; CAL. CONST. art. I, § 19; COLO. CONST. art. 2, § 15; GA. CONST. art. I, § III, ¶ 1(a); HAW. CONST. art. I, § 20; ILL. CONST. art. I, § 15; LA. CONST. art. I, § 4; MISS. CONST. art. III, § 17; NEB. CONST. art. I, § 21; N.M. CONST. art. II, § 20; N.D. CONST. art. I, § 16; OKLA. CONST. art. II, § 23; S.D. CONST. art. VI, § 13; TEX. CONST. art. I, § 17; UTAH CONST. art. I, § 22; VA. CONST. art. I, § 11; WASH. CONST. art. I, § 16; W. VA. CONST. art. III, § 9; WYO. CONST. art I, § 33. Under this provision, or sometimes even without it, some

change, the individual's legal rights with respect to that property, the government action will not be considered a taking.[109] Instead, courts will label such lost value a "consequential injury" and refuse to find a taking, even in cases in which the devaluation is total.[110] The formal rule that justifies this result is that the words "private property" in the Fifth Amendment refer not to the exchange value of the physical property, but to the legal rules governing the relationship between various individuals and the physical property.[111] As a result, government action that devalues an individual's property, without changing the legal rules governing the relationship between the owner and everyone else with respect to the physical property, has not taken "property" as that term is used in the Fifth Amendment.[112]

The general rule that courts will not find a taking if government action has only devalued property, without changing the legal entitlements of the owner, has a corollary in determining the amount of just compensation required: the government must compensate the owner only for the value of those property rights taken.[113] If the government's taking of certain property rights incidentally devalues the remaining property rights retained by the owner, that loss in value is considered a consequential injury, and will not be considered in determining just compensation.[114]

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state courts have required compensation for this sort of consequential injury. *See, e.g.*, 1 LEWIS ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 6, at 33-39 (2d ed. 1953).

109. *See generally* Lunney, *supra* note 1, at 1903-05.

110. *See* Mullen Benevolent Corp. v. United States, 290 U.S. 89, 94-95 (1933) (stating that government action which rendered the plaintiffs' property worthless, without changing their legal rights with respect to that property, was not a taking of "property" within the meaning of the Just Compensation Clause); Reichelderfer v. Quinn, 287 U.S. 315, 319-20 (1932) (same); *see also* Sauer v. City of New York, 206 U.S. 536, 547-48 (1907) (same); Meyer v. City of Richmond, 172 U.S. 82, 94-95 (1898) (same); Transportation Co. v. City of Chicago, 99 U.S. 635, 643-44 (1879) (same); Smith v. Corporation of Washington, 61 U.S. 135, 146-49 (1858) (same). *But see* Armstrong v. United States, 364 U.S. 40, 46-49 (1960) (finding that government action which rendered the plaintiffs' property worthless, without changing their legal rights with respect to the property, *was* a taking). Note that the Court's recent decision in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), does not affect this rule because the *Lucas* decision recognized that there must be a taking of a pre-existing property right before the Just Compensation Clause is implicated, even when the government action denies all economic use. *Id.* at 2900-01.

111. Lunney, *supra* note 1, at 1900-01.

112. *Id.* at 1904-05. This distinction between property as exchange value and property as legal entitlements provides the proper context for understanding what Justice Holmes meant when he explained that "[g]overnment 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." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); *see* Lunney, *supra* note 1, at 1905.

113. *See* United States v. General Motors Corp., 323 U.S. 373, 378-80 (1945).

114. United States v. Miller, 317 U.S. 369, 376 (1943); Campbell v. United States, 266 U.S. 368, 371-72 (1924); Sharp v. United States, 191 U.S. 341, 354 (1903).

This rule, however, can generate disparate results in the compensation awarded to similarly-situated property owners.[115] As a result, courts have developed a number of exceptions. For example, if the government condemns a portion of a parcel of land and leaves the remainder of the parcel in the owner's possession, courts have allowed the owner to recover, under the concept of severance damages, the reduction in value to the remainder of the parcel that was caused by the taking.[116]

To examine further the consequential injury rule and its exceptions, consider the seemingly inconsistent results reached on two issues: (i) whether the government must provide compensation for the loss in value of a business that was caused by the government's appropriation of the physical assets with which the business had been conducted; and (ii) whether the government must provide compensation that reflects the value of the owner's reasonable expectations with respect to permissible uses of the taken property. In looking at how the Supreme Court has resolved these two issues, this Article will examine two cases considering the first issue: *Mitchell v.*

115. *See, e.g.*, *Campbell*, 266 U.S. at 369-71. In *Campbell*, the government appropriated a portion (1.81 acres) of the plaintiff's 70 acre parcel of land. *Id.* at 369. The government planned to combine the land taken from the plaintiff with parcels taken from others to provide land for a nitrate production plant. In total, the government appropriated 1,300 acres in the immediate area of the plaintiff's land. *Id.* at 370. At trial, the plaintiff established that the market value of the 1.81 parcel taken was $750, and that the market value of the portion of the parcel retained by the plaintiff had fallen by $7,250. *Id.* at 369. Of this $7,250 reduction in value, $2,250 was caused by the taking of the 1.81 acre parcel, and the rest resulted "from the [industrial] use to be made of the lands acquired from others." *Id.* at 370. Applying the consequential injury rule, the Court held that the plaintiff was entitled to compensation for the $2,250, but was not entitled to compensation for the remainder of the lost value. *Id.* at 371.

Or consider a recent case from Louisiana. In 1983, the State of Louisiana began rebuilding the Danzinger Bridge outside New Orleans. After the project was finished, the new approach to the bridge re-routed traffic away from an adjacent grocery store, reducing the level of ground-level traffic from 30,000 vehicles per day to 1,000 per day. Evidence presented at the just compensation trial established that sales at the store had dropped from $62 million in 1984, before the traffic had been re-routed, to half that in 1990. *See* Steve Cannizaro, *Grocer Wins $5 million in Lawsuit*, New Orleans Times-Picayune, June 25, 1993, at C1, C8. If the state had not expropriated any land from the grocery store in rebuilding the approach to the bridge, the loss in the store's sales volume and profits, even though caused, at least in part, by the rebuilding of the approach to the bridge, would have been a non-compensable consequential injury. *See, e.g.*, Transportation Co. v. City of Chicago, 99 U.S. 635, 643-44 (1879) (holding that the loss in value attributable to construction of tunnel across Chicago River adjacent to plaintiff's property non-compensable). However, some of the store's land was taken as part of the rebuilding, and as a result, the store was entitled to the loss in value.

116. *Miller*, 317 U.S. at 376; United States v. Welch, 217 U.S. 333, 338-39 (1910); Bauman v. Ross, 167 U.S. 548, 574 (1897); *see also* ORGEL, *supra* note 108, § 4. This was the formal rule the *Campbell* Court applied to permit the plaintiff to recover for the loss in value to his retained land caused by the taking of his 1.81 acres, but not for the loss in value caused by the taking of adjacent parcels for industrial use. *Campbell*, 266 U.S. at 371.

United States[117] and *Kimball Laundry Co. v. United States*;[118] and two cases considering the second: *United States v. Fuller*[119] and *Almota Farmers Elevator & Warehouse Co. v. United States*.[120] Despite the focus of these cases on distinct issues, all four deal with the basic issue of whether an owner is entitled to recover that aspect of her pecuniary loss that reflects a consequential injury.

1. Compensation for the Destruction of a Business's Goodwill

In both *Mitchell* and *Kimball Laundry*, the government appropriated physical assets essential to the plaintiffs' respective businesses. In *Mitchell*, the government appropriated land that was especially adapted to "growing and canning corn of a special grade and quality."[121] The plaintiffs operated a corn canning business using the land, and because no suitable alternative land could be found, they were unable to reestablish the business after the taking of their land.[122]

Kimball Laundry presented materially identical facts. The government requisitioned the plaintiff's laundry facilities for use by the army during World War II.[123] Unable to find substitute facilities, the plaintiff could not continue to service the steady customers it had painstakingly acquired over the years.[124] As a result, the plaintiff lost the value, described by the Court as the "going-concern" value, attributable to these repeat customers.[125]

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117. 267 U.S. 341 (1925).
118. 338 U.S. 1 (1949).
119. 409 U.S. 488 (1973).
120. 409 U.S. 470 (1973).
121. *Mitchell*, 267 U.S. at 343.
122. *Id.*
123. Kimball Laundry Co. v. United States, 338 U.S. 1, 3 (1949).
124. *Id.* at 8.
125. *Id.* at 9-14. In support of its position that the "going-concern" value was compensable, the *Kimball Laundry* Court cited three cases that discuss whether the going-concern value of a utility should be included in the "base value" of a utility for purposes of rate regulation. *Id.* at 11 (citing McCardle v. Indianapolis Water Co., 272 U.S. 400 (1926); Galveston Elec. Co. v. City of Galveston, 258 U.S. 388 (1922); Des Moines Gas Co. v. Des Moines, 238 U.S. 153, 165 (1915)). In all three cases, however, the Court distinguished between "going-concern" value and "goodwill" value. In these cases, the Court defined the going-concern value as "the value which inheres in a plant where its business is established, as distinguished from one which has yet to establish its business." *See, e.g.*, *Des Moines Gas*, 238 U.S. at 165. The goodwill value, on the other hand, represents "that element of value which inheres in the fixed and favorable consideration of customers." *Id.* Using these definitions, the value of the trade routes developed by Kimball Laundry would represent goodwill value, rather than going-concern value. The distinction is important because all three of the utility rate regulation cases permit the going-concern value to be included in the base value of the utility; but none of the three permit the goodwill value to be included in that basis. *Id.* (stating that the goodwill value "has no place in the fixing of valuation for the purpose of rate-making of public service corporations of this character"); *Galveston Elec. Co.*, 258 U.S. at 396 (stating that "in deter-

Under the consequential injury doctrine, the government action in the two cases did not change the plaintiffs' legal rights with respect to their businesses.[126] In the absence of such a change in legal rights, no compensation should have been required for the diminution in the value of the business. The *Mitchell* Court followed the doctrine, and held that while the plaintiffs were permitted to recover for the "special value of [the] land due to its adaptability for use" in the corn growing and canning business,[127] they were not entitled to compensation for the destruction of the business itself.[128] The *Kimball Laundry* Court refused to follow the doctrine and permitted the plaintiff to recover for its lost "going-concern" value.[129]

2. *Compensation for Reasonable Expectations*

There is a similar difference in the results reached in *Fuller* and *Almota Farmers*. In these cases the physical appropriation, in addition to taking the plaintiffs' legal rights with respect to the appropriated property, also frustrated certain expectations that the plaintiffs held with respect to the use of the taken property. The central question before the Court was whether the plaintiffs should be compensated for their frustrated expectations.

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mining whether a rate is confiscatory, goodwill and franchise value [are] excluded from the base value"); *cf. Indianapolis Water*, 272 U.S. at 414 (permitting going-concern value, as defined, to be included in base value of plant; no mention of goodwill).

126. For example, Kimball Laundry's legal rights with respect to its goodwill would be defined by the laws of unfair competition and trade secrecy. *See, e.g.*, Theodore v. Williams, 185 P. 1014, 1015-16 (Cal. Ct. App. 1919) (discussing extent of legal rights under trade secret law for laundry routes); New Method Laundry Co. v. MacCann, 161 P. 990, 991 (Cal. 1916) (same); Empire Steam Laundry v. Lozier, 130 P. 1180, 1182 (Cal. 1913) (same). Under the consequential injury doctrine, the government action (appropriating the laundry facilities) did not change Kimball Laundry's legal rights with respect to its goodwill. As a result, the destruction of the value of those rights should have been a non-compensable consequential injury.

127. Mitchell v. United States, 267 U.S. 341, 344-35 (1925); *see also* United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 77 (1913) (noting that while the plaintiff was not entitled to recover for the lost business opportunity, it was entitled to recover for the market value of the land that reflected the land's adaptability to a specific business use).

128. *Mitchell*, 267 U.S. at 345; *see also* Bothwell v. United States, 254 U.S. 231 (1920) (finding no damages due for the destruction of a business when the government flooded plaintiff's lands). Given that in *Mitchell*, the plaintiffs had recovered—as a component of the land's market value—the added value attributable to the land's special adaptation for corn growing, it may be that the plaintiffs were trying to recover twice for that value by also asking for the value of their business. The Court, however, treated the value of the business as if it were distinct from the added value of the land, and held that the loss of the business and its value was a non-compensable consequential injury. *Mitchell*, 267 U.S. at 345.

129. *Kimball Laundry Co.*, 338 U.S. at 14; *see also* United States v. Petty Motor Co., 327 U.S. 372, 377-79 (1946) (permitting leaseholder to recover consequential injury for a temporary taking); United States v. General Motors Corp., 323 U.S. 373, 382 (1945) (same).

In *Almota Farmers* the plaintiff had operated, since 1919, a grain elevator on a parcel of land adjacent to a set of railroad tracks.[130] The plaintiff had occupied the land under a series of leases from the railroad, until the federal government condemned the plaintiff's interest in 1967.[131] At that time, the plaintiff was occupying the land under a twenty year lease, which had seven and a half years to run.[132] Based on the expectation that the lease would be renewed, as it had been in the past, the plaintiff had erected extensive buildings and other improvements on the land, the useful life expectancy of which extended beyond the term of the current lease.[133]

In determining the compensation required for the taking, the plaintiff argued that a reasonable buyer would assume that the railroad would renew the lease, and would, therefore, value the improvements for the remainder of their useful life.[134] The government countered that the renewal expectation, even if reasonable, was not a cognizable legal entitlement,[135] and that the improvements should be valued only over the seven and a half years remaining under the plaintiff's current lease—the period during which the plaintiff held a legally enforceable right to use the improvements.[136]

The *Almota Farmers* Court agreed with the plaintiff, rejecting the government's argument that a reasonable expectation could not be considered in determining the market value of the taken property. The Court ruled that a jury, in awarding compensation for the taking of the plaintiff's property interest, must consider the plaintiff's expectation that the lease would have been renewed because such expectation would have been reflected in the price a willing buyer would have paid a willing seller for the plaintiff's interest.[137]

In *Fuller*, the plaintiffs owned 1,280 acres of land in western Arizona on which they operated a large-scale ranch.[138] In addition to their own fee land, the plaintiffs held permits from the federal government that allowed them to graze their cattle on 31,461 acres of adjacent federal lands.[139] The federal government condemned 920 acres of the plaintiffs' fee lands.[140] In

130. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 470-71 (1973) (plurality opinion).

131. *Id.* at 471.

132. *Id.*

133. *Id.*

134. *Id.* at 471-72.

135. *See also* United States v. Petty Motor Co., 327 U.S. 372, 380 n.9 (1946) ("The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights.").

136. *Almota Farmers*, 409 U.S. at 471-72.

137. *Id.* at 477-78 (plurality opinion); *id.* at 479-80 (Powell, J., concurring).

138. United States v. Fuller, 409 U.S. 488, 488-89 (1973).

139. *Id.* at 489.

140. *Id.*

determining the compensation required, the plaintiffs asserted that the jury should consider the plaintiffs' expectation that the government would have allowed them, in the absence of the taking, to continue using the federal permit lands in combination with their own land.[141] The plaintiffs argued that because their expectation of continued combined use had been reasonable, a reasonable buyer would have considered this expectation in determining the market price she would have been willing to pay for the plaintiffs' property. As a result, a willing buyer would have paid a willing seller a higher market price for the plaintiffs' land based upon this expectation.[142]

The *Fuller* Court rejected the plaintiffs' argument. The Court ruled that even though a willing buyer would have paid more for the taken property given the expectation of continued combined use, the Court could not consider the added value because the government, rather than a private party, had created the expectation.[143]

3. Are These Compensable?

While there are factual differences between the paired cases (temporary rather than permanent taking, private party rather than government as the source of the expectation, leasehold rather than fee interest), it is not clear that these factual differences justify the differing outcomes.[144] Certainly, from the standpoint of the individual whose property the government has taken, the loss appears to be the same in each of the paired cases, both in type and degree. Ultimately, whether the factual differences justify the dif-

141. *Id.* In *Fuller*, the plaintiffs admitted that they were not entitled to compensation for the value of the permit lands themselves. *Id.* at 489.

142. *Id.*

143. *Id.* at 493. Because the government was the source of the plaintiffs' expectations, this case also presents the issue of whether courts should compensate for value reflecting a use that one could undertake only with the affirmative permission of the government. *See supra* text accompanying notes 65-91. Because the government had not actually revoked the grazing program, however, the fact that the actions of the government, rather than a private party, created the plaintiffs' expectations should not affect the plaintiffs' recovery. *See infra* text accompanying notes 191-93.

144. In *Kimball Laundry*, the Court suggested that compensation for the lost value was appropriate because the taking at issue was a temporary, rather than a permanent taking. Kimball Laundry Co. v. United States, 338 U.S. 1, 15 (1949). Yet, as the Court recognized, if the loss in value is relatively certain, why should it matter whether the taking is temporary or permanent? *Cf. id.* at 12, 13 (recognizing that the *Mitchell* Court assumed that the loss of value was certain, yet distinguished *Mitchell* and awarded compensation for the consequential injury in a temporary taking case based upon the high degree of certainty that the value would be lost). In *Fuller*, the Court relied on the fact that the expectation of continued use of the grazing lands at under-market prices arose from a government practice, whereas the expectation in *Almota Farmers* arose from a private party's practice. *Fuller*, 409 U.S. at 492-93. Yet, if the expectation is reasonable in either case, why should it matter whose actions generated the expectation?

ferences in outcome depends on whether the factual differences implicate some purpose that the compensation requirement is intended to achieve, an issue that will be discussed in Sections III and IV.

At this point, perhaps the most that one can say about the differences between these four decisions is that in the face of a significant loss imposed upon an individual whose property the government had taken, the Court in *Kimball Laundry* and *Almota Farmers* adopted a more generous measure of compensation to ensure that the compensation award fully reimbursed the individual for the financial loss actually suffered. The Court in *Mitchell* and *Fuller*, on the other hand, adopted a less generous measure of compensation that refused to hold the government responsible for the price of an individual's disappointed expectations.

III. Why Require Compensation?

To identify whether courts should follow the more or the less generous approach to just compensation reflected in the various resolutions of the "could have regulated" and "reasonable expectations" issues, requires ultimately an understanding of which approach best achieves the purpose that the Just Compensation Clause is intended to serve. The Supreme Court's opinions reflect two basic views of the reasons for the compensation requirement: (1) to provide compensation for those whose property the government has taken; and (2) to regulate the process by which the government decides whose property it will take. The following sections explore these two justifications, and identify the second—the need to regulate the process by which these burdens are imposed—as the sole sensible purpose behind a constitutional right to compensation.

A. Compensation as a Justification for a Court-Enforced Right to Compensation

As a ritual litany intoned whenever the compensation requirement is discussed, courts and commentators have suggested that the essential purpose of the just compensation requirement is 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."[145] In the context of determining just compensation courts refer to this purpose as the "indemnification" or "make-whole" principle.[146] Essentially, the argument is that those who

145. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also* Hodel v. Irving, 481 U.S. 704, 714 (1987); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

146. *See* Duncanville Landfill, 469 U.S. 24, 30 (1984); Lutheran Synod, 441 U.S. 506, 513 (1979); United States v. Virginia Elec. & Power Co., 365 U.S. 624, 631 (1961).

have suffered a disproportionate and substantial government-imposed loss deserve compensation that the courts should provide.

While any number of courts and commentators have based their analysis of the Just Compensation Clause on this "compensation" rationale,[147] the compensation rationale, standing alone, cannot explain why the perceived need to compensate these individuals requires a *court-enforced* right to compensation. On the contrary, if it is simply that "fairness and justice" demand compensation for the individual whose property has been taken in a particular case, one would expect the legislature to be perfectly capable of providing it. Legislatures, after all, have historically recognized the importance of property rights, and provided compensation under a variety of circumstances where they were not required to do so.[148] If the legislature has decided that the money would be better spent on some other pressing social need, rather than on compensating the former property owner, why should society permit the courts to decide that the legislature is wrong, and that the money would, in fact, be better spent compensating the former property owner?

Consider an example. The legislature has appropriated a parcel of land, valued at $50,000, for a post office. Given this "classic taking," everyone would agree that the Just Compensation Clause would be implicated and that compensation should be paid. If the legislature decided, however, that society would be better served by spending the money to subsidize prenatal care, the courts will not defer to this decision, as they would to most of the legislature's spending decisions,[149] but will require the legislature to compensate the former property owner. Yet when asked why deference is not

147. Indeed, some have focused so exclusively on the "compensation" rationale that they appear to consider the Compensation Clause nothing more than a form of government-provided insurance applicable to a specific type of loss. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2922 n.5 (1992) (Stevens, J., dissenting); Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569 (1984); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986). These works build on an economic analysis by Blume, Rubinfeld, and Shapiro. *See* Lawrence Blume, et al., *The Taking of Land: When Should Compensation Be Paid?*, 99 Q.J. ECON. 71 (1984). Because the risk of the government imposing a serious and disproportionate loss on a particular individual depends almost entirely on the individual's political clout, treating the risk of such loss as an insurable type of risk is inapposite to the political reality by which these losses are imposed. *See* Lunney, *supra* note 1, at 1962-63; *see also* Robert D. Tollison, *A Comment on Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 139, 139-40 (1992).

148. *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936) (providing extensive subsidies to farmers in return for a limit on agricultural production); *see also* Barton H. Thompson, Jr., *A Comment on Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 141, 141 (1992).

149. *See* Helvering v. Davis, 301 U.S. 619 (1937).

appropriate, the pure compensation rationale provides no answer.[150] It cannot explain why a court should "sit as a super-legislature"[151] with respect to the legislature's decision on how this money should be spent.

The justification ultimately must lie in the supposition that certain property rights are so important that courts must insulate them from government takings in the absence of compensation.[152] And yet, if the legislature has considered the issue, and decided that society will receive more for its money by investing in prenatal care than by compensating the former owner—that the need to provide additional prenatal care is more vital to society than the need to protect the property rights of the former owner—the pure compensation rationale suggests no reason to believe that the legislature's decision is likely to be wrong. Even if the decision is wrong, there is little reason to expect that courts will be better able to identify the situations in which the taken property interest represents a more important interest for society than the interest to which the legislature has decided to allocate society's tax revenues. Indeed, permitting a court to second-guess the legislature's decision under the compensation rationale is simply an invitation to the court to substitute its own value structure for those of our elected representatives—an approach usually associated with the discredited *Lochner* era approach of protecting various "free market" principles as part of the "liberty" guaranteed by the Fourteenth Amendment.[153]

This is not to suggest that the former owner whose land the government appropriated should not be compensated; rather, this discussion is intended to suggest that the pure compensation purpose standing on its own does not

150. *See* Kaplow, *supra* note 147, at 552, 602-07 (outlining the pure compensation rationale); William A. Fischel & Perry Shapiro, *A Constitutional Choice Model of Compensation for Takings*, 9 INT'L REV. L. & ECON. 115, 120-21 (1989) (same).

151. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).

152. Commentators have offered various reasons why a particular property right might be sufficiently important to merit insulation from legislative control. *See, e.g.*, Robert Kratovil & Frank J. Harrison, Jr., *Eminent Domain—Policy and Concept*, 42 CAL. L. REV. 596, 609 (1954) (noting that the right is sufficiently important if the owner values keeping the right more than the public values taking the right); Michelman, *supra* note 1, at 1215, 1223-24 (stating that the right is sufficiently important if its taking would create disaffection costs that exceed settlement costs). Even some commentators who justify the compensation requirement under a regulatory rationale may end up defining the requirement's ultimate role in terms of those property rights that they consider most important. *See* Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 299, 307 (1992) ("A regulation is a taking if it is functionally equivalent to a governmental land acquisition.").

153. *See* Lochner v. New York, 198 U.S. 45 (1905), *overruled by Day-Brite*, 342 U.S. at 421; *see also* Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915), *overruled by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). This line of authority was overturned by a series of decisions in the 1940s, 1950s, and 1960s. *See* Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963); *Day-Brite*, 342 U.S. at 423; Olsen v. Nebraska *ex rel.* Reference & Bond Ass'n, 313 U.S. 236, 246-47 (1941).

explain the compensation requirement's inclusion in the Bill of Rights as a constitutional, court-enforced right. If the point is simply that these individuals merit compensation given the nature and extent of their loss, the institutional competence concerns that led the Supreme Court to reject *Lochner* and its progeny suggest that, here too, courts should not second-guess the legislature's decision as to whether any particular property interest is sufficiently special that the owner should be compensated for its taking.[154] The inclusion of the Just Compensation Clause in the Bill of Rights, however, implicitly entrusts the judicial branch with the task of ensuring that compensation is paid whenever it is appropriate. This placement of the Clause effectively requires courts to oversee the legislature's decisions with respect to property rights, and reflects society's belief that it cannot trust the legislature to provide compensation in all of the cases in which it should.[155]

Thus, the proper approach for courts under the compensation requirement is not to examine the need for compensation in terms of whether the extent and nature of the loss suffered are sufficiently serious that the "victim" of the government taking merits an award of compensation. Rather, it is to determine whether the nature of the legislative process by which the taking has occurred, or is to occur, calls for court supervision through the enforcement of the constitutional right to compensation. Restated, the purpose of the compensation requirement is not to compensate those who have suffered disproportionate government-imposed losses, though that is what the requirement does; instead, the purpose of the requirement is to enable the courts to control, through the requirement that compensation be paid, the process by which those losses are imposed.

B. Regulation of the Legislature as the Purpose Behind the Compensation Requirement

In using the compensation requirement to regulate the process by which the government takes property, courts should be aware of two models that try to capture the different manners in which political decisions can be made: (1) the majoritarian model; and (2) the interest group model.[156] Within each

154. *See generally* Lunney, *supra* note 1, at 1935-45; *see also* JOHN H. ELY, DEMOCRACY AND DISTRUST 63-69 (1980). While one need not agree with Professor Ely that every provision in the Constitution should be interpreted in terms of correcting a political process flaw, rather than protecting a substantive right, the Court's rejection of substantive protection for particular property rights reflected in the *Lochner* line of cases, see Nebbia v. New York, 291 U.S. 502 (1934), suggests that a political process, rather than substantive right approach is particularly appropriate for property interests.

155. For a more complete discussion of these issues, see Lunney, *supra* note 1, at 1935-45, 1948-50, 1952-54.

156. *See, e.g.*, Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 404-10 (1977).

of these political models, there are particular circumstances in which the legislative process is likely to produce systematically incorrect decisions.[157] Because these circumstances suggest not only the possibility that the legislature might be wrong in its judgment, but also the likelihood that many of its decisions under these circumstances will be wrong, these circumstances justify court interference with the results of the legislative decision making process through the enforcement of various constitutional rights.[158] From this "regulation" perspective, the role of the courts is to identify the circumstances that will lead to systematic mistakes with respect to private property, and fashion a remedy that will redress the systematic mistakes that the legislature, if left to its own devices, would otherwise make.[159]

1. Mistakes and the Need for Compensation Under the Majoritarian Model

Under the majoritarian model, the working assumption is that the legislative process will be controlled by the desires of a distinct majority of the electorate who hold similar views with respect to how the legislature should resolve the relevant issues.[160] If the political reality of a given polity roughly matches this model,[161] the principle circumstance under which systematic legislative mistakes are likely is one form, or another, of scapegoating.

As a political process, scapegoating involves three steps:

(1) "identification," in which "we" (the majority in control of the political process) identify the group or individual who is to be the scapegoat in a manner that clearly distinguishes "them" from "us";

(2) "vilification," in which we attach some morally objectionable character to the scapegoat, which permits us to think of them as "not as good as" us in a way that makes us comfortable with what we are about to do to them; and

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157. A decision will be "incorrect" either if the legislature enacts a measure that—from the perspective of society as a whole—is not desirable, or if the legislature fails to enact a measure that—from the perspective of society as a whole—would have been desirable. Lunney, *supra* note 1, at 1947 n.239.

158. *See id.* at 1949, 1952-53 & n.262 (explaining the rights of equal protection and free speech as necessary to correct systematic mistakes in the legislative process); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that higher scrutiny may be appropriate for measures that burden political speech and insular minorities because of the likelihood of flaws in the political process by which these decisions are made).

159. Because this Article focuses more specifically on the proper measure of compensation than on these political models for their own sake, it will present only a sketch of each model and the reasons each suggests for having an external check on the legislative process in the form of a court-enforced right to compensation.

160. *See, e.g.*, Ellickson, *supra* note 156, at 405.

161. For example, most exclusive suburbs would operate along the lines of the majoritarian model. *See id.* at 407.

(3) "blame," in which we hold the scapegoat solely or primarily responsible for creating a problem for which we are, in a purely factual sense, equally responsible.

As an example of the process, consider a city in which the road system marginally supports the existing population. New housing construction is proposed that will significantly increase the traffic and congestion on the existing roads. As a factual matter, the *combination* of the demand for the roads from the residents of the new housing, *and* the demand from the existing residents, creates the congestion and the requisite need for additional roads.[162] Yet, the existing residents generally will not acknowledge their role in causing the problem. Instead, they will identify a discrete group ("newcomers"), easily distinguished from the existing residents that represent the majority in control of the political process, vilify them ("selfish," "pigs"), and then blame them for the problem. The net result of such a process might be the imposition of an exaction fee or a special impact assessment on new residential construction to solve the traffic congestion problems.[163]

This scapegoating process creates the likelihood that the legislature will make three types of systematic mistakes. First, after vilifying and blaming the scapegoat for the problem, political reality makes it extremely unlikely that the majority-controlled legislature will recognize and provide compensation for the scapegoat even when such compensation is justified.[164] Second, the scapegoating process makes it likely that the majority-driven legislature will undervalue the costs being imposed on "them," and overvalue the benefits "we" are receiving. This inability to balance fairly the costs to "them" against the benefits to "us" creates the likelihood that the

162. *See id.* at 448 ("If congestion results from the achievement of some critical population size, the first household to reside in a suburb contributes as much to the problem as the last to come in."). *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960). Similar "joint" causation problems are reflected in the drive to require new construction to bear the burden of achieving a "no net-loss" policy for wetlands, or preventing the erosion of the shoreline. In both of these situations, the central problem is, as a factual matter, caused as much (or more) by historic development practices as it is by new construction.

163. *See* Ellickson, *supra* note 156, at 465-67 (discussing the escalation of subdivision exactions); *cf.* Bernard V. Keenan & Peter A. Buchsbaum, *Report of the Subcommittee on Exactions and Impact Fees*, 23 URB. LAW. 627, 636-37 (1991) (discussing cases that have permitted cities to impose the cost of solving congestion problems on new construction).

164. Some commentators have suggested that compensation should not be required if the government has placed the burden on the only group capable of solving the problem. *See* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 169 (1971). *Cf.* Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1345 (1991) (noting that "the government's aims could have been achieved in many ways but the means chosen places losses" on a distinct minority). However, the essential insight behind the Just Compensation Clause is that there is always at least one other group that could bear that burden—the taxpayers—through the payment of compensation.

majority-driven legislature will systematically enact measures that appear desirable to the legislature, yet are not, in fact, desirable given a fair balance between the costs to "them" and the benefits to "us."[165] Third, because the legislature undervalues the costs imposed on the scapegoat, the legislature is likely to impose the burden on the scapegoat although a member or members of the majority faction could, as or more easily, redress the perceived problem. I will refer to both the second and third type of mistakes as "fiscal illusion."[166]

The ballot-box will not prove an adequate check on this type of majoritarian oppression[167] because the ballot box ultimately is the cause of the problem. Remedying the problem, therefore, requires an external check on the political process—one that the Constitution provides, in this instance, in the form of a court-enforced right to compensation.

2. *Mistakes and the Need for Compensation in the Interest Group Model*

While the majoritarian model may accurately reflect the political realities in small-town America, larger political subdivisions are less susceptible to sustained majoritarian influence.[168] Instead of a distinct majority of the electorate controlling the legislature and its decisions, only the particular groups of individuals most directly affected by the government action will

165. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 51 (3d ed. 1986); Blume & Rubinfield, *supra* note 147, at 620-22; Sax, *supra* note 1, at 62-67.

166. While I agree with William Fischel and Perry Shapiro that such mistakes are driven by the political process, see Fischel & Shapiro, *supra* note 150, at 123, I am comfortable with the phrase "fiscal illusion" as a label for these mistakes.

167. The Court suggested as long ago as 1888 the ballot box as a solution to legislative misfeasance. *See* Powell v. Pennsylvania, 127 U.S. 678, 686 (1888). In upholding a law that prohibited the sale of margarine in order to protect the existing dairy butter industry, the Court stated: "[I]f all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to [particular individuals] . . . , their appeal must be to the legislature, or to the ballot-box, not to the judiciary." *Id.* at 686.

168. Thus, in larger political subdivisions even when majoritarian pressures are able to triumph in the short-term, in the long-term and detailed application of the regulations, only those most directly affected will remain interested and involved, and eventually pressure from such affected groups will lead the legislature to water-down or reverse its initial majority-driven position. *See, e.g.*, Lisa A. St. Amand, *Sea Level Rise and Coastal Wetlands: Opportunities for Peaceful Migration*, *in* 1992 ZONING & PLAN. L. HANDBOOK 513, 528-32 (Kenneth H. Young ed.) (stating that majoritarian pressures led the state to prohibit absolutely new development too close to the beach; within two years, however, the demands of those most specifically affected by the prohibition had convinced the legislature to provide numerous exceptions to the development ban).

take the time to become informed about the government's action[169] and make the effort to influence the government's decision on that issue.

The interest group model attempts to capture the political process by which the often conflicting demands of these competing "interest" groups will be resolved.[170] While a detailed discussion of the model is beyond the scope of this Article, the central insight of the interest group model, based upon both historical evidence and theory, is that a smaller more cohesive group (a "concentrated" group) will have a disproportionate ability to persuade the legislature to its point of view, as compared with a larger, more diverse group (a "dispersed" group).[171]

In a political process dominated by such interest groups, the principal circumstance under which the legislature will make systematic mistakes is where a concentrated group and a dispersed group compete on an issue. Because of its disproportionate political power, the concentrated group generally will win such legislative battles, even where a fair balancing of the interests of the two groups would indicate that the concentrated group should have lost.

The disproportionate lobbying advantage of the concentrated group can result in two types of systematic mistakes. First, when the legislature considers a measure that would, if enacted, benefit a concentrated group at the expense of a dispersed group, the concentrated group, by using its disproportionate political power, can make the benefits of the measure appear more substantial, and the costs of the measure less substantial than they actually are. As a result, a concentrated group can often convince the legislature to enact such a measure, even though a fair balancing of the costs and benefits would establish that the measure was not desirable from the perspective of society as a whole.[172] Second, when the legislature considers a measure that would, if enacted, burden a concentrated group for the benefit of a dispersed group, the concentrated group can, again by using its disproportionate political power, make the benefits of the measure appear less substantial, and the

169. For example, how many of us who are not peanut farmers, but are peanut butter eaters, know the details of the peanut quota? *See, e.g.*, Keith Bradsher, *Study: Public Cost of Farm Quota Isn't Peanuts*, NEW ORLEANS TIMES-PICAYUNE, Mar. 5, 1993, at C2.

170. *See* THEODORE J. LOWI, THE END OF LIBERALISM 50-61 (2d ed. 1979).

171. For introductory reading on the strengths and weaknesses of this "public choice" view of the interest group model, see THE POLITICAL ECONOMY OF RENT-SEEKING (Charles K. Rowley et al. eds., 1988); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988) (addressing the public choice issue); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988) (same).

172. This is the traditional sort of rent-seeking legislation. *See* Farber, *supra* note 152, at 293-94.

costs of the measure appear more substantial, than they actually are. As a result, a concentrated group can often convince the legislature *not to enact* such a measure, even though a fair balancing of the costs and benefits of the measure would reveal that enactment of the measure would have been desirable from the perspective of society as a whole.

Thus, the disproportionate political advantage of a concentrated group creates two types of systemic mistakes: (i) enactment of undesirable measures that benefit the concentrated group; and (ii) a failure to enact desirable measure that would have burdened the concentrated group. As was the case with respect to the systemic mistakes created in the majoritarian political process, the ballot box will prove to be an inadequate check on the potential for these kinds of legislative mistakes as the ballot box is their ultimate cause.[173] Remedying these mistakes, therefore, requires an external check on the legislative process. Furthermore, because there are two types of systemic mistakes, courts will need to fashion a distinct remedy to redress each type of mistake.[174]

First, with respect to the systemic tendency of an interest group-driven legislature to enact undesirable measures that benefit concentrated groups, the courts should construct a remedy that makes it more difficult for the concentrated group to benefit from the enactment of such measures. Ideally, the courts could provide such a remedy by more careful scrutiny of, and a greater willingness to strike down, government action that benefits a concentrated group at the expense of a dispersed group.[175] Such court action would make it more difficult for concentrated groups to reap the benefits of such socially undesirable, rent-seeking measures, and therefore reduce the incentive for concentrated groups to pester government to enact such measures.

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173. Public choice literature suggests that one of the principle connections between concentrated groups and disproportionate influence is the necessity for politicians to accumulate large campaign war chests to assure their reelection. *See, e.g.*, DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13 (1974); Eskridge, *supra* note 171, at 288; M. Bruce Johnson, *Planning Without Prices: A Discussion of Land Use Regulation Without Compensation*, *in* PLANNING WITHOUT PRICES 63, 88 (Bernard H. Siegan ed., 1977).

174. A check is required not because the legislature's decision might be wrong, as the courts are poorly suited to conduct a de novo determination of the merits of any given enactment, but because the enactment is likely to reflect a flaw in the political process.

175. The Court has closed its eyes to this need since the 1930s. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (involving a politically more powerful group that used its political clout to close down a competitor, and the Court washed its hands); United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (same). This would also be necessary to address the possibility that a broader compensation requirement might result in the enactment of additional undesirable, rent-seeking measures. *See* Farber, *supra* note 152, at 293-94 (mandating compensation may increase rent-seeking).

Second, with respect to the systemic tendency of an interest group-driven legislature to fail to enact desirable measures that burden particular concentrated groups, the courts should construct a remedy that makes the enactment of such measures more likely. The courts can do this by consistently requiring just compensation whenever the government acts to burden the property rights of a concentrated group for the benefit of a dispersed group. While this suggestion runs counter to the traditional assumption that requiring compensation will block desirable changes in existing property rights,[176] for reasons I have explained in more detail elsewhere,[177] requiring compensation in this circumstance will make such action, if the action is in fact desirable, more, rather than less, likely. Essentially, a consistent requirement that the government compensate the members of a concentrated group when it acts to limit, restrict, or modify their property rights in order to benefit a dispersed group makes such government action more likely because the promise of compensation will placate the opposition of the members of the concentrated group to the enactment of the measures (as they will be compensated in any event). Absent the opposition of the concentrated group, the dispersed group that would benefit from the measure will have a better chance to convince the legislature of the need for the measure, making the measure's enactment more likely than it would have been had the concentrated group remained opposed to the measure.[178]

176. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 423 (1837).

177. *See* Lunney, *supra* note 1, at 1955-59.

178. Some might assume that the legislature is perfectly capable of recognizing the need for, and providing, compensation to secure passage of a desirable measure that burdens a concentrated interest group. *Cf.* Farber, *supra* note 152, at 280, 295 ("[A rule making compensation optional with the legislature] would produce compensation in most cases, perhaps the large majority . . . ."); Levmore, *supra* note 164, at 1345 (limiting takings under singling out theory to individuals who are not part of "an existing or easily organized political coalition."). Yet, the ability of the legislature to recognize the need for, and provide, appropriate compensation is limited by three considerations. First, the bargaining between the concentrated group and the legislature with respect to compensation takes place within the context of a bilateral monopoly, a context within which the bargaining process can often fail. *See* POSNER, *supra* note 165, at 54 ("Indeed, each party may be so determined to engross the greater part of the potential profits from the transaction that they never succeed in coming to terms."). A uniform compensation requirement can provide a framework for this bargaining process, and thereby, both minimize the chance that game-playing and posturing will prevent the two sides from reaching agreement, and reduce the transaction costs of reaching agreement. Second, political reality presents something of a Catch-22 situation for a group that would support a measure if it were compensated. Admitting a willingness to support a measure if the group is compensated may undermine the persuasive force of the group's opposition to the measure, making it likely that the measure will be enacted. If the measure seems likely to be enacted, the group may be unable to convince the legislature that compensation is warranted. Third, in seeking to overcome politically the opposition of the concentrated group, proponents of such a measure are likely to resort to scapegoating in an effort to ensure enactment of the measure,

IV. THE PROPER MEASURE OF COMPENSATION

Thus, this analysis suggests that role of the Just Compensation Clause is to compensate a minority group[179] whose property has been taken. In the majoritarian model, the courts should provide such compensation to protect the minority "scapegoat" group from undesirable, majority-driven takings. In the interest group model, the courts should provide such compensation to ensure that the minority "concentrated" group will not use its disproportionate political power in the political arena to block desirable governmental takings.

While the majoritarian and interest group models suggest slightly different reasons for the court-enforced right to compensation, both identify the need to regulate systematic mistakes in the legislative process as the central purpose behind the Just Compensation Clause. In defining the proper measure of just compensation, the remedy the courts provide should not be thought of as independent of the substantive determination that a taking has occurred; rather, the resolution of both the compensation issue and the taking issue should fit together to achieve the identified purpose behind the compensation requirement.

A. An Initial Take on the Compensation Standard

A measure of compensation will be just if it redresses the systematic mistakes with respect to property that would otherwise occur in the legislature under either the majoritarian or interest group model. As discussed, under the interest group model, the principal systematic mistake that the Compensation Clause can remedy is the likelihood that the legislature will systematically fail to enact desirable measures that burden a concentrated group and benefit a dispersed group. To redress this systemic risk of mistake, courts should award a measure of compensation that will adequately pacify the potential opposition of the concentrated group.

Under the majoritarian model, the legislature, if left to its own devices, will systematically make two principle mistakes: (1) fiscal illusion will lead the legislature to impose improper burdens on a scapegoat; and (2) the scapegoating process will lead the legislature to refuse to compensate a

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and as a result, these politicians may fail to recognize the need for, and refuse to provide in any event, compensation to the vilified concentrated group.

179. First, the phrase "minority group" refers to the numerical size of the group, as a minority of the eligible voters. Second, while the phrases "minority group" and "concentrated group" are not entirely interchangeable because the numerical size of a group is only one factor in determining whether a group will be able to organize and lobby effectively, the size of the group has a sufficiently close relation to the organization costs that I have used it as a reasonable proxy for whether a group is concentrated or dispersed. *See* Lunney, *supra* note 1, at 1952-53, 1965.

scapegoat for a taking, even though such compensation is desirable. To redress the systemic risks of these kinds of mistakes, the compensation requirement must accomplish two objectives. First, it must force the government to consider the full costs of its action when it would force a scapegoat to bear the burden of government action. Such consideration would reduce the likelihood that the legislature will improperly force the scapegoat to bear a significant government-imposed burden either when a member of the majority faction could better have borne the burden or when the government should not have taken the action at all. Second, to ensure that the property interests of the scapegoat are protected when they should be, yet not second-guess the legislature's decisions as to whether any given property interest is consistent with society's welfare, the measure of compensation should force the legislature to provide the same sort of protection for a property interest when held by a scapegoat as it has provided a member of the majority faction who holds the same or similar property interest. Thus, if the legislature has itself acted in a way that recognizes a certain property interest as both an important part of our common conception of property and as consistent with society's welfare when the interest is owned by a member of the majority faction, courts should require the legislature to maintain a consistent view of the property interest when it is owned by a scapegoat.

Achieving the necessary goals under the majoritarian and interest group models will not require a radical restructuring of the proper measure of compensation. It will only require courts to apply realistically the general standards already recognized by the Court for measuring compensation. Thus, to be just, the compensation award must represent a "full and exact equivalent" for the taken property,[180] and "put [the former owner] in as good a position pecuniarily as if his property had not been taken."[181]

Under the interest group model, the promise of such a measure of compensation will reassure the members of a concentrated group that if the legislature acts in a manner that takes their property, they will be fully compensated for their loss. With the opposition of the concentrated group fully placated, the dispersed group will more likely be able to convince the legislature to enact the measure, if the measure is in fact desirable from the perspective of society as a whole. Under the majoritarian model, providing such a measure of compensation will force the legislature to recognize the full costs imposed by its actions, and thereby, reduce the likelihood that the legislature will force a scapegoat to bear the burden of government action

180. Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893); *see also* cases cited *supra* note 3.

181. Seaboard Airline Ry. v. United States, 201 U.S. 299, 304 (1923) (citation omitted); *see also* cases cited *supra* note 4.

when someone else could more easily have borne that burden, or when the action should not have been taken at all. In addition, such a measure will require the government to provide the same sort of protection for the property interests of the scapegoat that it has, in practice, extended to those interests when held by members of the majority faction.

Almost from the outset, however, the Supreme Court has developed "working rules" that have shaped the compensation inquiry in a manner inevitably reducing the substantive measure of compensation. For example, a compensation award based on market value will provide a "full and exact equivalent" only if the taken property was fungible. If, as is often the case, the owner idiosyncratically valued the taken property in excess of its market value, an award based upon the property's market value would not fully compensate the former owner for her loss.

Moreover, the problem with such an award is not simply that the market value does not fully indemnify the former owner for her loss. Rather, the problem with such an award is that it would frustrate the need reflected in the Just Compensation Clause to regulate the process by which these burdens are imposed. Under the interest group model, such an incomplete award would not fully address the risk of systematic mistakes because it would not fully compensate the concentrated group for its pecuniary loss. While such an award would tend to placate the opposition of the concentrated group to some extent, the promise of incomplete compensation is unlikely to placate the opposition of the concentrated group completely, and if the idiosyncratic value was a significant part of the group's pecuniary loss, the failure to compensate for such value would leave the concentrated group with good reason to exercise its disproportionate political power to block the government's proposed action.[182]

Additionally, such an incomplete award would not fully redress the possibility of systematic mistakes under the majoritarian model. First, such an award would not require the government to treat a given property interest when held by a scapegoat consistently with the manner in which it has treated the interest when held by a member of the majority faction. On the contrary, after the government action and the award of such incomplete

182. At some point, a near-exact equivalent may placate the concentrated group to such an extent that the organizational advantage of the concentrated group will no longer enable it to block the enactment of a measure that would burden the group. At this point, the interest group model suggests that adequate compensation has been provided. *Cf.* Fischel & Shapiro, *supra* note 150, at 123 (suggesting that less than full compensation may be optimal). The fact that some interest groups, however, will receive full compensation through the political process may suggest that equality concerns justify similar treatment for all. *See* Farber, *supra* note 152, at 296-99, 308. *Cf.* Fischel & Shapiro, *supra* note 150, at 123 n.5 ("It can be shown that more than one hundred percent of market value *may* be the optimal compensation rule if a majoritarian government is anticipated and such nonmarket losses are important.").

compensation, each member of the majority faction would continue to enjoy his idiosyncratic value because the political process has protected such value, while the scapegoat would be deprived of her idiosyncratic value. Second, such an award would not force the legislature to consider the full costs of its actions, and would thereby leave open the possibility that the legislature might impose a burden on the scapegoat based upon fiscal illusion. Specifically, if the measure of compensation is incomplete, the legislature remains likely to impose the burden of government action on the scapegoat even though a member of the majority faction would more easily have borne that burden, or even though the government action should not have been taken at all.[183]

While recognizing that an award that reflects such idiosyncratic values as a component of just compensation will lead some individuals to "perjure claims"[184] and may, on occasion, lead to "overcompensation,"[185] society has generally trusted the trier of fact to distinguish such perjured claims from honest claims in similar situations. For example, society permits the award of damages for "pain and suffering" in product liability cases, and thereby, creates a similar risk of overcompensation if the trier of fact believes perjured testimony with respect to the plaintiff's mental and emotional distress. Despite this risk, we have trusted the jury's good sense and permitted them to determine an appropriate award based on the evidence. There appears to be no good reason to do otherwise in the context of just compensation awards.[186]

While administrability concerns can justify a rough, rather than precise, estimate of the pecuniary loss to the former property owner, the Supreme Court should not use these concerns as an excuse to reduce the substantive measure of compensation. The Court's suggestion in *Duncanville Land-*

183. *Cf.* POSNER, *supra* note 165, at 49 ("The extra value I place on the property has the same status in economic analysis as any other value.").

184. *See* Thompson, *supra* note 148, at 142. Even with awards based solely on market value, the trier of fact will still have to separate "perjured" claims from true claims. *See, e.g.*, United States *ex rel.* TVA v. Powelson, 319 U.S. 266, 270-71 (1943) (stating that the plaintiffs claimed that the property was worth $7.5 million based on hydroelectric use). Given the nature of the inquiry, a trier of fact is probably more capable of understanding and evaluating testimony with respect to idiosyncratic values, than the type of economic testimony often introduced in an attempt to establish market value.

185. Thompson, *supra* note 148, at 142. "Overcompensation" would occur only if the jury believed that the plaintiff held an idiosyncratic value with respect to the property when he, in fact, did not.

186. The central risks created by overcompensation in the Just Compensation context are that it may block efficient government projects and lead to false claims. *See id.* Yet, the possibility of overcompensation in the product liability context creates analogous risks. First, the risk of overcompensation may drive desirable products from the market. Second, it may encourage individuals to sue a product manufacturer for slight or imagined injuries.

fill,[187] for example, that an award based upon reproduction cost "would enhance the risk of error and prejudice,"[188] rings hollow given the difficult valuation issues we routinely entrust to the trier of fact in other contexts. Indeed, for all of the cases discussed in Section II in which the Court adopted the less generous, rather than the more generous, standard for compensation, applying the more generous standard would not have presented factual issues of noticeably greater difficulty than the less generous standard.[189]

Thus, to achieve the regulatory purpose behind the Just Compensation Clause, courts should realistically attempt to provide a "full and exact equivalent," from the former owner's perspective,[190] for the taken property, and thereby return the owner to the same pecuniary position she would have occupied in the absence of the taking. By requiring the compensation award to satisfy these standards, courts will address the likelihood of systematic legislative mistakes with respect to property rights that would otherwise be present under either the majoritarian or the interest group model.

B. The Difficult Issues: Government Authority and Reasonable Expectations

In applying the "full and exact equivalent" and "same position pecuniarily" standards to the legal issues presented in Section II, courts should adopt a compensation rule with respect to these issues that best achieves the identified regulatory purpose behind the Just Compensation Clause. As discussed, a court should compensate the former owner for a pecuniary loss if such compensation is necessary both to ensure that the legislature treats any given property interest consistently whether held by a scapegoat or by a member of the majority faction, and to minimize the possibility of government action based upon fiscal illusion. Alternatively, a court should compensate for a pecuniary loss under the interest group model if such compensation is necessary to placate the opposition that a concentrated group would otherwise have toward the measure.

To satisfy these objectives and the underlying regulatory purpose behind the compensation requirement, a court should require compensation for the added value reflecting a revocable license or reasonable expectations held by

187. 469 U.S. 24 (1984).

188. *Id.* at 36 (footnote omitted).

189. Indeed, in United States v. Fuller, 409 U.S. 488 (1973), the more generous standard would have been easier to apply because it would have required the trier of fact to determine the property's value based upon the manner in which the land had historically been used. *Id.* at 492-93.

190. *Cf.* Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910) (noting that "the question is what has the owner lost, not what has the taker gained").

the former owner with respect to the taken property. A court should generally not require compensation, on the other hand, for the market value of taken property in excess of its regulated price.

1. Courts Should Compensate for the Value of the Taken Property Reflecting a Revocable License

If the government takes property and part of the property's value reflects a special use to which the former owner could devote the property because of a revocable government license, the courts will best achieve the underlying purpose of the Just Compensation Clause by requiring the government to compensate the former owner for the added value of the property attributable to the revocable license. The purpose behind the Just Compensation Clause is to serve as a check on the authority of the legislature to modify property rights as it sees fit. This court-enforced check is to apply, however, only where the circumstances establish a likelihood of systematic legislative mistakes with respect to the property at issue. Thus, property rights are protected initially by the political process, and secondarily by the court-enforced constitutional right to compensation.

Given this framework, if a court were to reduce a compensation award to reflect what the legislature could permissibly have done, it would improperly circumvent the initial political check on whether the government should have taken the property without compensation. For example, while it is possible that the state of North Carolina in *Powelson* might have revoked the plaintiffs' power of eminent domain or that the federal government in *Fuller* might have revoked the plaintiffs' grazing permits specifically or the grazing permit program generally, political reality makes these possibilities extremely unlikely.[191]

While the Supreme Court should carefully scrutinize whether the initial grant of authority from the government may have resulted from a flaw in the legislative process,[192] once a court concludes that the grant of the revocable license was proper, it should not circumvent this political decision by applying a less generous standard of compensation. If the political process has "properly"[193] recognized the importance of the interest reflected in the revo-

191. President Clinton, for example, recently learned the difficulty of abolishing the under-market aspect of the grazing program, when political pressure forced him to withdraw his proposal to raise the fees under the program to market values. *See* Betsy Carpenter & Lisa Busch, *America's Landlord*, U.S. NEWS & WORLD REP., May 17, 1993, at 63.

192. *See supra* text accompanying notes 172-75.

193. The adjective "properly" does not refer to the correctness of the legislature's substantive decision, but to whether or not the legislature used a flawed process in reaching its decision.

cable license, courts should respect that political decision and compensate the former owner for the added value attributable to the revocable license.

2. *Courts Should Compensate for the Value of Frustrated Expectations*

If the government takes property and part of that property's value reflects the former owner's reasonable expectations with respect to continued use of the property, courts will best achieve the purpose behind the Just Compensation Clause by requiring the government to compensate the former owner for the lost expectations. This requirement is based on several considerations.

First, courts should protect the value of frustrated expectations so that the Just Compensation Clause can fully address the risks of systematic legislative mistakes under both the majoritarian and interest group models.[194] Under the majoritarian model, protecting the value of these expectations is necessary to ensure consistent treatment of these property interests when held by a scapegoat, as the legislature, in practice, would otherwise recognize and protect these interests only when held by a member of the majority faction. In addition, requiring compensation for these values is necessary to ensure that the legislature gives fair weight to these values when it considers imposing any particular burden on a scapegoat. As with idiosyncratic values, these expectation values reflect real losses[195] that the government should have to consider when it decides whether any given action would be desirable, and if it is, who should bear the loss. Alternatively, under the interest group model, an award that does not reflect the value of these expectations will not placate a concentrated group as the group is unlikely when facing such a significant loss to be much comforted by the Court's reassurance that the financial loss reflected only a frustrated expectation and not a taken property right.

Second, behind these policy considerations lies a recognition that most expectations derived from everyday life are both different than, and often more important than, our formal legal rights.[196] For example, both the grain elevator company in *Almota Farmers* and the cattle ranchers in *Fuller* made significant investments in their businesses based not on formal legal rights, but on past experience. Their experience suggested that, legal rights notwithstanding, they would be allowed to continue using their property in

194. This analysis follows closely the justification for court-protection of subjective values already discussed. *See supra* text accompanying notes 182-85.

195. *See* POSNER, *supra* note 165, at 49.

196. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 69-81 (1991).

the manner in which they had used it historically.[197] Professor Ellickson's work with respect to cattle trespass in Shasta County, California also suggests that expectations formed by day-to-day life, rather than the niceties of the formal legal rules, generally govern people's conduct, and shape their expectations of allowable behavior.[198]

Implicitly recognizing this reality, the Court at times has been uncomfortable with the extremely formal notion that values reflecting reasonable expectations should not be protected as "property" under the Fifth Amendment because such expectations are not legally enforceable rights. As the Court recognized in *Armstrong v. United States*,[199] if the government has destroyed the value of an individual's property, it should not matter that the government did so without formally changing the individual's legal rights.[200] To be sure, the government should not have to provide compensation every time its actions devalue property.[201] If, however, the government action with respect to a property interest singles out the very few to bear a significant burden to benefit the very many, that the action was taken with respect to a reasonable expectation, rather than a formal legal right, should be no bar to recovery.

Moreover, even if the Supreme Court decides to retain the consequential injury rule in the context of whether a taking has occurred, the Court should follow its decisions in *Kimball Laundry Co.* and *Almota Farmers*, and reject the rule in determining the proper measure of compensation once it is clear that a taking has occurred. Those few reasons that would justify retaining the rule in the context of whether a taking has occurred, including, for example, a desire to limit the potential number of claimants and to prevent the occurrence of "accidental"[202] takings, do not apply in the context of deter-

197. *See also* Nixon v. United States, 978 F.2d 1269, 1275 (D.C. Cir. 1992) ("The essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement.").

198. *See* ELLICKSON, *supra* note 194, at 69-81, 103.

199. 364 U.S. 40 (1960).

200. *Id.* at 46-49.

201. *Cf.* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

202. Because the government has no easy way to determine in advance of its action all of the reasonable expectations those property owners who will be affected by its action hold, the government might be unaware that its action will unduly interfere with such an expectation. When the government acts, on the other hand, to change or limit an existing property right, it knows that it is changing the owners' property rights, even if it does not intend the action to go so far as to constitute a taking. Thus, "accidental" takings with respect to expectations can be considered materially different from "accidental" takings with respect to changes in existing rights. *Cf.* Mitchell v. United States, 267 U.S. 341, 345 (1925) ("There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land."). "Accidental" as used in the text refers only to situations in which the government was unaware that its action would change or limit one of the owners' property interests (whether we

mining the amount of compensation that should be awarded. If we have reached the issue of how much compensation is due, the government has knowingly acted to take property rights, and therefore cannot claim that the taking which lead to the need for compensation was an accident. In addition, by compensating for the consequential portion of the loss, courts would not increase the number of claimants, but would simply ensure "just" compensation for the pre-existing claimants.

Therefore, both to satisfy the regulatory purpose behind the Just Compensation Clause and to ensure that the Clause addresses the real concerns of those it is meant to protect, courts should provide compensation for that component of the taken property's value that reflects reasonable expectations, even if those expectations are not themselves legally enforceable property rights.

3. *When Property is Subject to General Price Controls, Courts Should Award the Regulated Price*

In contrast to the previous two situations, if the government takes property that has been subjected to general price controls, courts will best achieve the purpose behind the Just Compensation Clause by treating the regulated price as the proper measure of just compensation. In this case, the government has imposed a *uniform* restriction that reduces the value of property owned by a relatively large number of people. Such general restrictions will not usually implicate any of the concerns with respect to flaws in the legislative process that suggest a likelihood of systematic legislative mistakes.

If the political reality presents a situation in which two large classes of individuals hold opposing views on an issue, such as price control, this reality will not usually match the majoritarian model (if the individual members of both groups are entitled to vote).[203] Thus, the concern that a majority-driven legislature may make mistakes through scapegoating or fiscal illusion will not be present. Instead, such a political reality will match the interest group model.

Even under the interest group model, however, if the class adversely affected by the price regulation of reasonably similar size to the group benefitted by the regulation,[204] courts should defer to the legislature's judgment on

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define the phrase "property interests" to include both expectations and property rights, or limit it solely to property rights); it does not refer to situations in which the government knows it has changed those interests, but hopes that the courts will not find the change to have gone too far.

203. Some rent control schemes may implicate our scapegoat concerns under the majoritarian model.

204. Because organizational costs, including free riders, will increase exponentially with an increase in the effective size of an interest group, an absolutely large group that consists of fifty

the need for the price control. In this case both sides should be equally capable of presenting their views to the legislature, which in turn suggests that the legislature's decision with respect to the issue will usually be correct.[205] In the absence of any suggestion of a flaw in the legislative process that would create a likelihood of systematic mistakes, the rejection of *Lochnerism* suggest that courts should defer to the legislature's judgment on the issue.

Thus, the enactment of a law of general application[206] does not implicate our political process concerns under either political model. As a result, a general price regulation should be considered a legitimate restriction on the property rights of those who hold the regulated property. In providing compensation for such regulated property if it is taken by the government, the courts should limit the recovery to reflect this restriction on the owner's property rights, and award the former owner the regulated price as compensation.

More generally, if the government has enacted general legislation that imposes similar restrictions, both in form and effect, on the property rights of a large number of people, courts should award compensation based on the value of the property as regulated, if the government should later take the regulated property from any one of them.[207] Because such general regulation does not implicate the political process concerns addressed by the Just

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thousand members will not generally have much of an organizational cost advantage over even a relatively much larger group of one hundred million members. Neither group will be able to meet in a backroom to discuss strategy; both will need to rely on various mass media methods to distribute information to their members and to organize their members to support or oppose particular legislation. Lunney, *supra* note 1, at 1952 n.261. As a result, both groups are likely to have a similar fraction of the measure's private value to the group available as lobbying resources, and a legislative battle between two such groups is likely to reflect accurately how the legislature should resolve the issue to best serve the underlying public interest. *Id.* at 1952.

205. *See id.*

206. To be a law of general application, the legislature must do more than simply word the statute generally. To be a law of general application, the statute, as applied, must change the property rights of a large number of people; otherwise, the concern about the legislative process under either the majoritarian or interest group model will reappear. Thus, a statute enacted in January 1991 that applied to "all parcels of land that were subdivided into more than forty lots between January 1, 1980 and January 1, 1990" would not be of general application if, in fact, only one parcel of land in the relevant jurisdiction, Jane Doe's farm, satisfied the statute's criteria. The careful wording of the statute would not make the statute any more general than if the statute had replaced its general language with a specific reference to "Jane Doe's farm." In both cases, the reality is that the legislature has regulated only Jane Doe's farm by the ordinance, and this "singling out" is what raises process concerns under both the majoritarian and the interest group models.

207. If the original regulation did not realistically apply to a large number of people, but instead actually affected only the particular property that the government later took, the court should award compensation based upon the value of the property in the absence of the regulation. *See supra* note 206.

Compensation Clause, this is the type of issue that the ballot box is fully capable of solving, if a solution is warranted. In this instance, a court-enforced check on the political process is unnecessary, and so the courts should not substitute their judgment regarding the desirability and fairness of requiring compensation for the losses occasioned by such general regulation for that of the legislature.

C. *Compensation as Insurance: Moral Hazards and "Overcompensation"*

In arguing against both a broader interpretation to whether a taking has occurred and a more generous standard for compensation, a number of commentators have suggested that excessive compensation will lead people to over-invest in their property, or will force the government to pay a high price for worthless property rights.[208] Careful analysis shows, however, that neither concern justifies a less generous measure of compensation.

With respect to the over-investment point, the argument is that if the government provides something approaching full compensation, the individual will continue to invest in her property, even when she expects the government to take it, based upon the expectation that her "insurance" policy—the Just Compensation Clause—will require the government to reimburse her fully for her lost investment.[209] Based upon this assumption, commentators have suggested that the compensation requirement, if enforced too rigorously, will lead to a moral hazard problem similar to that presented by earthquake or hurricane insurance.[210] In each case, individuals will rely on their insurance and invest more than they should in their property, given that their property is in an earthquake zone, in an area prone to hurricanes, or in the path of government regulators.[211]

As a practical matter, the risk of moral hazard is almost certainly overstated. As the Chicago, Burlington & Quincy Railroad learned as long ago as 1897, relying on a jury to protect fully an owner's investment in its prop-

208. *See, e.g.*, Kaplow, *supra* note 147, at 529; Farber, *supra* note 152, at 285. For example, Professor Thompson worries that overly generous compensation may "encourage landowners to lobby in *favor* of their property being taken." Thompson, *supra* note 148, at 142 (emphasis in original).

209. *See* Farber, *supra* note 152, at 285; Kaplow, *supra* note 147, at 529.

210. *Cf.* William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269, 272-74 (1988) (comparing the moral hazard created by insurance under Just Compensation Clause to moral hazards created by fire insurance, payments to the victims of pollution, and granting of tenure to professors); *see also* Farber, *supra* note 152, at 283-84 (comparing the moral hazard created by insurance under Just Compensation Clause to that created by fire insurance).

211. *See* Farber, *supra* note 152, at 283-84; Fischel & Shapiro, *supra* note 210, at 272-74.

erty represents a risky proposition.[212] Moreover, leaving the trier of fact free to consider the impact of reasonably likely government action on the taken property's value should fully address the moral hazard that individual owners will unreasonably over-invest in the face of an impending government taking.[213]

Other commentators have expressed the concern that a broader scope to the compensation requirement will force the government to "purchase" property at an excessive price. Essentially, this concern is that the owners of property will convince the legislature to take the property, even though such action is undesirable from the viewpoint of society as a whole, and also convince the trier of fact to award them excessive compensation for the taken property in the subsequent eminent domain proceeding.[214] While such a concern appears superficially plausible, closer analysis suggests that there is little chance that a broader constitutional right will lead to this sort of overcompensation.

Initially, it should be noted that if the Just Compensation Clause is put to one side, the government is presently free to overpay for such property by buying it directly. All a property owner needs to do is convince the legislature, or some other state agency, that it should purchase her property for an excessive price and the courts will generally defer to that decision.

As an alternative to this "direct sale" approach, a broader interpretation of the Just Compensation Clause may give the owner another method by which she can "sell" her property at an excessive price to the government. Under this approach, she would first convince the legislature to take the property and then she would convince the trier of fact to award her excessive compensation for the property taken. As this suggests, an owner using this "just compensation sale" approach would need to obtain favorable decisions from two branches of government, a decision to take the property by the legislative or executive branch and a decision to overcompensate the owner by the judicial branch. In contrast, an owner using the direct sale approach would need to obtain a favorable decision from only one branch.

It seems extremely unlikely that a property owner would have more success with the two-branch approach than with the one. If the property owner

212. *See* Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 260 (1897) (Brewer, J., dissenting) (noting that jury awarded the railroad $1 as just compensation for the taking of an easement across its land, when adjacent property owners received $5000 as compensation for the taking of a similar interest).

213. *Cf.* Kenneth H. Young, *New Decisions in Litigation*, *in* 1992 ZONING & PLAN. L. HANDBOOK 21, 43 (Kenneth H. Young ed.) (noting a decision that ordered destruction without compensation of a $370,000 private residence built in knowing violation of a town's zoning laws).

214. *See* Thompson, *supra* note 148, at 142.

has sufficient political power to convince the legislature to take the property even though such action is not in society's best interest, the same political leverage should also enable her to obtain a higher price for the property from the legislature than she would receive from an impartial trier of fact. As a result, while a broader scope to the compensation requirement would provide an alternative approach by which individuals could attempt to sell their property to the government at an excessive price, the availability of this alternative is not likely to have any real effect on an owner's chance to overcharge the government for her property.

V. CONCLUSION: CONFUSION OVER COMPENSATION

In addressing the issue of how much compensation is just over the years, the Court has vacillated between a realistic award that is intended to indemnify the former owner fully for the loss suffered, and a less generous award that is intended to limit, as much as reasonably possible, the government's obligation to pay. The central difficulty for a practitioner in the area is that the Court has never overruled expressly its inconsistent decisions. Thus, even today, when the Court's most recent decisions seem to prefer the less generous measure of compensation,[215] the more generous standards reflected in some of the Court's earlier decisions[216] remain good law, and may legitimately be applied by a court, if it should choose to do so.

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. Those who trust the legislature with this task will manipulate precedent, as necessary, to establish a less generous measure of compensation, and a narrower scope to the Takings Clause, as Justice Brennan did in *Penn Central Transportation Co.*[217] to permit the legislature to accomplish as much as it can for society with its limited resources.[218] On the other hand, those who distrust the legislature will manipulate precedent, as necessary, to establish a more generous measure of

215. *See* Duncanville Landfill, 469 U.S. 24 (1984); Lutheran Synod, 441 U.S. 506 (1979); United States v. Fuller, 409 U.S. 488 (1973). *But see* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973).

216. *See, e.g.*, Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. General Motors Corp., 323 U.S. 373 (1945); Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).

217. 438 U.S. 104 (1978). For a general discussion of the Court's misuse of the early takings jurisprudence, see Lunney, *supra* note 1, at 1927-32.

218. Indeed, the sole justification for continuing to enforce the compensation requirement from this perspective would be that a refusal to enforce such a clear provision of the Constitution would reveal to a greater degree than is comfortable the Court's political nature.

compensation, and a broader scope to the Takings Clause, as Justice Scalia did in *Lucas v. South Carolina Coastal Council*,[219] in order to limit the legislature's discretion to force "some people alone to bear public burdens."

The inclusion of the Just Compensation Clause in the Bill of Rights reflects a measured approach between the extremes of absolute trust or distrust. It reflects the recognition that, while we can generally trust the legislature to deal appropriately with property rights, we do not trust the legislature with complete control over our property under every circumstance. Under certain circumstances, we have good reason to suspect that, if left to its own devices, the legislature would make systematic mistakes in its decisions with respect to property.

Analysis of the legislative process suggests that competition between the very many and the very few with respect to property is the principal circumstance that would, if unchecked, lead to such systematic mistakes. Under the majoritarian model, the majority-driven legislature is likely to give inadequate weight to the interests of the minority scapegoat. As a result, a majority-driven legislature will systematically fail to compensate the scapegoat, even when such compensation is appropriate, and will systematically act to burden the scapegoat for the benefit of the majority, even when such action is not desirable. Under the interest group model, on the other hand, the minority group is likely to have disproportionate influence on the legislature's decision. As a result, an interest group-driven legislature will systematically fail to act to burden the minority group for the benefit of the majority, even when such action would have been desirable.

To make the Just Compensation Clause an effective tool to redress the possibility of these systematic mistakes, courts should generally find a taking whenever the government has taken the property rights of the very few to benefit the very many, and should award a measure of compensation that realistically ensures that the former owner receives a "full and exact equivalent" for the taken property.

219. As Justice Stevens correctly pointed out in dissent, Justice Scalia pieced his "total taking" rule together from dicta in a few cases, but ignored the plain import of the holding of every taking case decided by the Court since the 1962 decision of Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2918-19 (1992) (Stevens, J., dissenting).