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Raisins and Resilience: Elaborating Home's Compensation Analysis with an Eye to Coastal Climate Change Adaptation

Joshua Ulan Galperin

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The State of New Jersey, the Borough of Harvey Cedars, and the United States Army Corps of Engineers were all preparing for an event like Hurricane Sandy years before the 2012 super-storm made landfall along the Mid-Atlantic coast.[1] *The governments began, for instance, a major dune restoration project in 2005 in order to protect the New Jersey coast from massive storm surges that could destroy homes and businesses.*[2] *To carry out the effort, the local governments sought to purchase the right to build along the seaward portion of property owners' land, and would then construct roughly twenty-foot-high, thirty-foot-wide dunes.*[3] *If the government and the landowner could not agree on a price or the landowner refused to sell, the government would acquire the necessary strip of property using eminent domain: the right of government to take private property for public use as long as it offers just compensation.*[4]

This Article is about the proper way to calculate just compensation when government partially takes private property for a use that provides a degree of benefit to the remaining property.

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* Clinical Director and Lecturer in Law at Yale Law School, lecturer and Environmental Law and Policy Program Director at the Yale School of Forestry and Environmental Studies. I would like to first thank Connie Vogelmann, who helped me with the early research for this article in 2013, even before I knew what I was going to write about. Thanks to Doug Kysar, Zaheer Tajani, and Chris Halfnight for their critical assistance on later versions, when I just barely knew what I was writing about. Thanks to Lauren Tarpey and the staff of the Stanford Environmental Law Journal for making sure that the rest of the world would understand what I wrote about. Thanks also to my wife Sara Kuebbing, a better and more prolific academic than I. I am proud that at roughly 20,000 words, this short article is only 5,000 words shorter than Sara's entire academic canon of 20 articles.

1. *See, e.g.*, Borough of Harvey Cedars v. Karan, 70 A.3d 524, 527 (N.J. 2013).
2. *Id.* at 527.
3. *Id.*
4. *Id.* at 528.

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I. INTRODUCTION

A. *The Importance of Climate Change Resilience and the Option of Eminent Domain*

Coastal climate change adaptation strategies like those in New Jersey, which assess and then respond to all types of climate vulnerabilities, are critical. The United States coasts are home to more than 164 million people, more than 50% of the country's population.[5] These areas support "66 million jobs and $3.4 trillion

5. Susanne C. Moser et al., *Ch. 25: Coastal Zone Development and Ecosystems*, *in* CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT, 579, 581 (U.S. Global Change Research Program ed., May 2014),

in wages."[6] In the aggregate, coastal communities "generate 58% of the national gross domestic product"[7] and contribute $6.7 trillion to the United States economy.[8] But this concentration of people, jobs, wealth, and economic energy is threatened by climate change.

The risk is particularly acute given historical development patterns. Shoreline developments have "frequently occurred without adequate regard for coastal hazards."[9] Sea levels rose at an average of 1.7 millimeters per year through the 20th century, and this rate seems to be accelerating.[10] Other studies estimate "global sea levels rose approximately eight inches [203 millimeters], despite stable levels over the previous two millennia."[11] Some research estimates that global sea levels could rise by a meter or more over the next hundred years.[12] And sea level rise is likely to continue for many centuries.[13]

This threat has not escaped public notice. Sea level rise has resulted in a "national conversation about what coastal developments should be permitted and how they should be built."[14] There have been various attempts to chronicle local, regional, and national adaptation activities.[15] "Hard" protections, such as sea walls, can exacerbate erosion and coast loss, resulting in "negative effects on coastal ecosystems, undermining the attractiveness of beach tourism."[16] Alternatively, "soft" coastal

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http://nca2014.globalchange.gov/system/files_force/downloads/high/NCA3_Climate_Change_Impacts_in_the_United%20States_ HighRes.pdf.

6. *Id.* at 589

7. *Id.* at 581.

8. NAT'L OCEANIC & ATMOSPHERIC ADMIN. OFFICE OF OCEAN & COASTAL RES. MGMT, ADAPTING TO CLIMATE CHANGE: A PLANNING GUIDE FOR STATE COASTAL MANAGERS 5 (2010), https://coast.noaa.gov/digitalcoast/_/pdf/adaptationguide.pdf.

9. Moser et al., *supra* note 5, at 589.

10. *See, e.g.*, Robert J. Nicholls et al., *Ch. 6: Coastal Systems and Low-lying Areas, in* FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE: CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, 317, 317 (2007), http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter6.pdf.

11. Lara D. Guercio, *Climate Change Adaptation and Coastal Property Rights: A Massachusetts Case Study*, 40 B.C. ENVTL. AFF. L. REV. 349, 355 (2013) (alteration in original).

12. *E.g.*, *id.* at 356.

13. Nicholls et al., *supra* note 10, at 317.

14. Edna Sussman et al., *Climate Change Adaptation: Fostering Progress Through Law and Regulation*, 18 N.Y.U. ENVTL. L.J. 55, 70-71 (2010).

15. *See, e.g.*, Moser et al., *supra* note 5, at 678.

16. *Id.* at 589.

adaptation strategies, such as dune renourishment, are less expensive but still effective, which helps explain why they are the most common method of coastline protection in the United States.[17] "Soft" adaptation "is commonly employed along ocean shores—generally at public expense."[18] In some cases dunes and other soft projects might not intrude on private property. In most cases, however, coastal adaptation projects will require government possession of strips of private property on the seaward edge of coastal lots, which may require the use of eminent domain.[19]

Despite the clear and present threat of climate change—or, at the very least, intense and destructive coastal storms—there is perhaps a feeling among some coastal residents that it is not climate change, but government-driven coastal resilience projects, that are the real threat to their property.

Naturally, government adaptation programs have spawned litigation, from Washington to Texas to Florida to New Jersey. The litigation addresses coastal sewage systems, integration of adaptation into utility development plans, nutrient concerns in changing water conditions, and insurance considerations, to name a few.[20] In New Jersey alone, the Department of Environmental Protection estimates needing 4,200 easements for public projects along the coast, and, though it has acquired all but 366, 239 owners refuse to sell the needed portion of their property.[21]

However, constitutional protection of private property is not absolute. The government may take private property, through eminent domain, to serve the public good as long as the government also offers the property owner just compensation.[22] Accordingly, one must ask: what is "just" in the case of a partial

17. T.J. Campbell & L. Benedet, *Beach Nourishment Magnitudes and Trends in the U.S.*, SI 39 J. OF COASTAL RESEARCH (SPECIAL ISSUE) 57, 63 (2006), *available at* http://www.cerf-jcr.org/images/stories/09_tom.pdf.

18. James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. REV. 1279, 1308 (1998).

19. *See, e.g.*, *Property Owners Throw Cold Water on N.J. Shore Protective Dunes Plan*, W. VA. PUB. BROADCASTING (May 26, 2015, 3:47 PM), http://wvpublic.org/post/property-owners-throw-cold-water-nj-shore-protective-dunes-plan.

20. Jacqueline Peel & Hari M. Osofsky, *Sue to Adapt?*, 99 MINN. L. REV. 2177, 2192 (2015).

21. Kevin McArdle, *Want Dunes to Protect the Shore? New Jersey Facing Down 239 'Hardcore' Holdouts*, N.J.101.5 (Oct. 5, 2015), http://nj1015.com/want-dunes-to-protect-the-shore-nj-facing-down-240-hardcore-holdouts/.

22. *E.g.*, Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924) ("The power of eminent domain is an attribute of sovereignty, and inheres in every independent state.").

taking, where the government takes part of a property, but leaves a "remainder" in private hands? How much should the government compensate for the taken portion? How does the government account for damages to the remaining portion? What do they do when the remaining portion benefits from the taking? What is just when a coastal resilience project takes a small portion of property to construct a dune, and the dune blocks a beautiful ocean view but also saves a beachfront home from complete destruction at the hands of an enormous storm? This was the issue the New Jersey Supreme Court faced in *Borough of Harvey Cedars v. Karan*.[23] The New Jersey court issued a sound and comprehensive answer, focusing on market value of the remainder, which is a model for other courts.

B. *Judicial Convolution*

The United States Supreme Court, on the other hand, lacks a clear rule for this benefit-offset problem.[24] The Court's 2015 case *Horne v. Department of Agriculture* revolved around raisin farmers who, by federal regulation, were required to turn a portion of their crop over to the federal government in order to lower supply and raise raisin prices nationwide.[25] When debating the correct method for setting compensation, justices were misdirected by their complex precedent and poorly defined standards. *Horne* demonstrates that the Court has been bogged down in jargon related to the scope of benefits, including whether they are "general" or "special"[26] and how to account for those benefits that accrue to the general public, the whole neighborhood, or just to a single landowner, for example.[27] This is not the correct framework for dealing with the benefit-offset problem, and it can lead courts to set unjust compensation that ignores real benefits that impact a property's market value.

Because adaptation projects protect private property, they often lead to landowner benefits. Therefore, coastal governments need articulate guidance from the Court in order to implement appropriate adaptation measures. This Article argues that the

23. 70 A.3d 524 (N.J. 2013).

24. The phrase "benefit-offset problem" is borrowed from William Fischel. *See* WILLIAM FISCHEL, REGULATORY TAKINGS LAW, ECONOMICS, POLITICS (1998).

25. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2424 (2015).

26. *Id.* at 2432.

27. *Id.* at 2434-35 (Breyer, J., dissenting).

United States Supreme Court should move beyond the impenetrable nomenclature that it has used for more than a century to assess compensation in cases of so-called "partial takings," and should instead adopt a simple rule, setting compensation that accounts for the market value of the remainder, and reducing compensation by any calculable and certain increase in that value.

As governments more frequently acquire private property in coastal resilience efforts, often through eminent domain, courts will need to confront this partial-takings issue head on. Therefore, this Article seeks to coalesce a doctrine that can address the benefit-offset problem. While fair market value is the standard measure of just compensation, in an effort to solve the problem, some courts have created a dichotomy of "special" and "general" benefits—those that are unique to a single property versus those that apply to all properties in the area. But this dichotomy is unhelpful and courts have misapplied their own distinction or simply treated it as a *post hoc* justification rather than analytical tool.[28] As this Article explains, the distinction is subjective, has no basis in the Constitution, and, ultimately, is not a good solution to the benefit-offset problem

C. *A Proposed Solution*

This Article also seeks to rectify apparent discrepancies among leading cases that address the benefit-offset problem. In over a century of case law, courts have sometimes used benefits to offset compensation and other times have refused. This Article argues that the consistent analytical rule applied in all these cases is not the special-general distinction, that is, the breadth of the benefit, but rather whether the benefit has a certain and presently calculable impact on the market value of the property. If the impact is certain and calculable, then courts must offset the increase against compensation.

The following Section offers a primer on takings law. Section III goes on to discuss the scope of the benefit-offset problem by focusing on the antiquated and unhelpful distinction between "special" and "general" benefits. Section IV reviews Supreme Court doctrine around benefit calculations and concludes that the Court has implicitly used a fair market value analysis even when it

28. *See infra* Section IV.B.

claims to use a special-general benefit rule. Section V analyzes the New Jersey Supreme Court's decision in *Harvey Cedars v. Karan* and offers it as a sound and eloquent statement of the rule that the United States Supreme Court should adopt to set compensation for partial takings. Section VI revisits *Horne* and describes how the Chief Justice's misinterpretation of the Court's precedent nevertheless resulted in the correct disposition. Section VII seeks to articulate a constitutionally sound and practically administrable doctrine that rectifies *Horne* with the existing precedent.

II. A VERY BRIEF PRIMER ON TAKINGS LAW

It is important briefly to cover the concept of takings before exploring the benefit-offset problem and the nuances of just compensation.

The government can take private property, whether directly through the power of eminent domain,[29] or whether inadvertently, through a regulatory program.[30] The Fifth Amendment to the United States Constitution, however, places certain limitations on that allowance.[31] First, the Takings Clauses of the Fifth Amendment explicitly requires that the government can only take property for "public use."[32] Generally speaking, any purpose that promotes the public health, safety, welfare, or morals is a valid public use.[33] Thus, while a government "may not take the property of *A* for the sole purpose of transferring it to another private party *B*," "a [s]tate may transfer property from one private party to another if future use by the public is the purpose of the taking" or if the purpose of the transfer is broad economic development.[34]

The second limitation on the government's power to take

29. *E.g.*, Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924) ("The power of eminent domain is an attribute of sovereignty, and inheres in every independent state.").

30. *E.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 412-13 (1922).

31. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

32. *Id*; *see also, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994) (noting that the Fifth Amendment only allows takings for public use); 26 AM. JUR. 2d *Eminent Domain* § 3 (2015) (explaining that the Fifth Amendment is not a prohibition on interfering with property, but a constraint on government actions by requiring that eminent domain is only used for a public use).

33. Kelo v. City of New London, 545 U.S. 469, 481 (2005) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." (quoting Berman v. Parker, 348 U.S. 26, 33 (1954))).

34. *Id.* at 477-79 (internal quotation marks omitted).

private property is that the government must give the property owner (or prior property owner, as the case may be) "just compensation."[35] Determining what amount of compensation is just is the responsibility of the judicial branch.[36] The remainder of this Article addresses one aspect of judicial calculation of just compensation. But, in broad terms, the constitutional guarantee of just compensation assures that the government will put the property owner "in the same position monetarily as he would have occupied if his property had not been taken."[37] At the same time, the courts must assure that compensation is not only just to the individual whose property was taken, but also to the public at large.[38] After all, it is the public, through their tax dollars, that foots the compensation bill. To best balance these two competing components of just compensation, the Supreme Court has frequently held that the market value of property at the time of the taking is the best measure for compensation.[39]

This Article focuses on when and how courts deviate from the market value rule to account for any benefits to the remaining property that an owner may reap from a government project or regulation, and whether a distinction between general and special benefits should be part of that accounting.

III. GENERAL VERSUS SPECIAL BENEFITS

Because the government can only take property for the purposes of public use, it is natural that whenever the government takes property, there will be some resulting benefit to the owner or former owner. The quantity and quality of that benefit, however, can vary dramatically. The distinction between "general" and "special" benefits arises from this inevitable reality.[40]

35. *E.g.*, Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473 (1973); 3 NICHOLS ON EMINENT DOMAIN § 8.01 (3d ed. 2015).

36. *E.g.*, United States v. New River Collieries Co., 262 U.S. 341, 343-44 (1923) ("The ascertainment of compensation is a judicial function, and no power exists in any other department of government to declare what the compensation shall be or to prescribe any binding rule in that regard." (citing Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893))); 2 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 683 (3d ed. 1909); 3 NICHOLS, *supra* note 35, § 8.21.

37. *Almota Farmers*, 409 U.S. at 474 (quoting United States v. Reynolds, 379 U.S. 14, 16 (1970)).

38. *See* Bauman v. Ross, 167 U.S. 548, 574 (1897); Searl v. Sch. Dist. No. 2, 133 U.S. 553, 562 (1890).

39. *Almota Farmers*, 409 U.S. at 474 (citing New York v. Sage, 239 U.S. 57, 61 (1915)).

40. *E.g.*, *Bauman*, 167 U.S. at 562; E.H. Schopflocher, Annotation, *Deduction of Benefits*

Unfortunately, the exact definitions of "general" and "special" are quite unclear,[41] and reliance on this distinction can lead to unjust calculations of compensation. Although this Article argues that courts should dispose of the general-special dichotomy, it is necessary to have a working explanation of the terms in order to understand the problems that they cause.

When the government effects a partial taking, a general benefit is a benefit to the remaining property that is similar to the benefits that other properties in the area will receive from the project or regulatory scheme.[42] By some definitions, a benefit that is uncertain, speculative, or unquantifiable is also a general benefit.[43] Conversely, a special benefit is a benefit that is unique to the targeted property, does not apply to other properties, and in some applications, is reasonably certain to occur and reasonably calculable.[44]

Highway construction serves as an excellent example of both general and special benefits. Imagine that the state department of transportation (DOT) uses eminent domain to build a new highway across a farmer's land. In calculating just compensation, the DOT may argue that the highway will provide faster access to the nearest town. Under the standard definition of the special-general distinction, which focuses on the breath of the benefit, quicker highway access is a general benefit. To begin with, the farmer and her neighbors will now all have quicker highway access. This is not unique to the farmer's property. Although the farmer may live immediately next to the new onramp and therefore have the greatest benefit in terms of access, her neighbors will receive the same *kind* of benefit even if they do not receive exactly the same *quantity* of benefit. That is, the entire area will have quicker access even if the degree of that benefit varies somewhat based on proximity to the new highway and ramp.

In some cases, courts use the term "general benefits" to describe benefits that are uncertain or unquantifiable. With respect to this speculation-oriented definition, consider the following example. DOT might argue that the highway case will

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in Determining Compensation or Damages in Eminent Domain, 145 A.L.R. FED. 7 (1945).

41. *E.g.*, Borough of Harvey Cedars v. Karan, 70 A.3d 524, 536 (N.J. 2013).

42. 3 NICHOLS, *supra* note 35, § 8A.02.

43. *E.g.*, Mangles v. Hudson Cty. Bd. of Chosen Freeholders, 25 A. 322, 323 (N.J. 1892).

44. 3 NICHOLS, *supra* note 35, § 8A.02.

bring new people into the town and increase traffic through local business districts, which could result in greater property values. DOT may well be correct in its prediction. Nevertheless, this benefit is speculative because there is hardly certainty that more traffic will increase property values. Moreover, even if DOT's prediction is accurate, assessing a potential future increase in property values resulting from more traffic is not easily susceptible to present calculation.

The same example can be used to illustrate a special benefit. Suppose that to construct the highway DOT will drain an inundated portion of the farmer's land. When it drains the wetlands, the farmer will have more arable land and can grow more crops. This benefit is unique to the farmer's property. While the entire community benefits from the highway generally, only the farmer will have new cropland available and this benefit would therefore fall under the standard definition of "special benefit." With respect to the speculation-oriented definition, there is no speculation needed to recognize the individualized advantage here: when DOT drains the land, it will be available for planting without respect to contingencies such as highway usage or the effect of highway usage on the local economy. Moreover, while it may not be easy to calculate the value of the new cropland, it is certainly quantifiable in a way that benefits from new traffic are not.

The distinction between general and special benefits is critical because many courts will offset special benefits when calculating just compensation but will not offset general benefits.[45] The distinction between the types of benefits and the distinct approaches that different courts take, while susceptible to manipulation and confusion, do have a logical basis. Just compensation must be "just" to both the property owner and the public.[46] Therefore, the rationale for subtracting special benefits from compensation is to prevent a property owner from receiving a windfall that would put her in a better place than she was in

45. *E.g.*, Schopflocher, *supra* note 40, at Part V.a.

46. Bauman v. Ross, 167 U.S. 548, 574 (1897) ("The just compensation required by the constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public."); LEWIS, *supra* note 36, § 684; 29A C.J.S. *Eminent Domain* § 134 (2015); Schopflocher, *supra* note 40.

before the taking.[47]

Assume the farmer's taken property is worth $60,000 and she will earn a net profit of $20,000 from the newly arable land. Without considering special benefits, her total compensation would be $60,000, but that leaves the farmer, and the farmer alone (not the public at large) $20,000 richer than before the government project. She is therefore in a better position than she would have been without the taking, and the government payment, at taxpayer expense, is unjust. Were the government to subtract the $20,000 benefit, the farmer would only receive $40,000 as compensation, putting her in exactly the same financial position she occupied before DOT took her land.

Conversely, if the government subtracts general benefits, the result might be unjust to the property owner. Revisiting the new highway example, DOT might calculate that each town resident will receive a $500 benefit from the added traffic and faster transportation. If the farmer is paid $60,000 and that amount is reduced by the general benefit of $500, then the farmer will receive $59,500. Other citizens will receive $500 in benefits, which will leave the farmer $500 worse off than she would have been had the taking not occurred. This discrepancy demonstrates the underlying logic of the practice to not offset general benefits, and courts have long held that an individual property owner should not bear the burdens of a public project "which, in all fairness and justice, should be borne by the public as a whole."[48]

While there is an obvious logical appeal to the distinction between general and special benefits, this distinction and the consequential impacts on compensation are not constitutional requirements.[49] Rather, the Constitution demands only "just compensation" and the Court has refused to read that requirement as weighing—one way or the other—on the benefit-offset problem.[50]

Indeed, the special-general distinction itself, and any implied prohibition on offsetting benefits, may undermine the justice of compensation. The special-general distinction presents at least two practical difficulties. First, the distinction between general and special benefits is inconsistent and frequently muddled to the

47. 3 NICHOLS, *supra* note 35, § 8.06; Schopflocher, *supra* note 40, at Part V.a.

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

49. *Bauman*, 167 U.S. at 584.

50. *Id.*

point where "the difference between the two is difficult to ascertain even for trained legal minds. The distinction is further complicated by the fact that many jurisdictions disagree as to what constitutes a special benefit."[51] Second, the "shadowy"[52] definitions and subjectivity of the distinction create a great deal of flexibility that can undermine truly just compensation and confidence in the fairness of eminent domain more broadly.

In the coastal context, the subjectivity of the special-general distinction is obvious. If a dune restoration project protects the coastline from future storm surges, is that protection general because it provides substantial protections to homes further from the coast? Or is the coastline protection special because the first row of homeowners is protected from complete destruction while others are only protected from storm damage? If the dunes system stretches past 75 houses, is the benefit general because 75 property owners are benefited or special because only 75 of 75,000 residents are benefited?

The Supreme Court's handling of the benefit-offset problem is complex. As the following section illustrates, what the Court says is often different from what it does. On the one hand the Court sometimes speaks about the special-general distinction as if it is a controlling rule. On the other hand, the Court's underlying analysis, which is much more consistent, shows that the degree of certainty and calculability of a benefit is the truly controlling factor.

IV. HOW HAS THE SUPREME COURT DEALT WITH THE BENEFIT-OFFSET PROBLEM?

The Supreme Court precedent regarding the benefit-offset problem begins with the rule that when property is taken, the former "owner is to be put in the same position monetarily as he would have occupied if his property had not been taken."[53] Early on, the Court settled on fair market value as the mechanism to give effect to this command.[54] In the case of a partial taking, the Court

51. 3 NICHOLS, *supra* note 35, § 8A.02 (citing State v. Gatson, 617 S.W.2d 80 (Mo. Ct. App. 1981) (internal citations omitted)).

52. State *ex rel.* State Highway Comm'n v. Koziatek., 639 S.W.2d 86, 88 (Mo. Ct. App. 1982) ("In practical application, the distinction between special and general benefits is shadowy at best.").

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

54. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474

has had a more difficult time articulating a simple rule because of its adherence to the special-general benefit terminology and because a partial taking creates opportunity for benefits to accrue to a remainder.[55]

The following Section demonstrates that despite the inconsistent vocabulary and the confusion it causes with decisionmakers and lower courts, the Supreme Court's practice is, in fact, centered on a market value approach, even in the case of partial takings.[56] This Section uses the existing case law to justify the following rule: if a government project or regulation produces a benefit that is reflected in a higher market value of the remainder, then there is no net harm to the remainder so no compensation is owed for damages. The marginal benefit to the remainder may be offset against compensation for the part of the property that the government actually took. Courts should not rely on the unhelpful distinction between special and general benefits even though the Supreme Court has frequently used those terms. Rather than relying strictly on the general-special distinction, a closer analysis of the Court's precedent demonstrates that it has used benefit-influenced market value to measure compensation when the benefits are reasonably certain and capable of present estimation.[57] Put differently, in actual practice the Court relies on fair market value for determining if there are damages to the remainder, if there are benefits to the remainder, and if a benefit to the remainder can be subtracted from compensation for the part taken. Benefits that might accrue to a remainder are only relevant if they impact fair market value. Distant, unlikely, speculative, or unquantifiable benefits are not likely to impact fair market value and are therefore not relevant to compensation.

This balance of this Section explores the use and definition of fair market value and clarifies the long history of the special-general distinction that has dominated the benefit-offset

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(1973); *Reynolds*, 397 U.S. at 16; City of New York v. Sage, 239 U.S. 57, 61 (1933).

55. Of course, if the entire property is taken, the "landowner" is no longer really a landowner and therefore cannot receive a market value benefit from the taking.

56. *See, e.g., Almota Farmers*, 409 U.S. at 474; United States v. Miller, 317 U.S. 369, 376 (1943); Reichelderfer v. Quinn, 287 U.S. 315, 323 (1932); United States v. River Rouge Improvement Co., 269 U.S. 411, 415-16 (1926); McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 365-66 (1918); Village of Norwood v. Baker, 172 U.S. 269, 290 (1898); Bauman v. Ross, 167 U.S. 548, 557-58 (1897); Monangahela Navigation Co. v. United States, 148 U.S., 312, 326 (1893); Garrison v. City of New York, 88 U.S. 196, 204 (1874).

57. *E.g., Bauman*, 167 U.S. at 584.

conversation and long been the source of confusion.

A. *Calculating Fair Market Value*

The Fifth Amendment of the Constitution requires just compensation when the government takes an individual's property;[58] it does not *require* fair market value, but courts have identified fair market value as the best means of achieving justice.[59] As *Nichols on Eminent Domain* explains, market value "is not an end in itself, but merely a means to an end; the ultimate object being the ascertainment of 'just compensation.'"[60] Fair market value may not always give rise to perfect compensation, but it is a "relatively objective working rule."[61] The *Nichols* point is also a reminder that courts should not forget the constitutional requirements that give rise to the use of fair market value as the central test for just compensation.

The Court defines market value as the price a "willing buyer would pay in cash to a willing seller at the time of the taking."[62] Market value is not necessarily the same as the owner's investment in the property because the owner may have paid too much or too little for it.[63] Likewise, the property's value may have declined or increased since the owner's purchase and subsequent investments.[64] In other words, "[i]t is the property and not the cost of it that is safeguarded by state and Federal Constitutions."[65] Moreover, the fair market value does not depend on the current or

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58. U.S. CONST. amend. V.

59. *E.g.*, *Miller*, 317 U.S. at 373-74. Although it is well settled that market value is the correct approach for setting just compensation, United States v. Reynolds, 397 U.S. 14, 16 (1970), there are various arguments for alternative measures, and arriving at market value is not always a simple process. Some commentators have argued for a restitution standard that compensates at a level equal to the benefit that the taker receives. Others have argued for an indemnification standard that compensates at a level equaling the loss to the owner. *E.g.*, DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 172-73 (2002). Additionally, appraisers can use any number of standards for determining the actual market value of property, including sales history, comparable sales, capitalization of rental value, and rebuilding costs. *Id.* at 170-71.

60. 4 NICHOLS, *supra* note 35, § 12.02.

61. United States v. 564.54 Acres of Land, 441 U.S 506, 511 (1979) (citing *Miller*, 317 U.S. at 374; United States v. Cors, 337 U.S. 325, 332 (1949)).

62. *564.54 Acres of Land*, 441 U.S. at 506.

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

64. *Id.*

65. *Id.* (citing Simpson v. Sheppard (*Minnesota Rate Cases*), 230 U.S. 352, 454 (1913)).

past use of property, but on "all the uses for which it is suitable."[66] Market value is not measured by loss of profits, goodwill, or the expense of relocation.[67] It is likewise not measured by the cost of substitute property.[68]

Much of this definition focuses on what market value is not. Fair market value *does* consider all the transferable uses (as opposed to owner-specific uses) for which the property is generally suited.[69] An assessment of fair market value could therefore consider the highest and best use of a property, existing restrictions on use of the property (for example, zoning restrictions), the amount of time it would take to sell the property, recent good faith sales of the property, recent good faith sales of similar properties, the value of improvements to the property, and the productive value of property.[70]

The fair market value test for just compensation dates back to the Supreme Court's earliest cases.[71] Courts have long referred to the touchstone of just compensation as "value," "market value," "fair market value," and "market value fairly determined."[72] Justice Owen Roberts once added that "the term 'fair' hardly adds anything to the phrase 'market value.'"[73] Regardless of the exact phrasing, the Fifth Amendment assures that "no private property shall be appropriated to pubic uses unless a full and exact equivalent for it be returned to the owner" and the Supreme Court has consistently held that the "equivalent is the market value of the property."[74]

The Court identified early on that the Constitution demands that compensation not be "just" "merely to the individual whose property is taken, but to the public which is to pay for it."[75] Where the government compensates a property owner below market value, the compensation may be unjust to the property owner.[76]

66. *Id.*

67. United States v. Petty Motor Co., 327 U.S. 372, 377-78 (1946).

68. United States v. 50 Acres of Land, 469 U.S. 24, 26 (1984).

69. 4 NICHOLS, *supra* note 35, § 12.02.

70. *Id.*

71. *See, e.g.*, Searl v. Sch. Dist. No. 2, 133 U.S. 553, 564 (1890).

72. United States v. Miller, 317 U.S. 369, 374 (1943).

73. *Id.*

74. Olson v. United States, 292 U.S. 254, 255 (1934) (citing Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893)).

75. Garrison v. City of New York, 88 U.S. 196, 204 (1874).

76. Bauman v. Ross, 167 U.S. 548, 574 (1897); *Searl*, 133 U.S. at 562.

Where the government compensates the property owner above market value, the compensation may be unjust to the public that, through its tax dollars, must pay for the compensation.[77] Whether serving as a rule of thumb for objective judicial decision-making or as a safeguard of justice, fair market value has been critical to the Court's effectuation of the Compensation Clause.[78]

Determining market value is far from a science, requiring both judgment and math,[79] and relying on market demand, economic development, permitted uses, and other considerations that provide a quantifiable and reasonably certain view of property value.[80] Determining fair market value, again, is not the goal of the inquiry; it is merely a means of quantifying just compensation.[81] Throughout the Court's jurisprudence, fair market value assessments have taken account of any real, actual, certain, reasonably probable, calculable, quantitative benefits that accrue to property as a result of the taking.[82] These assessments have ignored any uncertain, conjectural, speculative, contingent, merely supposed benefits that are either incapable of estimation or incalculable.[83] Notwithstanding its use of the terms special and general, the Court has not ignored benefits simply because they are widespread.

B. *Special and General Benefits Are Mere Descriptors, Not a Test of Compensability*

The Supreme Court has been dealing with market value as a measure of just compensation for nearly 150 years.[84] Over that time it has developed a robust, if not singularly articulated, doctrine. One aspect of that doctrine that suffers from confusion is the role of the terms "special benefit" and "general benefit." This Section is an effort to clarify the history of those terms at the Supreme Court. In short, the distinction between "special" and

77. *See Bauman*, 167 U.S. at 574; *Searl*, 133 U.S. at 562.

78. *See, e.g.*, United States v. Cors, 337 U.S. 325, 332 (1949) ("The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value.").

79. Standard Oil Co. of N.J. v. S. Pac. Co., 268 U.S. 146, 156 (1925).

80. *See, e.g.*, Dep't of Transp. & Dev. v. Hammons, 550 So. 2d 767, 771 (La. Ct. App. 1989).

81. 4 NICHOLS, *supra* note 35, § 12.02.

82. *See infra* Section IV.B.

83. *Id.*

84. *E.g.*, Garrison v. City of New York, 88 U.S. 196 (1874).

"general" benefit is irrelevant, having largely been applied as a *post hoc*, shorthand descriptor of benefits after the Court has determined whether to offset them. As the discussion immediately below illustrates, the Court began its treatment of the benefit-offset problem by focusing solely on the need to be just, without regard to the breadth of the benefit. It then developed a more precise focus on market value. In time it introduced the terms "special" and "general," but never with reliance on the scope of the benefit. Certainty and calculability, not generality, is the centerpiece of the Court's doctrine.

The idea that a widespread benefit is "general" and cannot be offset is not founded in the earliest benefit-offset cases. Although not a Supreme Court decision, one of the earliest appearances of the benefit-offset problem is captured in a D.C. Circuit Court opinion from 1829.[85] In this case, there was a partial taking for the purposes of building a canal.[86] The trial court instructed the jury to consider the "actual benefit" that would accrue to the remaining property by virtue of its contiguity with the new canal.[87] "If the jury should be satisfied that the individual would, by the proposed public work, receive a benefit to the full value of the property taken," then it is right to consider that benefit in offsetting compensation.[88] The district court, therefore, began a line of reasoning that relied on the actuality and certainty of a benefit. The decision was clearly not based on the breadth of the benefit because the canal would undoubtedly have had a widespread impact on many properties along its path.

Absorbing this reasoning into the Supreme Court's case law, the 1874 case *Garrison v. City of New York* similarly accepted that a court could offset certain benefits to a remainder even in the case of a benefit as common as a road improvement.[89] It was here that the Court recognized the constitutional problem of ignoring genuine benefits: compensation must be "just, not merely to the individual whose property is taken, but to the public which is to pay for it."[90] Failure to consider any benefits that, in fact, accrue to the property means that the public will subsidize a windfall to the

85. Chesapeake & Ohio Canal Co. v. Key, 5 F. Cas. 563 (D.C. Cir. 1829).
86. *Id.* at 563.
87. *Id.* at 564.
88. *Id.*
89. *Garrison*, 88 U.S. at 198.
90. *Id.* at 204.

owner.

In the late nineteenth century, several cases demonstrated a focus on certainty over commonality in setting compensation, even though they did not directly address benefit offsetting in partial takings. In the 1890 case *Searl v. School District No. 2*, the Court dealt with a property on which a school building had been constructed.[91] The Court noted in dicta that it is easy to determine the value of the building distinct from the underlying property,[92] and commented approvingly that when the government began to consider compensation, "the inquiry was limited to such compensation as was just, and did not embrace remote or speculative damages."[93] Here, the Court dealt not with speculative benefits, but instead with speculative damages from the taking.[94] Despite the fact that damages are the opposite of benefits, *Searl* highlights the Court's early and continuing discomfort with speculation in the realm of just compensation for partial takings.

In 1893 the Court addressed lands taken for a park in *Shoemaker v. United States* and looked specifically at the certainty of benefits arising from the condemnation.[95] At the time of condemnation for a new city park, a set of commissioners was appointed to set compensation.[96] A statute instructed the commissioners to make their determination by considering the value of the lands "in the market" and "at its market value."[97] Moreover, the commissioners were to ignore "purely speculative purposes" to which the property might be put.[98] The Court approved of these instructions without comment about the breadth of the park's benefits, adding that compensation should not include "evidence of conjectural or speculative values."[99] Confronting widespread benefits for the first time—that is, the benefits associated with a new park—the Court focused not on the breadth of those benefits, but on their level of certainty.

In 1893, the same year as *Shoemaker*, the Court reversed a lower court's judgment in part because the lower court failed to consider

91. Searl v. Sch. Dist. No. 2, 133 U.S. 553 (1890).
92. *Id.* at 562.
93. *Id.* at 564.
94. *Id.*
95. Shoemaker v. United States, 147 U.S. 282, 284 (1893).
96. *Id.* at 304.
97. *Id.*
98. *Id.*
99. *Id.* at 305.

factors that were not at all speculative.[100] *Monongahela* arose when the United States exercised eminent domain to acquire a lock and dam on the Monongahela River.[101] The government assessed the value of the property, but it explicitly did not consider the value of tolls that the previous owner collected and that the government, as the new owner, could also collect.[102] The trial court accepted the government's toll-free compensation award.[103] The Supreme Court reversed, stating that the tolls do increase the value of the property, and should be included in a compensation award.[104] The tolls were easily calculable and not speculative for two reasons. First, the Court was able to review the average toll income over the past several years to get a well-informed idea of the future toll income.[105] Perhaps more importantly, the value increase from the tolls was easily calculable because it was set by Pennsylvania law.[106] As with *Searl*, *Monongahela* dealt not with offsetting benefits for a partial taking, but with factoring different values into compensation for a total taking. However, for the purposes of the present analysis, it demonstrates a continuing focus on certainty and calculability.

In dicta, *Monongahela* does express one ostensibly contrary position. While trying to distinguish the certain benefits that arise from toll collection, the Court also stated that it should not consider "any supposed benefit that the owner may recieve [sic] in common with all."[107] This is a rare mention in the Court's case law, suggesting that breadth is a relevant consideration. However, the more operative word here is "supposed," as the Court is still speaking to uncertainty and speculation.[108] Later cases demonstrate that where "common" benefits are not "supposed" but are rather benefits in fact, fair market compensation may reflect those benefits.[109]

100. Monongahela Navigation Co. v. United States, 148 U.S. 312, 329 (1893).
101. *Id.* at 312.
102. *Id.* at 313-14.
103. *Id.* at 319.
104. *Id.* at 328-29.
105. *Id.* at 318.
106. *Id.* at 329.
107. *Id.* at 326.
108. *Id.*
109. *E.g.*, United States v. River Rouge Improvement Co., 269 U.S. 411, 415-16 (1926); McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 365-66 (1918); Bauman v. Ross, 167 U.S. 548, 557-58 (1897).

Decided in 1897, *Bauman v. Ross* is the first case to address the benefit-offset problem head-on with respect to partial takings and remainders.[110] In *Bauman*, Congress (as the municipal government of the District of Columbia) began a project to improve the street layout in the District.[111] The project involved partially condemning tracts for laying roads, but leaving remainders adjacent to the newly improved roads.[112] The act authorizing the project expected that the real benefits of the road improvement would be considered in the award. The act directed that a jury, when considering compensation, "shall take into consideration the benefit [that] the purpose for which [the property] is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same."[113] The Court upheld this provision.[114]

In its analysis, the *Bauman* court carefully reviewed the laws of several states and identified a consistency in their assessments: courts would offset benefits that were "direct," "actual," "in fact," "proximate," "immediately accruing," "capable of present estimate," or capable of "reasonable computation."[115] At the same time, the Court rejected, and saw others reject, benefits that were in the "indefinite future," "contingent and speculative," or might only "arise in the future."[116] These distinctions fit perfectly with the notion that courts may reduce compensation based on a real, certain, and calculable benefit to a remainder. This is particularly true when considered in tandem with the Court's holding on the issue of the benefit-offset:

> The constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and, for the reasons and upon the authorities above stated, no such prohibition can be implied; and it is therefore within the authority of congress, in the exercise of the right of eminent domain, to direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of

110. *See Bauman*, 167 U.S. at 548.
111. *Id.* at 551.
112. *See id.* at 550-51.
113. *Id.* at 557 (first alteration in original, second alteration not in original).
114. *Id.* at 584.
115. *Id.* at 576-82.
116. *Id.* at 577, 584.

> Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken.[117]

Unfortunately, the Court here introduced the term "special benefits."[118] Already, that term had been used in other jurisdictions as an opposite of "general benefits," meaning those benefits "in common with all lands in the neighborhood"[119] or "benefits which result to the public as a whole."[120]

The Court introduced confusion that persists to this day by implying that only narrowly accruing benefits could be considered while those that were broadly applicable must be ignored. The Court had approved of offsetting the benefits of road improvements, which are distinctly widespread, relying on certainty and calculability rather than breadth, but its elevation of the term "special benefits" underlies the constricting use of these terms over the past century. For example, in an 1898 condemnation case, the Court wrote that "such assessment must be measured or limited by the special benefits accruing to it (that is, by the benefits that are not shared by the general public)."[121] In that case there is reference only to breadth and none to certainty.

Although it would not end the confusion, in 1918 the Court issued an opinion in *McCoy v. Union Elevated Rail*, which reinforced *Bauman*'s focus on certainty rather than breadth, and further paired this certainty test with the longstanding reliance on fair market value.[122] William McCoy owned a hotel in Chicago adjacent to a new elevated railroad.[123] Although the railway included two station stops in the vicinity of McCoy's hotel which were proven to have increased the value of his property and his business, McCoy

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117. *Id.* at 584.

118. *Id.*

119. *Id.* at 577 (citing Mecham v. Fitchburg R.R. Co., 4 Cush. 291, 298-99 (Mass. 1849)).

120. *Id.* at 581 (citing Comm'rs v. O'Sullivan, 17 Kan. 58, 60 (1876)).

121. Village of Norwood v. Baker, 172 U.S. 269, 294 (1898) (discussing assessments rather than just compensation, but there is no indication that the distinction would be substantially different between the two).

122. McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 364, 364-65 (1918).

123. *Id.* at 355.

argued that these benefits could not be considered when setting just compensation for the government taking of easements appurtenant to his property.[124] The jury had been instructed that "benefits" mean:

> benefits and damages to the market value [of the property], and that the term 'market value' . . . is meant the price at which the owner . . . would under ordinary circumstances surrounding the sales of his property have sold the property for, and what a person desirous as purchaser would have paid for it under the same circumstances.[125]

At the same time, the instructions told the jury that they should not consider any "general benefits" that are "common to the public at large" even though they should consider any enhancement to the "fair cash market value by reason of the construction," which is a "special benefit."[126] The instructions both promulgated the misleading general-special distinction and seemed to offer contradictory direction: that the jury should look at market value increases from the project but not increases from the project that might apply broadly.

The Supreme Court recognized this confusion and contradiction and commented that a state may permit consideration of "actual benefits-enhancements in market value-flowing directly from a public work, *although all in the neighborhood receive like advantages.*"[127] Unfortunately, while *McCoy* clearly says that there is no reason widespread benefits cannot be offset from compensation, it does not go as far as to clearly jettison the special-general distinction.

Thanks to *McCoy,* a certainty-based approach began to take firmer hold despite lingering terminological confusion. In 1926, the Court held in *River Rogue Improvement Co.* that a court could consider "direct" and "immediate" benefits, but explained that by virtue of being direct and immediate, they were "special" even though common to all others.[128] This holding exemplifies the emerging *post hoc* nature of the special-benefit distinction. A court

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124. *Id.* at 355-56.

125. *Id.* at 358.

126. *Id.* at 359-60.

127. *Id.* at 366 (emphasis added).

128. United States v. River Rouge Improvement Co., 269 U.S. 411, 415-16 (1926).

first determines whether the nature of the benefit is sufficiently certain and calculable. If it is, then the court can offset the benefit. After making that determination, the court terms the benefit "special" without regard to its breadth.

The confusion persists. As recently as 1974 the Court mentioned—and avoided—the unique nature of special benefits, suggesting that whether or not benefits were "special" was a threshold compensation question.[129] Even in oral arguments for *Horne* (the raisin case), counsel cautioned the Court away from delving in to the special-general quagmire.[130]

In the cases so far covered, the Court has performed an analysis focused on the certainty and calculability of benefits and, as a result, has upheld government offsets of such benefits. Although it jumps back in time by a generation, in 1934, in *Olson v. Unites States,* the Court clearly utilized the certainty analysis but nevertheless found that the benefits at issue were too speculative to influence fair market value.[131] *Olson* involved condemnation for a reservoir.[132] The government argued that the change brought about by the new reservoir would allow the neighboring property owners, whose land was subject to a partial taking, to use their frontage for power generation.[133] The remaining property was certainly "physically adaptable" for power generation, but that outcome was contingent on all the landowners agreeing to work together.[134] The Court held that the potential use for power generation could not be offset because it was too speculative.[135] Such use would require cooperation and a series of new easements among the property owners.[136] The Court held that compensation is set on market value, which is based on all elements of value that can arise from the property in the "reasonably near future."[137] The Court distinguished this "near future" value from uses or values that are not "reasonably held to affect the market value."[138] Even if

129. Blanchette v. Conn. Gen. Ins. Corp., 419 U.S. 102, 151 (1974).

130. Transcript of Oral Argument at 16, Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015) (No. 14-275), 2015 WL 2473384.

131. Olson v. United States, 292 U.S. 246, 256 (1934).

132. *Id.* at 248.

133. *Id.*

134. *Id.* at 256-57.

135. *Id.*

136. *Id.*

137. *Id.* at 255.

138. *Id.* at 256.

a use is "within the realm of possibility," it should not be considered in setting compensation if it is not "reasonably probable."[139] If a use is not reasonably probable it is merely speculative and conjectural.

As time progressed, the Court focused more on market value. The Court recognized that using the increased market value of the remainder as a basis for offsetting compensation for the part taken avoids unnecessary complexity and uncertainty in the valuation process.[140] In 1983 the Court set aside a measure of value based on speculation in favor of market value, writing that a speculative "approach would add uncertainty and complexity to the valuation proceeding without any necessary improvement in the process."[141] "Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation."[142] There is no reason to distinguish narrow and broad benefits when market value inherently accounts for all benefits that are reasonably certain and capable of present calculation.

In 2015's *Horne v. Department of Agriculture,* the Supreme Court was presented with an opportunity to again address the benefit-offset problem in partial takings cases and to clarify the line of cases discussed in this Section. Unfortunately, the Court did not take that opportunity and instead created even more confusion. With the growing need for coastal resilience projects, there is a very real possibility that the Court will face this challenge again, and fortunately, the New Jersey Supreme Court has provided a thorough and well-reasoned articulation of the proper benefit-offset rule. The following Section details the New Jersey court's recent resolution of this problem, and the subsequent Section describes *Horne* in more detail.

V. A NEW JERSEY RESILIENCE PROJECT BRINGS FOCUS TO THE FAILINGS OF THE SPECIAL-GENERAL DISTINCTION

Given its location along the mid-Atlantic coast, New Jersey faces a particular threat from the rising sea levels and intense storms

139. *Id.* at 257.

140. United States v. 50 Acres of Land, 469 U.S. 24, 35 (1984).

141. *Id.*

142. United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 404 (1949).

that accompany climate change.[143] New Jersey has 127 miles of coast,[144] the vast majority of which has a "high" or "very high" vulnerability. risk.[145] Hurricane Sandy was a particularly devastating example of New Jersey's plight, destroying homes, historic and valuable commercial centers such as boardwalks and amusement parks, and otherwise battering much of the coast.[146] The coast's vulnerability demands climate change adaptation and mitigation policies, but the state's disjointed and at times contradictory case law—which until recently mimicked the United States Supreme Court's doctrine—made effective resilience policies seem an even greater challenge.[147]

A barrier island at the southern end of Ocean County, New Jersey, Long Beach Island has a year-round population of roughly 12,000, which booms in the summer months when families fill the nearly 18,000 seasonal second homes.[148] Tourism-related fields including real estate, food service, retail, and construction are the top industries in this region, contributing to the $14.2 billion gross county product for Ocean County.[149]

Recognizing the value of Long Beach Island to the economy as a whole, the nine Long Beach Island municipalities, as well as the state of New Jersey and the federal government, jointly established a massive beach restoration and storm protection project for the island.[150] One of the key components of this effort was a dune nourishment effort that would significantly enlarge the existing dune system all along Long Beach Island, thereby protecting the structures behind the new dunes from storm surges and

143. *See generally* Leigh Phillips, *U.S. Northeast Coast is Hotspot for Rising Sea Levels*, NATURE, Jun. 24, 2012, http://www.nature.com/news/us-northeast-coast-is-hotspot-for-rising-sea-levels-1.10880.

144. NORBERT P. PSUTY & DOUGLAS D. OFIARA, COASTAL HAZARD MANAGEMENT: LESSONS AND FUTURE DIRECTIONS FROM NEW JERSEY 9-10 (Rutgers Univ. Press eds., 2002).

145. E. Robert Thieler & Erika S. Hammer-Klose, *National Assessment of Coastal Vulnerability to Sea-Level Rise: Preliminary Results for the U.S. Atlantic Coast Fig. 4*, USGS (1999), http://pubs.usgs.gov/of/1999/of99-593/pages/figpage/fig4.html.

146. *E.g.*, Kevin J. Mahoney, Comment, *Mitigating Myopia: Climate Change, Rolling Easements, and the Jersey Shore*, 44 SEATON HALL L. REV. 1130, 1131-32 (2014), *available at* http://scholarship.shu.edu/shlr/vol44/iss4/6/.

147. *See e.g.*, *id.*

148. Ken McGill & Jon Gray, *The 2011 Economic Impact of Tourism in Southern Ocean County, NJ: Key Metrics and Evaluation*, ROCKPORT ANALYTICS 4 (2012), http://visitlbiregion.com/wp-content/uploads/2014/05/SOCC-2011-Econ-Impact-Final-10-2012-compact.pdf.

149. *Id.*

150. Borough of Harvey Cedars v. Karan, 70 A.3d 524, 527 (N.J. 2013).

flooding.[151] These dunes were constructed adjacent to the private homes along the shore, in most cases on the homeowners' private property.[152] Thus, while the Army Corps of Engineers carried out most of the technical aspects of this project under the federal-state-local arrangement, the towns were responsible for acquiring the property rights to build the dunes that would cross each property.[153]

In the Borough of Harvey Cedars, towards the northern end of Long Beach Island, town officials were responsible for gaining permissions on eighty-two properties.[154] Officials were able to reach agreements with sixty-six property owners, leaving sixteen properties on which the Borough had to exercise eminent domain.[155] One of these properties in the latter category belonged to Harvey and Phyllis Karan.[156] The Karans' property was 11,868 square feet on which the new dune would occupy a 3,381square foot strip on the ocean-side.[157] The Borough offered the Karans $300 for the right to build and maintain a new dune on the land, which the Karans refused, arguing that they deserved compensation not only for the land the Borough would take to build the dune, but also for the damage to their remaining property.[158] Specifically, the Karans asserted that the dune project would damage their remaining property by limiting their coveted ocean view.[159]

When the Karans did not consent to the project, the Borough of Harvey Cedars began an eminent domain proceeding and acquired the property by condemnation.[160] As New Jersey law requires, the trial court appointed a commission to determine just compensation after the acquisition.[161] The commission set

151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 527-28.
156. *Id.* at 528.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*; *see also* Eminent Domain Act of 1971, N.J. STAT. ANN. § 20:3-12(b) (Westlaw 2016) ("Upon determination that the condemnor is authorized to and has duly exercised its power of eminent domain, the court shall appoint 3 commissioners to determine the compensation to be paid by reason of the exercise of such power.").

compensation at $700.[162] The Karans rejected this sum of compensation—which, of course, was only $400 more than the initial offer—and demanded a jury trial.[163]

As these legal proceedings progressed, it was no secret that the new dune system along Long Beach Island, and in Harvey Cedars in particular, would protect the Karans' home from a major storm.[164] The Army Corps of Engineers' expert determined that without the new dunes, there was a 56% chance that in the next thirty years a storm would destroy the Karans' home.[165] With the dunes in place, however, the Karans could expect their house to be safe for the next two centuries.[166]

The Karans understood the potential benefits of the dune system, but in order to maximize their monetary situation, or perhaps to stop the condemnation altogether, their strategy was to rely on New Jersey's existing just compensation jurisprudence. This jurisprudence seemed to command that when setting compensation for the property taken and the remainder, the judge, jury, or commission must ignore any benefits that accrue generally to the public at large even if those benefits also accrue to the specific property at issue.[167] With respect to the Karans, even though a willing buyer would likely pay more to gain the storm-protection benefit, the Karans relied on a line of benefit-offset cases suggesting that this fair market increase was not sufficient to lower their compensation since all the neighboring houses would also increase in value.

The Borough of Harvey Cedars might have explained to the jury that, indeed, the dune project would take away a piece of the Karans' property and, as to the remainder, it would have a severely diminished view of the ocean. Nevertheless, the town would argue that the storm-protection benefit—the fact that the new dunes would enable the home to survive the next big storm—outweighed these costs.[168] Therefore, prior to the trial the Karans requested a

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162. Petition for Certification and Appendix on Behalf of Plaintiff/Petitioner Borough of Harvey Cedars at 10, *Karan*, 70 A.3d 524 (No. A-4555-10T3).

163. *Karan*, 70 A.3d at 528.

164. *Id.* at 529.

165. *Id.*

166. *Id.*

167. *Id.* at 528.

168. *See id.* ("Before trial, the Karans moved to bar any testimony from the Borough's expert, Dr. Donald M. Molliver, Ph.D., concerning storm-protection benefits afforded by the dune that increased the value of the Karans' home.").

hearing to determine whether the jury could consider any arguments regarding the benefits of the dune system.[169] Ultimately, the judge determined that the jury should not consider the storm protection benefits.[170] The case went to trial and the jury, instructed to ignore these benefits, calculated that the Borough of Harvey Cedars owed the Karans compensation in the amount of $375,000.[171]

The Borough appealed this award, first to the New Jersey appellate court, which agreed with the trial judge that the court could not offset so-called "general benefits."[172] The Borough then appealed to the New Jersey Supreme Court, which considered New Jersey's occasional practice of ignoring general benefits, but opted to change the law.[173]

The question presented to the New Jersey Supreme Court in the case of *Harvey Cedars v. Karan* was how to calculate just compensation considering both the Karans' reduced ocean view and improved storm protection.[174] Lest there be any question about the reality of the improved storm protection, the parties argued this case on May 13, 2013,[175] only six months after Hurricane Sandy made landfall in New Jersey.[176] The Army Corps of Engineers constructed the new dune system in front of the Karans' home in 2008.[177] Because of that protective barrier, the Karans' home survived the storm that ravaged the coast and the neighboring towns without improved dune systems.[178]

The New Jersey court began its analysis by distinguishing between two situations in which just compensation is due. In the first situation, the state government will owe just compensation

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169. *Id.*

170. *Id.* at 529.

171. *Id.* at 531.

172. *Id.* at 532.

173. *See generally Karan*, 70 A.3d 524.

174. *Id.* at 526.

175. *Id.* at 524.

176. *Hurricane Sandy Makes Landfall near Atlantic City*, THE STAR-LEDGER (Oct. 29, 2012), http://www.nj.com/news/index.ssf/2012/10/hurricane_sandy_makes_landfall.html.

177. *Karan*, 70 A.3d at 528.

178. *See, e.g.*, Nicholas Huba & Kirk Moore, *Harvey Cedars Homeowners Demand Payment from Town for Spoiling Ocean View*, ASBURY PARK PRESS (Dec. 20, 2012, 3:12 PM), http://archive.app.com/article/20121125/NJNEWS2002/311250050/ ("Thanks to a line of recently erected two-story high sand dunes, Harvey and Phyllis Karan's $1.7 million oceanfront house, and the town, stood fast when Sandy stormed ashore.").

when it takes an entire piece of property,[179] for example, when it acquires 100% of a lot in order to build a school or when it acquires a boat to use in a war effort. In the second situation, the government will owe just compensation when it takes a portion of the property,[180] not only for that portion of property actually taken, but also for any reduction in value to the remaining property.[181]

In New Jersey, when the government acquires an entire piece of property through eminent domain, "the measure [of just compensation] is the fair market value of the property as of the date of the taking, determined by what a willing buyer and a willing seller would agree to, neither being under any compulsion to act."[182]

When, as with the Karans, the government takes less than the entire property, the analysis of New Jersey courts "has not necessarily reflected the straightforward fair market value approach that is evident in total-takings cases."[183] Generally in a partial takings case, the government will use eminent domain to acquire a segment of property, for which it would pay the fair market value. However, by severing the property and taking possession of a part, there may be damage to the portion of property that remains with the private owner. This damage may result from the government's use of the taken portion—for example, if noise and vibrations from a new rail line decrease the value—or from the fact that the remainder can no longer be used in the same manner—for example, if a rail line bifurcates a farm, making efficient harvest impossible.

But when the value of the remainder increases, can the government offset the compensation by the increase?

The compensation calculation for partial takings prior to *Karan* revolved around the special-general benefits distinction.[184] Recognizing both the troubling policy implications of this distinction—specifically, that the Karans could receive $375,000

179. *Karan*, 70 A.3d at 535.

180. *Id.*

181. *Id.*

182. State by Comm'r of Transp. v. Silver, 457 A.2d 463, 466-67 (N.J. 1983) (alteration in original) (citing, *inter alia*, City of Trenton v. Lenzner, 109 A.2d 409, 414 (N.J. 1954), *cert. denied*, 348 U.S. 972 (1955)).

183. *Karan*, 70 A.3d at 535.

184. *See, e.g., id.*

from the government, while it protects the very existence of the home which they claim was damaged—and the subjective, malleable gradient on which the distinction relies, the *Karan* court looked carefully at New Jersey law to determine the roots of the special-general benefits distinction.[185]

The court concluded that the special-general distinction "bedeviled" [186] prior courts with varying definitions and inconsistent applications of the imprecise rule.[187] The two cases that present the most confusion are two of the earliest.

The benefit-offset problem in New Jersey often focused on the railroads, much as it did in other states.[188] In the 1889 case of *Sullivan v. North Hudson County Railroad Company*, authored by Justice Dixon,[189] the railroad was building an elevated railway in front of two properties.[190] The railroad argued that, when calculating compensation for damages to those properties, the court should offset any benefits, and consider the operation of the railroad as a benefit in itself.[191] The *Sullivan* court defined general benefits as "those which affect the whole community or neighborhood, by increasing the facility of transportation, attracting population, and the like."[192] Special benefits, on the other hand, were defined as "those which directly increase the value of the particular tract crossed."[193] The court ruled that only special benefits should be set off from compensation.[194]

Mangles v. Hudson County Board of Chosen Freeholders reexamined the issue in 1892 and exacerbated the confusion in the way it described general benefits.[195] In *Mangles* the state took a portion of several properties for the purpose of widening a highway. The Court considered the certainty of the highway's benefits, and the ability to calculate those benefits, without considering the breadth

185. *Id.*

186. *Id.* at 536.

187. *Id.* at 535-40.

188. *Id.* at 536 (citing Sullivan v. N. Hudson Cty. R.R. Co., 18 A. 689, 690 (N.J. 1889)).

189. *Sullivan*, 18 A. at 689.

190. *Id.* at 689.

191. *Id.* at 690.

192. *Id.*

193. *Id.*

194. *Id.*

195. Mangles v. Hudson Cty. Bd. of Chosen Freeholders, 25 A. 322 (N.J. 1892).

of benefits.[196] The court declared that it should not deduct any benefits that would only arise in the "indefinite future" or benefits that are so "uncertain in character as to be incapable of present estimation."[197] Justice Dixon, again writing for the court, described these uncertain, incalculable, and indefinite benefits as "general benefit[s]," [198] adding confusion to the doctrine because in *Sullivan* he used "general benefits" to describe only those that are widespread, without reference to certainty or calculability.[199] In reference to the breadth or specificity of the benefits in *Mangles*, Dixon says only that benefits enjoyed by the entire "community or neighborhood" are "usually styled 'general benefits'" but the fact that they are widespread and therefore general does not mean they cannot be subtracted from the award if they "admit[] of reasonable computation."[200] Justice Dixon reasoned that in the case of the highway project, the increased value of land along the improved road was not speculative and was calculable at the time the taking occurred.[201] In deciding that "general benefits," regardless of breadth, could be offset if they are specific and calculable, Justice Dixon changed the rule he announced in *Sullivan*.

It is with *Mangles* that New Jersey law begins to confuse the scope of the benefit—that is, whether the benefit is common to all neighbors or unique to the property at issue—with the nature of the benefit—whether the benefit is reasonably certain and reasonably calculable.[202] This same type of confusion in the United States Supreme Court's jurisprudence is likely the reason the Court the avoided tackling the benefit-offset problem in *Horne*. In New Jersey, this exact confusion forced the New Jersey Supreme Court to finally resolve the benefit-offset problem in *Karan*.

To further highlight the *Mangles*-induced confusion in its jurisprudence, the *Karan* court proceeded to consider three additional New Jersey cases in which the courts respectively: (1)

196. *Id.* at 323.

197. *Id.*

198. *Id.* at 324.

199. *Sullivan*, 18 A. at 690 ("[G]eneral benefits" are "those which affect the whole community or neighborhood.").

200. *Mangles*, 25 A. at 324.

201. *Id.*

202. *Id.* ("But *any* benefit which accompanies the act of taking the land for the contemplated use, and which admits of reasonable computation, may enter into the award.") (emphasis added).

disallowed the offset of what they termed "general benefits" without defining that term or considering whether the benefits in the case were capable of calculation and were non-conjectural;[203] (2) disallowed what they termed "general benefits" but defining that term as those benefits "which a property owner *may enjoy in the future* in common with all other property owners in the area;"[204] and similarly (3) disallowed offsetting because benefits can only offset if they provide "an advantage likely to accrue to [the remaining] property over and above the advantages to other property in the vicinity."[205] This degree of inconsistency around offsetting benefits, paired with the growing concern over coastal adaptation generally and dune replenishment more specifically, forced the New Jersey Supreme Court to articulate a clear and administrable rule.

Despite the confusion it helped create, *Mangles* did introduce a standard, one focused on the fair market value as set by real and calculable benefits,[206] from which the New Jersey Supreme Court could begin to fashion its modern rule. As described above, the articulation of this standard, side-by-side with *Sullivan*, created significant confusion in New Jersey's jurisprudence for more than a century, but *Karan* offers clarity, consistency with many other jurisdictions including the United States Supreme Court's analysis if not nominal rules, and important public policy outcomes.[207]

In its unanimous opinion, the *Karan* court declared that it "need not pay slavish homage to labels that have outlived their usefulness" and explained "the terms special and general benefits do more to obscure than illuminate the basic principles governing the computation of just compensation in eminent domain cases."[208] Eschewing the distinction, the court held that "[t]he fair-market considerations that inform computing just compensation in partial-takings cases should be no different than in total-takings cases. They are the considerations that a willing buyer and a willing seller would weigh in coming to an agreement on the property's

203. Borough of Harvey Cedars v. Karan, 70 A.3d 524, 538-39 (N.J. 2013) (citing Village of Ridgewood v. Sreel Inv. Corp., 145 A.2d 306, 312 (N.J. 1958)).

204. *Id.* at 539 (quoting State v. Interpace Corp., 327 A.2d 225, 229 (N.J. Super. Ct. App. Div. 1974)).

205. *Id.* (quoting N.J. Tpk. Auth. v. Herrontown Woods, Inc. 367 A.2d 893, 896-97 (N.J. Super. Ct. App. Div. 1976)).

206. *Mangles*, 25 A. at 324.

207. *Karan*, 70 A.3d at 538-40.

208. *Id.* at 540.

value at the time of the taking."[209]

Relying on the intent of *Mangles*, which was a focus on certainty and calculability, the court laid out a clear rule, doing away with the special-general distinction[210] and instead holding that "just compensation should be based on *non-conjectural* and *quantifiable* benefits . . . that are capable of reasonable calculation at the time of the taking."[211] With that rule in mind, it was not a stretch for the court to reason that "[a] willing purchaser of beachfront property would obviously value the view and proximity to the ocean. But it is also likely that a rational purchaser would place a value on a protective barrier that shielded his property from partial or total destruction."[212] In other words, the government taking offers benefits to the Karans' property at the same time that it causes damages and courts should not provide compensation based on the damages, while ignoring the benefits. Relying on a special-general distinction, which allows offsetting of only a limited number of real and calculable benefits, would ignore too many benefits and therefore provide owners like the Karans with a windfall when their property actually increases in value because of the taking. By relying on a market value approach to compensation, the New Jersey court settled on a rule that takes cognizance of the real value of a remainder. If a purchaser would pay more, then the taking has not only harmed the remainder, it has also produced a non-speculative benefit that the court can subtract from compensation. If a purchaser would pay less, then there has been damage, and the government must pay compensation.

Because the lower court prohibited the jury from considering evidence of how the dune replenishment project would actually and quantifiably benefit the Karans' property remainder, the New Jersey Supreme Court ordered a new trial.[213] Prior to that trial, the Karans agreed to settle with the Borough of Harvey Cedars for $1, putting an end to this particular conflict and to their windfall.[214] The larger confusion over the benefit-offset problem still lingers,

209. *Id.*

210. *Id.*

211. *Id.* (emphasis added).

212. *Id.* at 541.

213. *Id.* at 544.

214. MaryAnn Spoto, *Harvey Cedars Couple Receives $1 Settlement for Dune Blocking Ocean View*, THE STAR-LEDGER (Sept. 29, 2013), http://www.nj.com/ocean/index.ssf/2013/09/harvey_cedars_sand_dune_dispute_settled.html.

however, at the federal level.

VI. RAISIN REGULATIONS RAISE RECONSIDERATIONS OF THE BENEFIT-OFFSET PROBLEM

Surprisingly, the complexity and ambiguity of the United States Supreme Court's current partial takings doctrine is most recently demonstrated in a case stemming from depression-era regulations, not about climate change or coasts, but about California raisins.

The Great Depression and its aftermath presented some of "the most difficult and chaotic" economic conditions in United States history.[215] The banking system shut down and defaults were widespread among "every class of borrower except the Federal government."[216] This wave of disorder did not spare the agriculture industry, which was already suffering from a substantial price collapse in the 1920s.[217] In response, the Federal government enacted 130 new agriculture-related laws between 1933 and 1939, almost twice as many as in the previous fifty years.[218] Congress enacted 60% of these new laws for price support and supply management.[219] One such law was the Agricultural Marketing Agreement Act of 1937, which authorized raisin regulations.[220]

The Agricultural Marketing Act authorizes a "marketing order,"[221] requiring raisin growers to provide a portion of their crop (the "reserve" portion) to a government Raisin Committee in order to control the supply and therefore the market price of raisins.[222] The Committee takes ownership of the raisins and then donates them, sells them outside of the primary raisin market (to federal agencies, foreign governments, or exporters, for example),

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215. Ben S. Bernanke, *Non-Monetary Effects of the Financial Crisis in Propagation of the Great Depression*, 73 AM. ECON. REV. 257, 257 (1983).

216. *Id.*

217. *See* Gary D. Libecap, *The Great Depression and the Regulating State: Federal Government Regulation of Agriculture: 1884-1970, in* THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY 181, 186 (Michael D. Bordo, Claudia Goldin & Eugene N. White eds., 1998).

218. *Id.* at 183.

219. *See id.*

220. Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246 (codified as amended in scattered sections of 7 U.S.C.) (West 2016).

221. Agricultural Marketing Agreement Act, 7 U.S.C. § 602 (West 2016).

222. Horne v. Dep't. of Agric., 135 S. Ct. 2419, 2424 (2015); *see also* Raisins Produced from Grapes Grown in California, 7 C.F.R. §§ 989.65-.72 (2015).

or otherwise gets rid of the product.[223]

Raisin growers Marvin and Laura Horne took issue with the Raisin Committee's reserve requirement. The Hornes refused to reserve any of their own raisins or the raisins that they handled from other growers.[224] The Hornes argued that because the government acquired their property—the raisins—and did not pay for it,[225] the marketing order amounted to a taking without just compensation.[226]

That challenge rose to the Supreme Court of the United States and on June 22, 2015 the Court delivered an opinion in *Horne v. Department of Agriculture*.[227] The primary question in *Horne* was whether a physical appropriation of personal rather than real property—for example, the government taking possession of the Horne's raisins as opposed to their land—is a constitutional taking that requires just compensation.[228] Although the Court had not previously addressed this question, an 8-1 majority found that "[n]othing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different" between real and personal property. In short, "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."[229]

Having determined that the government seizure of the Hornes' property was a taking that required just compensation, the benefit-offset problem was the next hurdle, which split the justices more narrowly. [230] The Hornes probably received a monetary benefit from the long-term operation of the supply management program: by limiting the supply of raisins, the program raised the price and

223. *Horne*, 135 S. Ct. at 2424; *see also* Raisins Produced from Grapes Grown in California, 7 C.F.R. §§ 989.65-.72 (2015).

224. *Horne*, 135 S. Ct. at 2424.

225. *See id.* at 2424. In fact, the Hornes were entitled to contingent proceeds from the Raisin Committee. The Committee would sell the reserve raisins and, after deducting administrative and other expenses, would distribute any remaining profits to the handlers. *Id.*

226. *Id.* at 2425.

227. *Id.*

228. *See id.* at 2425.

229. *Id.* at 2426. It is interesting that the Court chose to use second person perspective in this sentence, the only instance of second person in the entire opinion. The literary tactic was no doubt a rhetorical technique to drive home the personal nature of property ownership.

230. *See id.* at 2432.

increased the Hornes' profit on their crop.[231] Should courts consider a regulatory benefit of this nature when calculating just compensation? Despite a robust dissent from Justice Breyer, Chief Justice Roberts, writing for the *Horne* majority, said no—the regulatory benefits should not reduce the total compensation—but the Chief Justice did not adequately explain his reasoning or announce any new framework for settling future compensation disputes.[232]

Although it was not well expressed in their opinions, the dispute among the justices seemed to center on whether the benefits the Hornes may have received were too general *and* whether those benefits were certain or speculative. On the one hand, the Government had earlier imposed a fine on the Hornes that was equal to the market value of the raisins that the Hornes failed to deliver to the Raisin Committee.[233] Chief Justice Roberts and his majority relied on the rule that market value is a fair measure of compensation, but said little more about the generality or certainty of the benefit.[234] On the other hand, the Government, and three justices led by Breyer in the dissent, raised the benefit-offset problem. They argued that the Supreme Court should send the case back to the lower courts in order to calculate compensation, adjusting the calculation to account for benefits that the price support system delivered.[235] The dissent, therefore, suggested that market value alone may not be the right measure of compensation.

The Government argued, and Justice Breyer in his dissent agreed, that under the Takings Clause "a property owner is

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231. *See, e.g.*, Raisins Produced from Grapes Grown in California, 7 C.F.R. §§ 989.65-.72 (2015); Final Free and Reserve Percentages for 2002-03 Crop Natural (Sun-dried) Seedless and Zante Currant Raisins, 68 Fed. Reg. 41,686, 41,686 (July 15, 2003) ("The volume regulation percentages are intended to help stabilize raisin supplies and prices, and strengthen market conditions.").

232. *Horne*, 135 S. Ct. at 2433 ("In any event, this litigation presents no occasion to consider the broader issues [of calculating just compensation].").

233. *See id.* at 2425.

234. *See id.* at 2432.

235. *Id.* at 2428. As it happened, in this case, the Committee never took possession of the raisins at issue. *Id.* at 2424. Rather, they fined the Hornes the value of the raisins and the Hornes refused to pay, claiming that the fine would amount to a taking. *Id.* at 2425. Therefore, whatever the ultimate compensation, the Government would only pay this amount if it chose to follow through and acquire the raisins at issue. Had the benefit-offset applied in this case and the courts determined that the benefit would entirely or very dramatically reduce the necessary compensation, then perhaps the ruling would have had no practical effect on the raisin marketing order.

entitled to be put in as good a position pecuniarily as if his property had not been taken, which is to say that he must be made whole but is not entitled to more."[236] The Court cannot ignore, therefore, that the reserve requirement exists to reduce raisin supply and increase raisin prices.[237] Of course, the purpose of the reserve requirement is to benefit an entire class of people, raisin growers, not any single raisin grower and, in fact, any benefit that accrues does apply across the industry.[238] The broad application of the benefits leads to the question of special versus general benefits. This point came up briefly at oral argument, but Professor Michael McConnell, representing the Hornes, brushed off the issue, warning the Court: "I don't think we want to get into whether this would be a special benefit."[239] Given the difficulty of the question, it is understandable that they would want to avoid it, but the Court should have addressed this issue directly in order to better justify its decision and clarify its jurisprudence on the subject.

Despite the warning, Justice Breyer did assess the special versus general distinction in the Court's precedent. As discussed in Section IV, *supra*, that precedent analytically relies on market value, which is calculated based only on certain benefits that are certain and quantifiable at the time of the taking, but the precedent also repeatedly refers to general and specific benefits. Justice Breyer read that precedent to speak primarily about the breadth of a benefit, whether the benefit is unique to the property owner or applies more widely.[240] Overlooking the issue of whether the benefit was certain and calculable and reflected in the market value of the property, Justice Breyer reached the conclusion that the "Constitution does not distinguish between 'special' benefits, which specifically affect the property taken, and 'general' benefits, which have a broader impact."[241] He concludes, therefore, that the lower court should measure the benefit that arises from the regulatory program (in the form of increased prices for the raisins

236. *Id.* at 2434 (Breyer, J., dissenting) (quoting Olson v. United States, 292 U.S. 246, 255 (1934)) (alteration and quotation marks omitted).

237. *Id.*

238. *See* Raisins Produced from Grapes Grown in California, 7 C.F.R. §§ 989.65-.72 (2015); Final Free and Reserve Percentages for 2002-03 Crop Natural (Sun-dried) Seedless and Zante Currant Raisins, 68 Fed. Reg. 41,686, 41,688-89 (July 15, 2003).

239. Transcript of Oral Argument at 16, *Horne*, 135 S. Ct. 2419 (No. 14-275), 2015 WL 2473384.

240. *Horne*, 135 S. Ct. at 2434 (Breyer, J., dissenting).

241. *Id.* at 2435.

that the Hornes sell on the open market) against the value of the raisins that the government took from the Hornes.[242] If the benefit exceeds, or exactly matches, the value of the taken property, then the government need not provide additional compensation.[243] Justice Breyer, however, was wrong in his disposition because he read the precedent only for its rules on the special-general distinction and not on the market value analysis. Had he focused on the market value test that really underlies the Court's previous decisions, he would have had to consider whether the benefits of the raisin regulations were certain and calculable and could therefore be objectively extracted from the market value for the purposes of offsetting compensation.

In his majority, Chief Justice Roberts quickly dismissed Breyer's reasoning. Roberts characterized the Government's argument and Justice Breyer's more detailed analysis as the "notion that general regulatory activity . . . can constitute just compensation for a specific physical taking."[244] But rather than consider that rule, he called upon the "clear and administrable rule" that "just compensation normally is to be measured by 'the market value of property at the time of the taking.'"[245] Justice Breyer's dissent cited *Bauman, McCoy,* and *Olson,* among other cases, for the proposition that there is no prohibition against considering widespread benefits. The Chief Justice, in laying out an apparently simple market value rule, opaquely distinguished these cases, noting that they "raise complicated questions . . . but they do not create a generally applicable exception to the usual compensation rule."[246] However, by distinguishing those cases, Chief Justice Roberts failed to recognize their endorsement of the market value rule on which he explicitly relied, and the certainty and calculability test that he implicitly applied. The benefits were too uncertain to be disaggregated from the market value of the remainder raisins and to offset against the value of the raisins taken. Put differently, the Chief Justice looked only at the market value of the taken portion and not the market value of the remainder.

But by endorsing a market value rule for setting

242. *Id.*

243. *See id.*

244. *Id.* at 2432 (majority opinion).

245. *Id.* (quoting United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984)).

246. *Id.* (quoting *50 Acres of Land,* 469 U.S. at 29 (internal quotation marks omitted)).

compensation,[247] the Chief Justice did seek to ignore hypothetical or speculative benefits.[248] In particular, Roberts emphasized that if the Hornes did benefit from the government program, it was from a far-reaching and long running regulatory program as opposed to a public works project, such as a dune.[249] While his intentions with this distinction are not clear, it seems likely that the impacts of a regulatory program, particularly one that has been running for generations, are harder to determine than those of a public works project. That is, the impacts of a regulatory program are generally more speculative and more difficult to calculate.[250] Ultimately, Chief Justice Roberts' conclusion does flow from the Court's precedent and if read to mimic that precedent they would present a more appropriate rule for addressing the benefit-offset problem. Unfortunately, in haste, Roberts distinguished precedent that does more to support his position, and he certainly failed to articulate his thinking in a compelling way.

Horne presented the opportunity to resolve a lingering issue in takings jurisprudence: how to deal with the benefit-offset problem. The question was barely briefed,[251] not forcefully presented at oral argument,[252] and though Justice Breyer chose to make it the centerpiece of his three-justice dissent, Chief Justice Roberts gave it only superficial treatment. With the increasing impacts of climate change and the growing efforts to adapt to them, this failure makes it more difficult for local governments and lower courts to effectively design resilience projects that involve partial takings of private property.

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247. *See id.* ("The Court has repeatedly held that just compensation normally is to be measured by 'the market value of the property at the time of the taking.'" (quoting *50 Acres of Land*, 469 U.S. at 29)).

248. *See id.* ("[T]he Government cites no support for its hypothetical-based approach.").

249. *Id.* ("[T]he Government cites no support for . . . its notion that general regulatory activity such as enforcement of quality standards can constitute just compensation for a specific physical taking.").

250. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 247 (1985).

251. *See Horne*, 135 S. Ct. at 2433 (Breyer, J. dissenting).

252. *See generally* Transcript of Oral Argument at 16, *Horne*, 135 S. Ct. 2419 (No. 14-275), 2015 WL 2473384.

VII. ARTICULATING A FAIR-MARKET VALUE FRAMEWORK FOR THE BENEFIT-OFFSET PROBLEM

When the United States Supreme Court next has the opportunity to consider the benefit-offset problem, it should avoid its errors in *Horne* and adopt an explicit and just rule. This does not require a reinvention of their doctrine. The Court has applied consistent reasoning when dealing with the benefit-offset problem, but has not articulated a rule in a sufficiently transparent and powerful way. In New Jersey, however, *Karan* very clearly announced a fair market value rule: when there is a partial taking, the courts will consider both unique and widespread benefits to the remaining property as long as those benefits are certain and calculable enough to have an impact on the price a willing buyer would pay a willing seller for the remaining property.[253] Though it would not be a departure from its current jurisprudence, the United States Supreme Court has failed to explicitly adopt this same rule, and Chief Justice Roberts declined the opportunity in *Horne*. The Court's ongoing failure to clearly outline a fair-market-based benefit-offset rule may have led to the Chief Justice's correct conclusions but insufficient analysis in *Horne*. When properly articulated, the rule aligns with Roberts' conclusion while also paralleling the New Jersey Supreme Court's reasoning and conclusion in *Karan*, despite the fact that the cases reach opposite conclusions with respect to "offsetting" the respective benefits.

Understanding the lessons of *Karan* provides the bulk of the analysis needed for a new articulation of the fair market value rule in the Supreme Court. This Section highlights those lessons, fleshes out a fuller analysis, and rectifies the divergent conclusions of *Karan*.

A. *Lessons from* Karan

The rule and rationale in *Karan* are, for all practical purposes, perfect reflections of the Supreme Court's jurisprudence, and since the Supreme Court has yet to clearly articulate the current lessons of its cases, *Karan* is an excellent guide.

The *Karan* court provided a good assessment of the rationale for disposing of the special-general distinction in New Jersey and relying instead on fair market value, which is central to the

253. Borough of Harvey Cedars v. Karan, 70 A.3d 524, 540 (N.J. 2013).

Supreme Court's precedent.[254] In fact, the *Karan* court had to deal with equally confusing and more explicitly contradictory New Jersey case law[255] than the Supreme Court will have to address in its own precedent,[256] should it take an opportunity to clearly announce a cohesive rule for the benefit-offset problem.

In disposing of the special-general distinction, *Karan* reasoned: "the terms special and general benefits do more to obscure than illuminate the basic principles governing the computation of just compensation in eminent domain cases."[257] The court continued, "the problem with the term 'general benefits' is that it may mean different things to different courts. To some courts the term 'general benefits' is a surrogate for speculative or conjectural benefits."[258] Indeed, *Karan* explained fully that courts must avoid speculative and conjectural benefits, but that is distinct from broadly applicable or widespread benefits, which courts may consider but are also sometimes subsumed by the definition of "general benefits."[259]

To avoid speculation and conjecture, and to move away from the special-general distinction, *Karan* announced the controlling rule as follows: "The fair-market considerations that inform computing just compensation in partial-takings cases should be no different than in total-takings cases. They are the considerations that a willing buyer and a willing seller would weigh in coming to an agreement on the property's value at the time of the taking."[260] Further:

> just compensation should be based on *non-conjectural* and *quantifiable* benefits that are *capable of reasonable calculation* at the time of the taking. *Speculative* benefits projected into the indefinite future should not be considered. Benefits that both a willing buyer and willing seller would agree enhance the value of the property should be considered in determining just compensation, whether those benefits are categorized as special or general.[261]

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254. *Id.* at 538.
255. *See id.* at 535-540.
256. *See supra* Section IV.
257. *Karan*, 70 A.3d at 540.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.* (emphasis added) (citations omitted).

To highlight the need for non-conjectural benefits, *Karan* focused on several clearly speculative arguments. For example, the rapid growth of railroads in the nineteenth century led to many partial takings in which railroad companies utilized portions of private property for track and sought to minimize their payments for damages to the remainder.[262] Railroads minimized their obligation to compensate for the initial taking by insisting that the presence of tracks would increase population and commerce, making the remaining property more valuable.[263] Courts responded to this rampant injustice by developing the idea of general benefits, initially curbing the railroads' free pass based on the idea that the population and commercial benefits to which the railroads pointed were widespread, applying to the entire community.[264] But in hindsight, a more accurate interpretation of the relevant cases is that the impacts of new population and new commerce were speculative and there was no way to calculate the present value of a non-quantifiable increase in population or commercial activity.[265] As the *Karan* court explained, earlier courts "expected that benefits emanating from a public project that enhanced the value of the remainder property in a partial-takings case—benefits that were non-speculative and reasonably calculable at the time of the taking—would be weighed in fixing an award of just compensation."[266]

Karan added more clarity to the early concerns about uncertain benefits by explaining that a benefit is conjectural if it might arise "in the indefinite future."[267] A benefit is unquantifiable if it is "so uncertain in character as to be incapable of present estimation."[268] In contrast, what the court must look for is benefits that are "capable of present estimation"[269] (i.e., reasonably certain), "capable of . . . reasonable computation"[270] (i.e., calculable), and "actual benefit"[271] (i.e., non-speculative), and an "enhancement in

262. *Id.* at 536.

263. *Id.*

264. *Id.*

265. *See id.*

266. *Id.*

267. *Id.* at 537.

268. *Id.* (quoting Mangles v. Hudson Cty. Bd. of Chosen Freeholders, 25 A. 322, 323 (N.J. 1892)).

269. *Id.* at 538 (quoting Bauman v. Ross, 167 U.S. 548, 585 (1897)).

270. *Id.* (quoting *Bauman*, 167 U.S. at 585).

271. *Id.* (citing McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 366 (1918)).

market value"[272] (i.e., real and measureable).

The Supreme Court's decisions already represent a nearly identical framework, though it has not yet attempted to lay out that framework in one systemized analysis. Below is an effort to do so.

B. *A Fair-Market-Value-Based Approach to the Benefit-Offset Problem*

This Article argues for the following approach to the benefit-offset problem: when a government regulatory program or public works project partially takes private property and creates a benefit to the remaining property, the owner is entitled to compensation that reflects certain and calculable increases in the market value of the remainder.[273] A court need not try to distinguish between special and general benefits insofar as those terms relate to the scope of the benefits. Across the board, courts should jettison these terms, which have never been well articulated and are frequently confused and misused, treated as controlling the outcome when they are merely descriptors, and inconsistent descriptors at that. Rather than leaning on an antiquated and unreliable distinction around the scope of benefits, the court need only determine if the benefits are reasonably certain and capable of present calculation, and therefore influence the market value of the remainder. If the benefits are reasonably certain and capable of present calculation; if they do not require speculation, qualitative judgments, or waiting for some prospective benefit to actually arise so that it can be calculated; and if they increase the fair market value of the remaining property; then the court can subtract that from the compensation for the part taken.

This rule is easily applicable in practice when the benefits are certain and quantifiable. If a government takes a sliver of land to create a park, which will reduce the size of a property but will also give it access to a new park, assessors will determine the fair market value of the property based on, for example, its acreage and its proximity to the park. The assessors will look to recent sales of similar property in the area. The shrinking lot size, when considered alone, will certainly decrease the property value, while

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272. *Id.* (citing *McCoy*, 247 U.S. at 366).

273. *E.g.*, Horne v. Dep't. of Agric., 135 S. Ct. 2419, 2432 (2015) (quoting United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984)) ("The Court has repeatedly held that just compensation normally is to be measured by 'the market value of the property at the time of the taking.").

the new park will likely increase the value. Based on their calculations, the assessors will be able to determine if the final fair market value of the property is higher or lower based on the government project. The benefit of the park is not speculative: there is no question that the park now exists and that the public, including the property owner, can access and use it. The benefit of this park is calculable if assessors can rely on sales of other homes in similar situations. This is not a rare situation. It is not a vague benefit but is instead easily identifiable when searching for comparable properties. If the park has increased the fair market value of the remainder, if a willing buyer would now pay a willing seller more than she would have before the park existed, then the government has not damaged the remaining property and the court can identify the margin of increase to offset the compensation. If the value of the remainder has decreased from its value prior to the park's creation, the court must order compensation equal to the decrease in fair market value, in addition to compensation for the part taken.[274]

The rule is also easily applicable when the benefits are speculative. If the benefits are speculative and not calculable, the court should instruct the assessors or fact finders to ignore those benefits, and therefore not factor those benefits into compensation. By way of example, the government may flood a portion of property to build a reservoir.[275] In so doing the government is taking the flooded portion of property. However, this process may also make the contours of the geography more appropriate for building a power plant. There is an obvious benefit here. Suppose, however, that the flooded land belongs to a number of landowners and these landowners would have to agree to cooperatively develop the power plant.[276] While there is still a

274. Quantitatively, an example: A sliver of land taken for a park is worth $1,000 and that becomes the baseline for compensation for the land actually taken. If assessors determine that proximity to the park will not increase the property value, then just compensation is $1,000. If the proximity will increase the property value by $250, then just compensation is $750 (the baseline of $1,000 less the increase in fair market value of $250). If the proximity raises the property value by $5,000, then there is no compensation because the benefit outweighs the total damage. If the remainder is damaged and is now worth $5,000 less, then compensation is $6,000, the market value of the land taken plus damage to the remainder's market value.

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

276. *See id.* at 248 (considering a taking that left properties partially flooded but better suited for power generation should the various property owners agree to cooperatively develop power facilitates).

possible benefit here, it relies on uncertainty about the cooperation of the landowners. They might not agree to pool their land. A court would have to speculate about the ultimate use of the land. In the same vein, calculating the value of such a speculative benefit poses a problem. Perhaps some neighbors will agree and others will not, or they will agree to allow a small facility that provides a small benefit, but not the maximum potential benefit. This uncertainty makes the potential benefit incalculable at the time of the taking. The precedent clearly objects to considering this sort of contingent benefit.

C. *Reevaluating* Horne *and* Karan

In *Horne*, Justice Breyer suggested that the Court should speculate on differing values to account for the uncertain benefits of the ongoing raisin reserve program.[277] Chief Justice Roberts refused and the Court approved of compensation at the actual and calculable market value of the taken raisins.[278] In *Karan*, the property owners argued that the court should speculate on differing values to discount for the storm-protection benefits.[279] The New Jersey Supreme Court refused because the benefits were certain and calculable enough to influence the fair market value and offset compensation.[280] Perhaps the United States Supreme Court refused to speculate on the prevailing market value in *Horne* because the exact benefits of the raisin-marketing program were uncertain and incalculable.

The single rule so far described in this Article—that compensation is adjusted based on the market value of a remainder, only as influenced by certain and presently calculable benefits—explains the opposite rulings in *Karan* and *Horne*. In *Karan* the storm-protection benefits were reasonably certain and were easily calculable. The fact that the government dune project would ultimately save the Karans' home was a natural

277. *See Horne*, 135 S. Ct. at 2436 (Breyer, J., dissenting) ("In my view, however, the relevant precedent indicates that the Takings Clause requires compensation in an amount equal to the value of the reserve raisins adjusted to account for the benefits received.").

278. The idea of fair market value may seem inappropriate in the context of such a highly regulated market. Nevertheless, the value of the Hornes' raisins was set at a level that a willing buyer would pay a willing seller. That amount is highly influenced by the government-managed supply program, but the individual transactions are not compelled and the prices are merely influenced by the program, not set thereunder.

279. Borough of Harvey Cedars v. Karan, 70 A.3d 524, 528 (N.J. 2013).

280. *Id.* at 544.

consideration in a fair market assessment of the home, likely causing the value of their home to increase after the dune project,[281] and therefore, under both New Jersey and Federal doctrine, the Karans were entitled only to any compensation for any net loss.

Appraisal is a reasonably objective mechanism for determining property value, but it is not without some subjective aspects. Two appraisers served as experts in *Karan*.[282] Both experts agreed on the initial, pre-taking value of the Karans' property and both agreed that they could ascertain fair market value by comparing the Karans' property to other similar properties on the Jersey Shore that were recently valued or sold.[283] A trial court judge, however, instructed both appraisers to ignore storm-protection related benefits in their assessments, forcing both experts to deviate from the actual market value of the property.[284] Ignoring the benefits inserted fiction into the process. As the engineering experts testified, prior to the dune construction, there was a 56% chance that a storm would destroy the Karans' home in the next thirty years.[285] After the dune construction, the house would withstand storms for 200 years or more.[286]

One should not allow this risk calculation to confuse the certainty of the market benefits. It is not the underlying risk reduction (which is indeed speculative) that is the critical calculation. Rather, it is the public or prospective buyer's knowledge of storm protection that boosts the fair market value. Appraisals can determine whether a willing buyer would pay more for a property that has significant storm protection than for a property without such protections. Indeed, the benefits of storm protection apply broadly to the entire neighborhood, even to all of Long Beach Island or the New Jersey coast.[287] However, that does not make their impact on fair market value any less certain or quantifiable. Under this Article's proposed rule, the court will allow consideration of appraisals that take into account only certain and calculable benefits. While different experts may reach

281. *Id.* at 541.
282. *Id.* at 530.
283. *Id.*
284. *Id.*
285. *Id.* at 529.
286. *Id.*
287. *See id.* at 541-42.

different conclusions as to value, it is up to the fact finder to determine which appraiser's conclusions are most sound.

In *Horne*, Chief Justice Roberts declined to make any special adjustments or to speculate about what fair market value might be in the absence of the raisin-marketing program.[288] Roberts followed the Court's precedent by recognizing that compensation should be set at the current market value of the Hornes' raisins, which included the benefits of the regulatory program, and which the Government had already calculated as part of its enforcement effort.[289] In extensive administrative hearings, a Department of Agriculture Judicial Officer calculated the market value of the Hornes' raisins that the Hornes failed to reserve.[290] Calculating this price simply involved multiplying the tonnage of raisins that the Hornes' should have turned over to the Raisin Administrative Committee by the average price per ton of raisins in the relevant crop year.[291] This number was an established market value that did not rely on speculation, but on actual prices, and was readily calculable.

The Chief Justice dismissed Justice Breyer's alternative.[292] Justice Breyer read the Court's precedent and understood that neither the cases nor the Constitution recognize a distinction between general and special benefits.[293] Justice Breyer also gleaned that it is appropriate to offset benefits.[294] Where Justice Breyer fell short was in his repeated claim that precedent dictated offsetting "any enhancement" or "any benefit."[295] In fact, the precedent only allows offsetting certain, non-speculative, calculable benefits. Breyer cited the correct precedent in his dissent (*Bauman*, *McCoy*, and *Olson*, among other cases), but failed to address the repeated admonitions against speculation. Chief Justice Roberts read each of the cases without appreciating that most of them actually support the proposition that market value is the measure of compensation and that speculative benefits are not valid considerations.[296] Roberts therefore distinguished cases that

288. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2433 (2015).
289. *Id.*
290. Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1135 n.6 (9th Cir. 2014).
291. Horne v. U.S. Dep't of Agric., 2009 WL 4895362, at *19 (E.D. Cal. 2009).
292. *Horne*, 135 S. Ct. at 2432-33.
293. *Id.* at 2434 (Breyer, J., dissenting).
294. *Id.*
295. *Id.*
296. *Id.* at 2432 (majority opinion).

supported his conclusions.[297]

The disposition in *Horne* for which Justice Breyer advocated, in addition to being a departure from precedent, would have required the Court to speculate about the impacts of the generations-old regulatory program, evaluate retrospectively how that program impacted prices over more than a half-century, and determine how that long-term impact influenced contemporary prices.[298] This method would have resulted in lower compensation (or possibly no compensation) but it would have placed more burden on the Court and injected greater uncertainty and speculation into the process. More importantly, it would have been contrary to all the Court's earlier decisions on this subject.[299]

There are only two possible distinctions in *Horne* that might have led to a different result. First, all of the earlier cases considered real property[300] while *Horne* dealt with personal property.[301] Of course, as Justice Breyer pointed out, *Horne*'s primary holding assured that the takings doctrine should not apply differently to personal and real property.[302]

The other possible distinction between *Horne* and prior cases on the benefit-offset problem is that *Horne* dealt with a regulatory program as opposed to a public works project.[303] There does not appear to be Supreme Court precedent providing rules for assessing how a comprehensive regulatory program that effects a

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297. *Id.*

298. *See id.* at 2435-36 (Breyer, J., dissenting).

299. *See supra* Section IV, analyzing the Supreme Court jurisprudence on the benefit-offset problem.

300. There is one notable exception to this statement. In *United States v. Cors*, the Court did address the case of personal property—a tugboat—condemned by the War Shipping Administration for the effort in World War II. 337 U.S. 325, 327 (1949). The fact that the Court was dealing with personal property rather than real property did not arise as an issue. *See id.* What is interesting about this case is that it presents perhaps the only example where the Court did set off what might otherwise have been a speculative benefit. *Id.* at 333. The entire market for tugs was inflated by a government buying and condemnation program, and the Court decided that it could offset the inflation attributed specifically to the government program. *Id.* at 328. This case is distinguishable on at least two grounds. First, it was clearly a total, not partial, taking of the tug and therefore the Court looked to precedent for considering how the operation of a program might influence the market before the final transfer of property. *Id.* at 332. Second, this case involved a temporary emergency program, the impact of which is more capable of calculation and less speculative than an on-going, decades-old, regulatory scheme. *See id.* at 333-34.

301. *Horne*, 135 S. Ct. at 2424.

302. *Id.* at 2436 (Breyer, J., dissenting) (citing majority opinion at 2433).

303. *Id.* at 2424 (majority opinion).

taking of property impacts the market value of that property or its remainder. The question of whether the impacts of the regulatory scheme are sufficiently certain and calculable to impact market value seems to be largely a factual inquiry.

In Richard Epstein's seminal (if not entirely reasonable) book on takings, he gives some consideration to the effects of comprehensive regulations in comparison to more traditional public-project takings.[304] Comprehensive government regulations, he argues, always create more uncertainty than do projects that impact one or several specific properties.[305] It should come as no surprise that calculating the benefits of a regulatory program is more challenging than calculating the benefits of a public works project because regulatory benefits come "in the form of public goods, which are notoriously difficult to value."[306] "It is," writes Epstein, "more difficult to calculate the wealth and distributional effects of comprehensive government regulations."[307] This reasoning, that regulations provide less calculable benefits than public works, is an indication that courts generally may not offset regulatory benefits.

The raisin supply management program may actually be more easily calculable than farther reaching regulatory programs. The raisin reserves, for example, apply only to a limited number of citizens—those handling California raisins.[308] The speculation and incalculability here arise because there is no obvious fair market value in the absence of the supply management program. The program has operated for over 60 years and has therefore influenced market prices over that entire timespan.[309] It is hard to argue the benefits that supply management provides to raisin handlers, as the program limits supply in order to raise prices, but the quantity of benefit is not capable of present calculation. "The sheer number of parties involved [in a regulatory program as opposed to public works project] indicates that the problems of error and measurement, far from being the tail that wags the dog, becomes, for all purposes, the dog itself."[310]

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304. *See* EPSTEIN, *supra* note 250, at 200-47.

305. *Id.* at 274.

306. *Id.* at 200.

307. *Id.* at 274.

308. *See* Horne v. U.S. Dep't of Agric., 2009 WL 4895362, at *1 (E.D. Cal. 2009).

309. *See id.*

310. EPSTEIN, *supra* note 250, at 200.

Perhaps if a raisin handler objected at the outset of the program, or shortly after its inception, a comparison of the prevailing market prices and the pre-regulation prices would allow for more certain calculations of the benefits the program. That is not the case in *Horne*, validating Chief Justice Roberts' unwillingness to speculate.

D. *Summarizing the Benefit-Offset Doctrine*

The Chief Justice may not want courts to speculate about the benefits of regulatory programs, but his poorly articulated justification for the compensation ruling in *Horne* forces courts and local government decision makers to speculate about the exact contours of the benefit-offset rule. The job of articulation is therefore left to academics, at least for the time being. The following is an attempt to summarize the rules that govern the benefit-offset problem.

Courts should rely on fair market value and refrain from adjusting compensation based on speculative or uncertain factors. Courts should discard the misleading dichotomy of special and general benefits and should instead consider whether benefits are reasonably certain and capable of present estimation. Courts should not endeavor to perform subjective and speculative adjustments based on potential but uncertain benefits that are not presently calculable.

VIII. CONCLUSION

The 2015 storm season spared the New Jersey coast from anything approaching the scale of Hurricane Sandy.[311] But major flooding in Charleston, South Carolina[312] is a reminder of how critical coastal adaptation projects are all along the coasts. A result of Hurricane Joaquin, Charleston saw "days of relentless, saturating rains."[313] "Vehicles were submerged, dams were pushed

311. *See, e.g.*, Gayathri Vaidyanathan & Benjamin Hulac, *Hurricane Joaquin Helps Fuel Record Rains, Damaging Floods*, SCI. AM. (Oct. 5, 2015), *available at* http://www.scientificamerican.com/article/hurricane-joaquin-helps-fuel-record-rains-damaging-floods/.

312. Richard Fausset & Alan Blinder, *Flooding Cripples South Carolina Where Some Areas See over a Foot of Rain*, N.Y. TIMES (Oct. 4, 2015), http://www.nytimes.com/2015/10/05/us/south-carolina-residents-told-to-stay-home-as-rain-continues-to-pound-region.html?_r=0.

313. *Id.*

to their limits, electricity was cut off to thousands and emergency officials staged hundreds of swift-water rescues."[314] At least 15 people were killed.[315]

Measurements in Charleston Harbor show an increase in sea levels since the 1920s, demonstrating that "today's floods are tomorrow's high tides."[316] Prior to the fall 2015 flooding, Charleston had taken some steps to account for this trajectory, but they were marginal and insufficient. For example, the City has installed backflow preventers in drainage systems around two downtown streets, and has upgraded one of its stormwater pumps stations.[317] Charleston will have to do more.

Charleston is less than 15 miles from Isle of Palms, South Carolina[318] where David Lucas owned a property that was central to another Fifth Amendment takings controversy more than two decades ago.[319] Charleston's future resilience efforts might spark similar legal objections and doctrinal opportunities, if not in Charleston, South Carolina, then perhaps in New Jersey, Delaware, Maryland, Virginia, North Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, or any other vulnerable jurisdiction. Regardless, there will be more resilience projects, there will be interference with private property, there will be legal challenges, and the United States Supreme Court will have its opportunity to revisit the benefit-offset problem.

When that time comes, the Court should clearly and directly resolve three issues. First, the Court must discharge the special-general benefits distinction. That distinction has added only confusion and subjectivity and has not served as an administrable benchmark for deciding when to offset a benefit against compensation. Second, the Court should reiterate that fair market value is the basis for determining just compensation. When the

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314. *Id.*

315. Holly Yan and Ray Sanchez, *South Carolina Flooding: Dams Breached, More Trouble Ahead*, CNN (Oct. 7, 2015, 12:40 PM), http://www.cnn.com/2015/10/06/us/south-carolina-flooding/.

316. *Minimizing the Impacts of Coastal Flooding Helps City Prepare for Sea Level Rise*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://toolkit.climate.gov/taking-action/minimizing-impacts-coastal-flooding-helps-city-prepare-sea-level-rise (last modified Nov. 13, 2015, 11:31 AM).

317. *Id.*

318. *E.g.*, *Isle of Palms: Irresistible Enjoyment*, CHARLESTON AREA CONVENTION & VISITORS BUREAU, http://www.charlestoncvb.com/beaches/isle-of-palms/ (last visited Oct. 16, 2015).

319. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

government partially takes private property, the government owes the owner for the taken portion (measured by its market value) and for any damage to the remainder (based on a decrease in its market value). But if certain and calculable benefits increase the market value of the remainder, then compensation for the part taken should decrease by the certain and calculable increase to the market value of the remainder. Third, and finally, the Court should elaborate its prior holdings that benefits resulting from a public project or regulation, whether widespread or narrow, may be considered as part of a fair market assessment and offset against compensation only if they are certain, non-speculative, and presently calculable. That is, only if they are the sort of benefits that a willing buyer and willing seller would consider in reaching a price on the open market.

All of these principles are established in the Court's case law, but they have not been fully drawn together in an articulate rule. *Horne* reached the same compensation conclusion that it would have under these rules, but without this express reasoning. *Karan*, and this Article, should provide the fodder for finally settling the benefit-offset problem.