10-2021

Brigham-Kanner Property Rights Journal, Volume 10

William & Mary Law School

Brigham-Kanner Property Rights Journal

Volume 10

October 2021

WHERE THEORY MEETS PRACTICE
October 1–2, 2020

Conference Authors

Henry E. Smith
Robert C. Ellickson
Carol M. Rose
Ezra Rosser
James Burling
Wendie L. Kellington
Jeremy P. Hopkins
David L. Callies & Ellen R. Ashford
James W. Ely, Jr.
Brian Angelo Lee
Andrew Prince Brigham & Lindsey Brigham Knott
Jonathan Brightbill & Peter McVeigh

A Publication of the Property Rights Project of

William & Mary Law School

BRIGHAM-KANNER PROPERTY RIGHTS JOURNAL

Volume 10
2021

Cite as:
10 BRIGHAM-KANNER PROPERTY RIGHTS J. ___ (2021)

A PUBLICATION OF THE PROPERTY RIGHTS PROJECT OF
WILLIAM & MARY LAW SCHOOL
POST OFFICE BOX 8795
WILLIAMSBURG, VIRGINIA 23187-8795

The *Brigham-Kanner Property Rights Journal* [ISSN Number: 2326-7437] is published by the Property Rights Project of William & Mary Law School. Our mailing address is *Brigham-Kanner Property Rights Journal,* William & Mary Law School, Post Office Box 8795, Williamsburg, Virginia 23187-8795. E-mail address: jgabbo@wm.edu. The views expressed in the *Journal* are those of the authors and do not necessarily reflect the policies or opinions of the *Brigham-Kanner Property Rights Journal,* its editors and staff, or William & Mary.

History of the William & Mary Law School

Chartered in 1693 by Queen Mary II and King William III of England, William & Mary is the second oldest institution of higher learning in the United States. The Chair of Law at William & Mary was created in 1779 by the Board of Visitors at the request of Thomas Jefferson, and was the first established in the United States. The first occupant of the Chair was George Wythe, in whose offices studied Thomas Jefferson, John Marshall, James Monroe, and Henry Clay. The growth of the law school was halted by the beginning of the Civil War in 1861. Sixty years later, the study of law was revived in a modern program that attracts students from all regions of the nation.

Copyright Notice

Subscriptions

The *Brigham-Kanner Property Rights Journal* is published once a year by the Property Rights Project of William & Mary Law School. Subscriptions to the *Journal* are considered to be continuous and, absent receipt of notice to the contrary, will be renewed automatically each year. The subscription price is $15.00 per issue. Correspondence related to subscriptions should be addressed to: Jan Abbott, Assistant Editor, *Brigham-Kanner Property Rights Journal,* William & Mary Law School, Post Office Box 8795, Williamsburg, Virginia 23187-8795.

BRIGHAM-KANNER PROPERTY RIGHTS JOURNAL

VOLUME 10 OCTOBER 2021

BRIGHAM-KANNER PROPERTY RIGHTS JOURNAL

VOLUME 10 OCTOBER 2021

WHERE THEORY MEETS PRACTICE
OCTOBER 1–2, 2020

SEVENTEENTH ANNUAL BRIGHAM-KANNER PRIZE: DINNER PRESENTATION AND AWARD RECIPIENT SPEECH

AWARD RECIPIENT
Henry E. Smith, *Fessenden Professor of Law and Director of the Project on the Foundations of Private Law, Harvard Law School*

INTRODUCTION
Lynda L. Butler, *Chancellor Professor of Law and Director, Property Rights Project, William & Mary Law School*

BUTLER. Each year, the Brigham-Kanner Prize is awarded to someone who has made significant contributions to our understanding of property. Prior recipients have included the nation's leading property scholars, a Supreme Court justice, a leading practitioner, and a Peruvian economist. This year's recipient, Henry Smith, is one of the deepest thinkers we have recognized. By that, I am referring to Henry's ability to innovate, introducing new methods and ideas about property that have led to the emergence of a theory of property focusing on its architecture.

Whether it is his work on the relevance of an old doctrine, his explanation of the interface between contracts and property, his insights into a well-managed semi-commons, or his work on two strategies for delineating the nature and scope of property rights, Henry continues to push the boundaries of property theory in ways that reveal its complexity. Very few scholars can take a seemingly obsolete doctrine, like *numerus clausus*, and give it modern relevance. Very few can bring property from what critics predicted was its demise, its disintegration, to its re-emergence as a powerful system. His analysis is complex. Reading his work is not a leisurely walk in the park. But, the lessons learned are so invigorating that the careful reader will inevitably have an "aha" moment. Henry's numerous publications include books on property, on patent, on the economics of property law, and on linguistics. He has also published many articles in the top journals, including Yale, Harvard, Columbia, Michigan, Chicago, William and Mary, and the Brigham-Kanner Property Rights Journal. A member of the American Law Institute, Henry is the Reporter for the Fourth Restatement of Property—a monumental task.

Professor Smith received his AB in German studies from Harvard, an AM in German and a PhD in linguistics from Stanford, and a JD from Yale.

After clerking for Judge Winter on the Second Circuit, Henry joined the Northwestern Law School faculty in 1997. He returned to Yale as a faculty member in 2002 before joining the faculty at Harvard in 2009, where he now directs the Project on the Foundations of Private Law and is the Fessenden Professor of Law.

Both academics and practitioners have praised Henry's contributions. When Justice Kagan was the dean of Harvard Law School, she praised Henry as "one of the nation's leading lights in the crucial fields of property and intellectual property" and as producing scholarship that is "as original as it is rigorous, as brilliantly interdisciplinary as it is deeply rooted in the law." Bob Ellickson described Henry as "universally admire[d]" and a leading property theorist, and Joe Waldo, whose commitment to property rights led to the creation of this Conference, described Henry as "a remarkable scholar" and praised his leadership of the Fourth Restatement. Joe especially appreciated Henry's recognition of the importance of practitioners to the restatement project.

Henry, we are deeply honored that you are here virtually to receive the Brigham-Kanner Prize. Now I am going to do a virtual presentation of the prize to you. This is what I've been worried about the entire day because the Crystal is very beautiful but very heavy.

Congratulations!

SMITH. Thank you so much, Lynda. That was such a kind and gracious introduction.

I have to say that not only am I virtually honored and humbled to receive this award. I am *actually* honored and humbled to receive this award.

It's really a surreal experience because this is a conference I've attended many, many times. I consider it the sort of high point of the property year.

And I've always enjoyed this Conference very much and have always profited from it greatly. Your leadership of the Conference has been incredible. You've stimulated people to really do their best work.

My thanks first of all to Joe Waldo and Andy Brigham for making this work and Conference possible. As I said, the Conference is really

a boon to the whole field, and really the high point of the year for people in the field of property. It's one, as was mentioned, that brings together the whole property community, academics and practitioners and judges, which is incredibly valuable for obvious reasons, but also ones that I'll talk about in a moment. I'm also very grateful to my former neighbor Dean Ben Spencer, as well. William & Mary Law School is incredibly lucky to have you as its leader, and I really appreciate the William & Mary Law School and Ali Trivette for handling everything so well here.

If there's any group I'd be thrilled to join and thrilled to be joining, it's this group of property prize winners. I looked over the list again today and I really didn't have to do it. I think I could have actually recited them from memory because they are really a super group, and it's really hard to believe that I'm joining them, not just at a conference but actually joining their ranks.

Among others, that group includes people with whom I have a deep friendship and value as colleagues: Frank Michelman and Joe Singer; two of my friends and mentors, Bob Ellickson and Carol Rose, who taught at Yale when I was a student; and my longtime friend and collaorator Tom Merrill. (I'll have more to say about that in a minute.)

So, I'm definitely surprised to be a part of their revered company, but I'm surprised for other reasons as well, because I did not know always that I would be a property person. I did not think of myself as a property person when I went to law school, while I was in law school, or even after I was in law school.

But I would say maybe it was a little bit of revisionist history. I always was a property person and let me explain how that works.

I came to law school having earned a PhD in linguistics. I'll say more about what the connection is later, but it really wasn't apparent at the time. I did not set out to do law and linguistics. I wanted to take law on its own terms and see how things went, and when I started teaching at Northwestern after my wonderful clerkship with Judge Winter, the law school tried to get me to teach property. I actually argued them out of it, which is a testament to how nice the people are at Northwestern because usually when, for curricular reasons, they ask a junior faculty member to teach a subject, that's not really a request. But I made some argument about how I was hired to teach commercial law and so I should start with contracts

and so forth. They actually bought the argument. Well, little did I know that they were right and I was wrong.

At the time I was trying to apply new institutional economics, in particular the property rights economics of economists like Yoram Barzel, to the question of how we give remedies under contract law. I think it's still a good idea but what happened was that during the course of gearing up for this, I ran across the puzzle of the medieval open field system, the system of scattered strips that would be thrown open for common grazing after harvests and in fallow periods. This was always treated as a puzzle because these long thin strips seem to be very inconvenient. The explanations, if that's what they can be called, ran from statements like you know people just didn't know better to a possible insurance arrangement. I had the idea that maybe this was a way of constraining strategic behavior in certain ways.

And then I thought, well, okay, that's kind of an interesting idea, maybe I'll write a little paper on that and then get back to business with contracts—take a little tangent and then get back to where I was. And I'm still on that tangent. So I never got back to business, and here I am. And I'm very glad of that.

So, basically, as Lynda mentioned, I came to property through contract. I was both writing and teaching on contracts and encountered property questions from time to time. I certainly thought back to Bob Ellickson's property class when I was doing it. It was really quite puzzling—the idea that property facilitates bargains and promotes human flourishing of people's projects, allowing them to conduct economic activity—all sorts of activities that are protected. The protected activities have their limits—based on anti-discrimination, public policy, excessive restraints on commerce, and so forth. So, there were a lot of similarities and I thought, well that's not surprising. After all, a lot of people said, "oh you know private law is private law and maybe all law is law, there really shouldn't be anything special about areas of law," and yeah, property did seem to be special in a variety of ways. In particular, even though in many (though not all) of its guises, property like contract was facilitative—property provided a platform for people to do their thing—property still was very different from contract in that a lot of property was mandatory. That is, property law tells you: OK, if you want to do this, then you

have to use this form. You can't make up your own form, and here's a menu of forms to use. That is not the way that the contract law works. This and various other aspects were kind of puzzling. One day I dropped by my next door neighbor at Northwestern, who was none other than Tom Merrill. And I have to say that it's hard to imagine a neighbor as fun as Tom. You could just drop in anytime and that was one way to spend the afternoon. It was very productive because when I mentioned these things that were puzzling me, he said well actually there's a name for that and it's called *numerus clausus*. So we started talking about why property is standardized, and why it serves its purposes the way it does and maybe there is something to the idea that property is in rem addressing the world at large. If I have a property right, I'm holding it with respect to everybody in many cases, and that's very different from contract. We would have these very productive conversations.

And, you know, over time, I realized that this is very relevant to a whole gamut of issues in property law, from mortgages to customary law, and so forth, where who the participants are, their social distance from the thing itself, and the people who are asserting the rights, are very important. One thing led to another, with one puzzle leading to another and then another. Property obviously is not formalized all the time. It's not a system of purely mandatory rules. Part of property is very context-specific. We have trust law, we have equity, and we used to have special chancery courts to deal with equity (as evidenced by the brass plaque and the marble tablet behind Andy noting that George Wythe was a judge of the Chancery Board). The element of equity in our legal system is still very important and I'd like to talk a little bit about that tomorrow, but the idea that property law has this complex and hybrid character where its doing many things at one time is very important.

So looking back I realized that I was actually always a property person. I was Bob's RA on his land use book and I was a director of the landlord tenant clinic, where I worked for the late Frank Dineen at Yale. I was trying to remember at what point I got the idea that I was a property person because I'm making this sound like one thing led to another, and that's basically what it was. I remember a workshop dinner at Yale. Bob and Carol were both there, and the paper was somewhat property related, and we started getting into this highly raucous and wide-ranging discussion about property.

I don't think I can even recall all the things that this conversation touched on, but I think it included water, infrastructure, and land records, and I don't know what else. I realized that, maybe to borrow a phrase, property is about life in all its fullness. And I think that's very important. At the same time, it's a very specific set of institutions, and these are important institutions that need our urgent attention precisely because they touch upon life in all of its fullness and all of its aspects. What could be more important!

So when Ricky Revesz asked me to be the reporter for the Fourth Restatement of Property, I certainly was somewhat hesitant. I'd always been kind of skeptical that this could work and I convinced myself partly because of what I just said, that property is important. It's an important institution that deserves attention for what it's doing in so many facets of life. And yet I thought that there's something that maybe past restatements did but we could do again and maybe even more completely. The first restatement was only actually a partial restatement, unlike the torts and contracts restatements. I thought there was maybe the possibility that we could do something that's both systematic on the one hand and flexible and empirically grounded and sensitive to the real world on the other. That's a very tall order, something no one person could possibly even begin to do—it requires all sorts of different kinds of creativity and expertise as inputs to a project like that. I've been very fortunate to work with many different people with many backgrounds on the team of associate reporters. They are an outstanding group and a total pleasure to work with. And many of the people are here today, including Molly Brady, Sara Bronin, Rick Brooks, Wilson Freyermuth, John Goldberg, Dan Kelly, Brian Lee, Tom Merrill, and Chris Newman. And in the spirit of this very prize, we've really benefited, all of us have benefited from the expertise and wisdom of practitioners, and included in those are people on the program and involved in this Conference, like Steve Weise and Joe Waldo.

And many of the academics here today are also advisors on the project. As I said, this kind of project requires many kinds of wisdom as an input, and I'm deeply grateful to them. Creativity in the service of making things work is something that is really hard to appreciate unless you actually try to do it.

As a result of the Restatement, I've been drawn into areas of property that I never thought I would do—more on the theme of one

thing after another. These areas include drone trespass and conversion of intangibles, trespass on the internet and things like that—cutting-edge issues. I realized when I teach first-year property, if you want to include cutting-edge issues in the property class, it's kind of hard to do.

I think it's valuable to do, but it's hard to do because they often come in at the point where very basic concepts enter the course, like possession and trespass and so forth. And I think that says something very deep about property, that it's precisely in those areas where the combination of important technological and social change may demand some attention in the law. And that connection to reality is actually why I went to law school in the first place. I love linguistics, but I thought it was time to get real.

Over time, I have seen how what I did in linguistics is more relevant than I thought at first. You know, all sorts of aspects from the ancient Indian grammarians who I studied in grad school, to the sociology of audiences in discourse analysis, all grew more real and more property related than I ever thought at first.

For me, then, this is an occasion to think about how all this actually fits together, at least in retrospect. And that brings me back to the beginning, which is how I got into academia in the first place through linguistics.

As Ben said, my family is here, my wife, Sun-Joo Shin, and our daughter Hannah, and I certainly thank them most of all for their support. I met Sun-Joo while we were working in a problem set group. We formed our little two-person subgroup for problem sets. And I remember thinking at the time, what a miracle it was to be working with the most amazing person in the world. And it's been like that ever since, so thank you.

BUTLER. Henry, that was a wonderful way to end your remarks.

PROPERTY BEYOND FLATLAND

HENRY E. SMITH*

INTRODUCTION

Although the world of property is wonderfully complex, property theory invites diverse perspectives, and the word "property" itself is elusively protean, there is one respect in which the field of property is neither complex, nor diverse, nor protean. Property suffers from a bad case of "dichotom-itis," and like private law generally, it is stuck in what, to borrow a term, I will call "Flatland."[1] In this Essay I want to help us escape from Flatland.

To do so, our field needs to incorporate modern notions of complex systems much more thoroughly than it now does. One theme I see in property theory and increasingly in property practice is an excessive reductionism. Let me emphasize the "excessive": the problem is not reductionism per se.[2] As limited beings, we are not capable of dealing with all of life's complexity all of the time.[3] And yet too

---

* Fessenden Professor of Law and Director of the Project on the Foundations of Private Law, Harvard Law School. Email: hesmith@law.harvard.edu. I would like to express my gratitude to the Property Rights Project at the William & Mary Law School for conferring on me this year's Brigham-Kanner Property Rights Prize. For helpful comments I would like to express my thanks to Bob Ellickson, Brian Lee, Carol Rose, and the conference participants. All errors are categorically mine.

1. I am referring to the satirical novella of that name. EDWIN A. ABBOTT, FLATLAND: A ROMANCE OF MANY DIMENSIONS (2005) (1884). I also acknowledge Carol Rose's use of the term "Propertyland," which she contrasts to "Contractland," and other territories. Also, as some of my former students know, "Flatland" is the lightly fictionalized version of my hometown of Chicago, which, particularly through its Flubs baseball team, makes regular appearances on my final exams.

2. Thus, I need not assume strong anti-reduction which holds that reduction is not possible in principle. *See* P.W. Anderson, *More Is Different: Broken Symmetry and the Nature of the Hierarchical Structure of Science*, 177 SCIENCE 393 (1972).

3. *See, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 402 (J .P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1835) (In contrast to the divine point of view that can take account of all particulars, "[g]eneral ideas do not bear witness to the power of human intelligence but rather to its inadequacy . . . . General ideas have this excellent quality, that they permit human minds to pass judgment quickly on a great number of things; but the conceptions they convey are always incomplete, and what is gained in extent is always lost in exactitude."); Albert Kocourek, *Formal Relation Between Law and Discretion*, 9 ILL. L. REV. 225, 238 (1914) ("While the combinations of situations, persons, things, and facts are beyond computation, yet these computations are not such that they cannot be

much reductionism or reductionism of the wrong kind can be seriously limiting.

The way to overcome this misplaced reductionism is to get beyond the dichotomies in property theorizing. And for that we need a better handle on the role complexity plays in property institutions, as they are embedded in real life.

By complexity, I do not mean complicatedness. Intricacy, elaboration, and the like are not complexity. Rather, complexity stems from the interactions of the elements of a system. If a system is a collection of interconnected elements, a complex system is one in which the elements are not only numerous enough but interconnected enough that properties of the system cannot be traced to the individual elements or their additive effect.[4] Instead, the action is in the interactions, and system properties can be emergent.

And here is where the idea of Flatland is inspiring and a little daunting. The characters in the two-dimensional world found the introduction of three-dimensional beings into their world very strange, and, seen in two dimensions, they were strange indeed.[5] Stepping outside a world of *n* dimensions and into one of *n +1* or more dimensions is disorienting. At least in property theory, we have the advantage of legal systems of other times and places with which we can compare our own. Further, in the spirit of Legal Realism, we have the complexity of the real world and nonlegal institutions as sources of comparison and inspiration (not, as we will see, simple mirroring), which can be our starting point for looking more deeply into our property system. To begin with, we can ask why in the face of complexity of the problems they confront, our legal system in general and property law in particular should not adopt the methods of dealing with complexity in these other aspects of life. Life in all its fullness requires no less, and as limited creatures, we can meet this challenge in characteristically limited ways. This Essay is about those.

To be sure, something going under the banner of "complexity" has often been invoked in property theory and in private law more

managed by the aid of legal science. The same multiplicity is found in the domain of nature, but yet the external sciences are able to bring order out of chaos.").

4. MELANIE MITCHELL, COMPLEXITY: A GUIDED TOUR (2011); HERBERT A. SIMON, THE SCIENCES OF THE ARTIFICIAL (2d ed. 1981); Ludwig von Bertalanffy, *An Outline of General System Theory*, 1 BRIT. J. PHIL. SCI. 134 (1950).

5. The narrator in *Flatland*, A Square, was even an old-fashioned lawyer.

generally. And, as we will see, Legal Realism has made great efforts at dealing with complexity, in the course of which notions of complexity have been adopted that are not entirely on point or even consistent with each other. I will draw on complex systems theory to bring out the role that interactions—those between attributes of resources, between resources, between aspects of the law, between law and society and so on—play in property institutions and how we can build our understanding of property law and institutions around this complexity.

Essential to what follows is to recognize that complexity falls along a spectrum (not a dichotomy) and that it matters greatly where, along that spectrum, the complexity of property law and institutions falls. The spectrum is defined by the nature and extent of the interconnections of the elements of a system. If the elements are not connected at all—they are a heap, as it were—then we have simplicity. Change in an element does not affect other elements, and each element contributes additively to the fitness of the entire collection. A literal bundle of sticks would be a good example. At the opposite extreme is disorganized, maximal complexity (even, in special cases, chaos), in which elements of a system are densely and intensively interconnected. Change in one element can have many and large effects on other elements and drastic effects on the performance of the system. In between is what Warren Weaver called organized complexity, in which elements are connected but not maximally, and the density of connections may not be uniform throughout the system.[6] Instead they may cluster, and in some systems may form distinct clusters that are connected much more intensely inside than outside to the rest of the system. Such systems are "nearly decomposable" (because the components are, unlike in simplicity, not totally unconnected[7]), and in such situations complexity can be managed through modularity: internally complex components can be linked through more sparse and stylized interfaces.[8] A car is a modular system (brakes and windshield wipers are not interconnected, and the drive

6. Warren Weaver, *Science and Complexity*, 36 AM. SCIENTIST 536 (1948).

7. SIMON, *supra* note 4, at 195–98.

8. *See, e.g.*, 1 CARLISS Y. BALDWIN & KIM B. CLARK, DESIGN RULES: THE POWER OF MODULARITY (2000); Richard N. Langlois, *Modularity in Technology and Organization*, 49 J. ECON. BEHAV. & ORG. 19 (2002).

train is connected in specific ways to, e.g., the wheels), as are most computer hardware and software.[9] There is an active debate about how modular the mind and human language competence are.[10] The more that elements are interconnected, whether organized in modules or not, the more we may expect system properties to be difficult to trace to individual components. Such system-level properties are emergent.[11] Thus, the hardness of a diamond or the wetness of water are not properties of carbon atoms or water molecules.

Because social and cognitive systems are complex—they fall somewhere along the spectrum of complexity well away from simplicity—we lose something, including the possibility of emergence, when we assume away those connections. The legal system as a whole, or property law itself, may exhibit properties that cannot be traced to a particular "legal rule."[12] Property law might be efficient or fair even though one rule or especially an invocation of a rule (a suit in trespass) might not be efficient or fair.[13]

To capture this kind of complexity requires more structure and a less homogeneous law than we often are led to expect. For one thing, property theory sports a lot of dichotomous thinking, which we need to overcome. I will explore a number of these dichotomies, the final one of which is that between theory and practice. Current theorizing is not just divorced from practice.[14] It is a kind of practice itself, substituting theoretical constructs for the reality they are supposed to be serving. This is deeply ironic given that the orientation in Legal Realism was to stress the "facts of the situation" and to fashion concepts to be closer to particulars. At the same time, under the influence of flattened property law, practice itself is not everything it could be.

I think something similar is true of property law, when current theory at its most reductionist is confronted with the complexity of

---

9. BALDWIN & CLARK, *supra* note 8, at 149–217.

10. *See, e.g.*, H. Clark Barrett & Robert Kurzban, *Modularity in Cognition: Framing the Debate*, 113 PSYCH. REV. 628 (2006) (reviewing the modularity of mind debate); JERROLD M. SADOCK, THE MODULAR ARCHITECTURE OF GRAMMAR (2012) (presenting theory of natural language based on nonhomogeneous modules connected by meta interfaces).

11. For a strong statement, see Anderson, *supra* note 2.

12. Andrew S. Gold & Henry E. Smith, *Sizing Up Private Law*, 70 U. TORONTO L.J. 489 (2020).

13. Henry E. Smith, Property as a Complex System (draft June 2021) (on file with author).

14. *See, e.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession* 91 MICH. L. REV. 34 (1992).

the world. An engagement with practice in that world is the way out of Flatland.

This Essay begins in Part I by setting out the partial view of complexity in property theory and how it expresses itself in a variety of dichotomies that systematically fall short in capturing the reality of property. Part II then turns to the kinds of system that might characterize property and how an understanding of organized complexity avoids the traps commonly thought to be inherent in "systems" in law. Turning to property on the ground (and in the air!), Part III shows how theories of property incorporating organized complexity point to solutions to a variety of problems, including aerial trespass, nuisance, and the clustering of rights. I conclude with some thoughts on the role of property theory in the world of property.

I. MISLEADING DICHOTOMIES IN PROPERTY THEORY

In property theory as currently practiced, dichotomies and reductionism abound. All stem from a lack of appreciation of complexity in its full sense. The problem is often identified with the so-called bundle-of-rights or bundle-of-sticks picture of property.[15] However, I think the problem extends far beyond the bundle picture, and the bundle picture itself is more a remediable symptom of a deeper problem—of complexity.

As with "property," the term "complexity" is certainly used a great deal in connection with property. Moreover, it was concerns about "complexity" that led the Realists to embrace the bundle picture.[16] "Complexity" also supplied an important motivation for the American Law Institute to initiate its Restatement projects.[17] When these

15. *See, e.g.*, J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012). *See generally* Symposium, *Property: A Bundle of Rights?,* 8(3) ECON J. WATCH (Sept. 2011), https://econjwatch.org/issues/volume-8-issue-3-september-2011?ref=issue-archive.

16. *See, e.g.*, THURMAN W. ARNOLD, THE FOLKLORE OF CAPITALISM 114–16 (1937); JAMES E. HERGET, AMERICAN JURISPRUDENCE, 1870–1970: A HISTORY 146–47 (1990); G. EDWARD WHITE, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change, in* PATTERNS OF AMERICAN LEGAL THOUGHT 136, 139 (Quid Pro Books 2010) (1978); *see also* RICHARD A. POSNER, REFLECTIONS ON JUDGING (2013) (arguing from complexity against formalism and for a new judicial realism).

17. REPORT OF THE COMMITTEE ON THE ESTABLISHMENT OF A PERMANENT ORGANIZATION FOR THE IMPROVEMENT OF THE LAW PROPOSING THE ESTABLISHMENT OF AN AMERICAN LAW

consequential movements got their start in the 1920s and 1930s, our understanding of complexity was intuitive but incomplete—sometimes even flat. What was meant in those days by "complex" was often more like complicated, having many pieces. Lawyers and commentators worried about the burgeoning wave of case law, and the law itself consisted of many rules. While complicatedness is a problem, it is a different one from true complexity. Further, the world itself was becoming more complex—new activities and industries were coming to the fore and social conflicts were coming to a head—and although this was closer in spirit to true complexity, many made the assumption that if the law were to meet each of these new challenges, it would need more complex rules.[18]

The true complexity problem required something more, and there were inklings at the time for a different take on complexity. In particular, the controversy in biology between vitalists and mechanists led Ludwig von Bertalanffy to develop his general systems theory, one of the first versions of modern complex systems theory.[19] Systems theory allows all the system properties to be grounded in elements of the system and their interactions, without having to hold true or even be identified with particular local collections of elements. Later Herbert Simon (well known to behavioral economists) developed the notion of complex system across fields. Simon was concerned with design (the artificial) across engineering, medicine, business, architecture, art, psychology, linguistics, and economics, among many areas, and he found nearly decomposable systems and a role for modularity in economic systems, business firms, computer programs, and even watches (a famous illustration). In doing so, he made the intriguing observation that complex systems theory makes it possible to be an "in-principle reductionist" and a "pragmatic holist."[20] These days complex systems theory (alternatively known as complex adaptive systems and complexity science) is an active field (it certainly promises a

---

INSTITUTE 12 (Feb. 23, 1923), *reprinted in* THE AMERICAN LAW INSTITUTE 50TH ANNIVERSARY (2d ed. 1973); *see* Henry E. Smith, *Restating the Architecture of Property*, *in* 10 MODERN STUDIES IN PROPERTY LAW 19 (Sinéad Agnew & Ben McFarlane eds., 2018).

18. *See infra* notes 31 and 94–99 and accompanying text.

19. *See* Bertalanffy, *supra* note 4; *see also* LUDWIG VON BERTALANFFY, GENERAL SYSTEM THEORY: FOUNDATIONS, DEVELOPMENT, APPLICATIONS (1969).

20. SIMON, *supra* note 4, at 195.

great deal!),[21] and there is increasing interest in seeing private law, including property law, in terms of complexity.[22]

The upshot is that even a conceptual "reduction" of more abstract notions to their "atomic" parts does not tell us which concepts we should use in our workaday use of the legal system. Notions like corporation or thing or possession (and so on) can still be useful, including in legal reasoning—as long as that reasoning is pragmatic and defeasible rather than rigidly deductive.[23] And from a practical point of view, concepts and rules of a middle-level abstractness are likely to be especially useful.[24] At the poles of extreme abstraction and extreme concreteness, concepts leave actors in extreme epistemic uncertainty. Super abstract concepts give little information at all,

---

21. In addition to the sources cited in note 4 *supra*, *see, e.g.*, NINO BOCCARA, MODELING COMPLEX SYSTEMS (2d ed. 2010); STEFAN THURNER ET AL., INTRODUCTION TO THE THEORY OF COMPLEX SYSTEMS (2018); *see also* GERALD M. WEINBERG, A GENERAL INTRODUCTION TO SYSTEMS THINKING (2011).

22. *See, e.g.*, Lynda L. Butler, *The Importance of Viewing Property as a System*, 58 SAN DIEGO L. REV. 73 (2021); David Harper, *Property Rights as a Complex Adaptive System: How Entrepreneurship Transforms Intellectual Property Structures*, 24 J. EVOLUTIONARY ECON. 335 (2014); Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487 (2017); Henry E. Smith, *Systems Theory: Emergent Private Law*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 139 (Andrew Gold et al. eds., 2020); Alan Calnan, *Torts as Systems*, 28 S. CAL. INTERDISC. L.J. 301 (2019); Spencer Williams, *Contracts as Systems*, 45 DEL. J. CORP. L. 219 (2021); Joshua C. Teitelbaum, *Computational Complexity and Tort Deterrence* (Geo. Univ. L. Ctr., Working Paper No. 3480709, 2021), https://ssrn.com/abstract=3480709. *See generally* Simon Deakin, *Legal Evolution: Integrating Economic and Systemic Approaches*, 7 REV. L. & ECON. 659 (2011); Eric Kades, *The Laws of Complexity and the Complexity of Laws: The Implications of Computational Complexity Theory for the Law*, 49 RUTGERS L. REV. 403 (1997); Daria Roithmayr, *Evolutionary Dynamics and Method, in* ENCYCLOPEDIA OF LAW AND ECONOMICS (Gerrit De Geest ed., 2d ed. 2012); J.B. Ruhl, *Law's Complexity: A Primer*, 24 GA. ST. L. REV. 885 (2008).

23. *See, e.g.*, Simon Deakin, *Juridical Ontology: The Evolution of Legal Form*, 40 HIST. SOC. RES. 170 (2015) (presenting system of defeasible concepts as able to coevolve with social and economic context); Kocourek, *supra* note 3, at 238 (presenting "legal science" as a method for managing "combinations of situations, persons, things, and facts" where these are not directly computable); F.H. Lawson, *The Creative Use of Legal Concepts*, 32 N.Y.U. L. REV. 909 (1957) (arguing for practical use of semi-abstract concepts that can be designed for convenience, especially for non-litigation uses of law); Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097 (2012). *See generally* J.A. SCOTT KELSO & DAVID A. ENGSTRØM, THE COMPLEMENTARY NATURE (2006) (showing how complementarity rises from systems resolving internal contradictions).

24. Mario J. Rizzo, *Abstract Rules for Complex Systems*, EUR. J. L. & ECON., Mar. 2021 at 6; Douglas Glen Whitman, *The Rules of Abstraction*, 22 REV. AUSTRIAN ECON. 21 (2009); *cf.* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011) (arguing for mid-level principles in intellectual property).

and very concrete concepts mimicking the complexity of life are uncertain in application and costly to process.

Property theory as currently practiced is suspicious of concepts of even middling abstractness. Before turning to how such concepts work better than is commonly thought, let me diagnose how property theory, by leaving complexity out of the picture, flattens the law into a series of distorting dichotomies.

1. The Bundle of Rights. Although I do not see the bundle as a huge obstacle to progress in theorizing about property (at least not as big an obstacle as I used to think), it is a symptom of how complexity has been read out of private law theory. There are different versions of the bundle picture, and it is sometimes hard to know which we are dealing with.

The bundle picture is so useful, seductive, and ultimately limiting because it is a kind of reductionism. Notions like property or ownership can be broken into smaller pieces, and the properties of the whole are reduced to the sum of the properties of these parts. One version is the Hohfeldian system of jural relations (right-duty, privilege-no right, power-liability, immunity-disability) and opposites across pairs of relations (right-no right, privilege-duty, power-disability, immunity-liability), which can capture what is going on in any legal situation—especially in terms of who can prevail legally against whom in a putative lawsuit.[25] This has an appealing bottom-line or "brass tacks" flavor, and the Legal Realists always wanted to keep close to the facts. The flip side is that more aggregate notions like ownership and property were downplayed or derided as "transcendental nonsense."[26] Legal concepts should be narrow and shallow and keep close to the facts.[27] While the Realists were motivated in part by their hope that

25. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913), *reprinted in* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 23–64 (Walter Wheeler Cook ed., 1923).

26. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935).

27. Smith, *supra* note 23, at 2102–06. For a moderate statement of the Realist position, see Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 438–51 (1930) (distinguishing between abstract legal verbalisms and concrete empirical facts). For a classic post-Realist statement, see Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980). For a

this picture would dethrone classical liberal notions of property and deprivilege traditional baselines, the bundle picture is not ultimately tied to any particular ideology.[28] While reducing property to a pile of sticks allows engineering to work stick by stick in isolation, libertarians and classical liberals have flipped the script: if each stick is property, then it might get protection against government takings.[29] Each stick is its own "denominator," and the government would be on the hook for compensation much of the time. Something isn't right here.

As I have argued elsewhere, what the bundle picture leaves out—flattens out—is an essential kind of complexity—organized (or structured) complexity to be exact.[30] Realism made a major effort to accommodate complexity, and complexity was a major reason cited for the inadequacy of prior law and the need for a different style of judging and legal scholarship. Nuisance would be a primary example.[31]

However, the role of complexity was, well, complex, and Realism's treatment of it was not terribly consistent. Thus, on the one hand, the world was taken as irreducibly complex, implying a high degree of unorganized complexity. The solution, however, was to assume that the law in general and the bundle in particular, needed to reflect that complexity stick by stick and rule by rule—without much internal structure, or complexity, itself. Often assuming away such internal connections, the picture of private law (especially the common law) that emerges is quite simple, in a way: a system with little internal structure or interaction among its parts. Notions like

---

modern defense of this moderate realist approach, see Hanoch Dagan, *Doctrinal Categories, Legal Realism, and the Rule of Law*, 163 U. PA. L. REV. 1889 (2015).

28. Grey, *supra* note 27, at 81 (noting that the legal realists "were on the whole supporters of the regulatory and welfare state, and in the writings that develop the bundle-of-rights conception, a purpose to remove the sanctity that had traditionally attached to the rights of property can often be discerned").

29. *See, e.g.*, Richard A. Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8(3) ECON J. WATCH 223 (Sept. 2011).

30. Smith, *supra* note 22; Henry E. Smith, *Complexity and the Cathedral: Making Law and Economics More Calabresian*, 48 EUR. J. L. & ECON. 43 (2019).

31. RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 121 (2004) ("The essential premise of much environmental law is . . . that the physical characteristics of the ecosystem generate spatial and temporal spillovers that require restrictions on the private use of natural resources far beyond those contemplated by centuries-old common law tort rules."); *see also* Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 9–36.

"reasonableness" or even "in accordance with policy" can reflect complexity but themselves are simple. That is, the law's own contribution is to let the complexity of the world take its course, and the law itself can be stated very briefly (and so, in that sense, simply).

The problem here is twofold, both theoretical and practical. As a matter of understanding, much of the structure of law and everyday cognition was simply assumed, in a way that traditional grammarians would assume the categories of Latin when analyzing non-Indo-European languages.[32] Once we endogenize categories—in property theory that would be things, bundles, and legal concepts—we get a more explanatory theory. At the practical level, an attention to what kind of complexity we're dealing with (and when) is crucial for picking the rights tools. The conventional bundle picture assumes that problems can be addressed in separate fashion—which is sometimes true. For very advanced problems that can be taken in isolation without ripple effects (i.e., they are on a separable margin), it is highly fruitful to regard entitlements in a disaggregated way. Because attention is focused more on such problems, the conventional bundle seems more generalizable than it really is. We may forget that property law and institutions are quite multipurpose, applying all the way from the sandbox and the parking lot to our dealings with everyday objects, like costs and watches, to residential leases and sophisticated real estate deals.[33]

If the problems facing property law show complexity with some organization, we might expect a different kind of reflection. The law itself might show structure to its own complexity, and the law might be a device for managing the complexity of the world through this very structure. That is, the very organization of the world into legal things that can be possessed and owned, and the definition of lumpy packages of legal relations (sometimes called "property") over them will, in a sense I will explore, serve to manage the complexity of the interactions among resource attributes and actors. Likewise, a set of interlocking legal concepts (like possession) can respond flexibly but at lower complexity cost than a more free-form or highly articulated

32. *See, e.g.*, WILLIAM CROFT, SYNTACTIC CATEGORIES AND GRAMMATICAL RELATIONS: THE COGNITIVE ORGANIZATION OF INFORMATION (1990).

33. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 398 (2002).

style of law. Systems rest on interrelationships—between resource attributes, legal relations, legal concepts, and the like—and on the architectural approach we need to ask about their relationships. Again, this need not mean any necessary or deductive relationship. It might be complementarity or any other influence on the value of one relation from the presence or absence of another.

The conventional bundle picture is only part of the story. First of all, we need to be clear on what we are doing when we analyze property into bundles. Hohfeld was engaged in conceptual analysis, and defenders of the bundle are on solid ground when they claim that as a conceptual matter one can think of each stick separately.[34] The problem is that in practice, conceptual separateness is treated the same as practical distinctness and independence.[35] To get from conceptual separateness to practical independence we have to assume away the actual contingent, empirical interdependencies among the sticks we have identified.[36]

---

34. Shane Nicholas Glackin, *Back to Bundles: Deflating Property Rights, Again*, 20 LEGAL THEORY 1 (2014).

35. Thomas Ross argues that the bundle-of-sticks metaphor itself implies strong separability:

> Although both the Hohfeldian abstraction and the pre-metaphor property law [property as thing ownership] recognized the separation of particular property interests, the metaphorical conception [bundle of sticks], when examined, emphasizes that separation. Within both the Hohfeldian abstraction and the metaphorical conception, my legally recognized right, for example, to lease my home is distinguishable from my other rights. But within the metaphorical conception if the state changes or takes away this particular right, all other rights are presumptively left intact and unaffected. To take one stick out of the bundle leaves the remaining sticks undisturbed. The metaphor not only makes analysis by disaggregation seem natural and right; it also suggests the separability of those disaggregated interests in a way not suggested by the Hohfeldian abstraction. Once you embrace the metaphor, it becomes hard to imagine how the taking of one interest could affect the interests remaining.

Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1061–62 (1989); *see also, e.g.*, CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 280 (1994) (arguing that the bundle-of-sticks metaphor implies that rights making up ownership are separable and "all more or less alike" and that seeing ownership rights as more like "[t]oys in a toy chest"would be truer to how they are "interconnected and interdependent," perhaps in the service of "some larger general purpose"); Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 967 (2010) ("In the sense of being an agglomeration of separable powers, property can be said to be a 'bundle of rights.'"); Anna di Robilant, *Property: A Bundle of Sticks or a Tree*, 66 VAND. L. REV. 869, 877–89 (2013) (setting out separability as element of the bundle theory of property); *see generally* Grey, *supra* note 27 (arguing for disaggregation of property bundle based in part on separability).

36. Whatever those are: individuation is a related challenge.

The nature and extent of such connections determine the type of complexity and hence the version of the bundle of rights. Various versions of the bundle picture correspond to types of complexity. If the sticks in the bundle are totally unconnected, the effects of the bundle are the additive sum of the effects of the sticks and optimizing each stick never makes the bundle less fit (efficient, fair, autonomy promoting) overall. This corresponds to simplicity. At the other extreme, each stick might be tightly connected (for example, by affecting the value greatly) of every other stick. If so, any change can lead to wild swings in the value of the bundle, which are very hard to predict. In between we might have some degree of connection in the bundle, and, importantly, greater internal connections within the bundle than between elements in the bundle and those outside. Thus, the bundle of rights includes rights of lateral support and rights and privileges for use of adjacent watercourses, because support and uses of water are highly complementary to what owners would do with land. (What "land" is can be endogenized in this way.[37]) In other words, the system overall is one of what Warren Weaver dubbed "organized complexity,"[38] with a pattern of partial decomposability.[39]

A modular structure emerges, which can be modeled using networks.[40] And the legal system can shape the interface between modules further (e.g., by ruling out unvaluable potential connections that could lead to costly complexity). Lee Alston and Bernardo Mueller capture this range of bundle pictures by using Stuart Kauffman's famous *N-K* model of biological evolution (*N* genes and *K* epistatic connections in the sense that the effect of a mutation in a gene depends on other genes).[41] They show how these different degrees of

37. For an early and sophisticated attempt, see Stuart S. Ball, *The Jural Nature of Land*, 23 ILL. L. REV. 45 (1928).

38. Weaver, *supra* note 6.

39. SIMON, *supra* note 4, at 209–17; *see also* Herbert A. Simon, *The Architecture of Complexity*, 106 PROC. AM. PHIL. SOC'Y 467, 477 (1962).

40. Ted Sichelman & Henry E. Smith, Modeling Legal Modularity (draft 2017) (on file with author); *see also* MATTHEW O. JACKSON, SOCIAL AND ECONOMIC NETWORKS 443–57 (2008); M. E. J. Newman & M. Girvan, *Finding and Evaluating Community Structure in Networks*, 69 PHYSICAL REV. E 026113 (2004).

41. STUART KAUFFMAN, AT HOME IN THE UNIVERSE: THE SEARCH FOR THE LAWS OF SELF-ORGANIZATION AND COMPLEXITY 170–76 (1995); Lee Alston & Bernardo Mueller, *Towards a More Evolutionary Theory of Property Rights*, 100 IOWA L. REV. 2255, 2262–63, 2265–68 (2015); *see also* James E. Krier, *Evolutionary Theory and the Origin of Property Rights,* 95 CORNELL L. REV. 139 (2009).

interconnection and hence complexity lead to different expectations about the evolution of property bundles. The unconnected-stick bundle, the simple one, has a fitness landscape that is like a smooth mountain with one overall optimum reachable by any path. The maximally connected bundle (or world) has a random-looking landscape: any change can lead to wild peaks and valleys, and the global maximum may not be reachable through small changes. By contrast, the fitness landscape corresponding to the bundle showing organized complexity is jagged, with several somewhat predictable maxima, and with some improvements outside the reach of incremental changes.

This middle-range organized complexity promises to be the most realistic. Alston and Mueller see my architectural approach as being an instance of this middle picture, and it nicely captures some of the stakes in the debate over the bundle. They give the example of the statutory right to roam in England, which was generally considered an unambiguous improvement (with one note of caution).[42] Consistent with a picture based on organized complexity, recent empirical work suggests that the statute did negatively affect land prices—which is not to say that this cost stemming from epistatic connections was not worth incurring.[43] Again, these connections are empirical and a matter of degree.

The picture here is endogenous, not exogenous. That is, the bundle endogenously responds to exogenous factors. We can thus explain the contours of bundles and things and how they respond to external change. Much of what can be owned is determined by purpose (land and tools yes, air normally no) and feasibility (land and everyday objects yes, distant astronomical objects no, *ad coelum* notwithstanding). Importantly, morality shapes what is eligible for property: wedding rings and other familiar property for personhood emphatically yes

42. Alston & Mueller, *supra* note 41, at 2267–68 (quoting Henry E. Smith, *Property Is Not Just a Bundle of Rights*, 8 ECON J. WATCH. 279, 286 (2011)) ("'[A]dding or subtracting a stick to the bundle affects the rest of the sticks. In principle the bundle theory could take this into account, but it typically does not. Instead, the metaphor of the bundle of sticks is used to imply precisely the opposite. In a bundle of sticks the sticks do not interact; you can add or subtract them at will, and still you will have a bundle with roughly the same properties. Not so with property: giving the right-to-roam stick to a neighbor or to the public affects the value of the remaining property, including "sticks" like the ability to grow plants, to eat dinner in peace, etc.'").

43. *See* Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. PA. L. REV. 917 (2017).

and slavery emphatically no.[44] What is definitely not true is that everything that could be a thing can be owned. Complexity considerations will make some possible things infeasible and shape which version of other things and bundles we see. On the margins, internal "epistatic" connections help determine the contours of bundles and affect the course of change.

In a sense, we need to adopt the spirit of Yoram Barzel's theory of property (and his related earlier work on taxation) to investigate how "quality changes" can occur.[45] Thus, for example a per unit tax on light bulbs or cigarettes can lead to inefficiently durable light bulbs or long cigarettes. And an ad valorem tax on cars can cause sound systems to be sold separately. The problem is that a tax can have an effect on the underlying things subject to taxation, because actors will want to alter the nominal thing to minimize the tax. We need to allow for the possibility of adjustment through the law and through actors' responses to the law, both in terms of things and bundles of rights.

The same is true of property law: legal rules can shape the "things" and the "bundles of rights" over them both directly and indirectly. While it is often convenient to assume that the objects of the legal system or taxation are given or constant, this can foreclose important kinds of description and explanation. It is not realistic.

Here, too, we need to get beyond an important reductionist dichotomy. Things and bundles are assumed to be either totally rigid or totally plastic, and sometimes things are assumed to be fixed and bundles plastic. It is sometimes assumed that allowing for fluidity at the margins or for some resources means that somehow fluidity reigns everywhere.[46] Property is more complex.

---

44. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). Slavery is immoral whether or not one believes in Lockean fashion that we own ourselves or that property only refers to objects separable from the self.

45. YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS (2d ed. 1997); Yoram Barzel, An *Alternative Approach to the Analysis of Taxation*, 84 J. POL. ECON. 1177 (1976); Henry E. Smith, *Ambiguous Quality Changes from Taxes and Legal Rules*, 67 U. CHI. L. REV. 647 (2000).

46. *See, e.g.*, Katrina M. Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183 (2017) (arguing from edge cases that thinghood in the architectural theory has no stability and is as protean as the bundle of rights). In a similar way, the usefulness of the bundle theory at the margin does not make it a theory of property as a whole, nor does it preclude that the bundle might have a relatively stable core. For analyses assuming a homogeneity in the bundle in this sense, *see, e.g.*, Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57 (2013); Stephen R. Munzer, *A Bundle Theorist Holds On to His Collection of Sticks*, 8 ECON. J. WATCH 265 (2011). Some theorists make the assumption that both things and bundles are totally disaggregating. *See* Grey, *supra* note 27.

2. System in Property and Private Law. The prevalent allergy to system in law reflects another flattening dichotomy. System in law is assumed to be fully deductive or nothing.[47] Because the former is obviously inadequate and even undesirable, we seem to be forced into anti-system. This doesn't follow (deductively or otherwise!). In keeping with complex systems theory, the real question is whether the parts of property law and its institutions interlock in interesting ways—and these ways need not be deductive.[48]

Basic notions of possession can be taken as emblematic of the vagaries of system in property law. Starting with Savigny, possession was taken as a central test for system in law and the use of Roman law as such a system.[49] This notion of system became more deductive and ambitious over time. Even Savigny's approach can be faulted for not being policy oriented,[50] and the Realists and their successors zeroed in on possession as a classic instance of overtheorizing. They went so far as to claim that there is no unitary notion of possession at all in the law but rather a series of context-specific notions for trespass, conversion, and adverse possession, all varying by resource, and so on.[51]

---

47. *See, e.g.*, GRANT GILMORE, THE AGES OF AMERICAN LAW 42 (1977) (claiming that in supposed Langdellian formalism, "the law is a closed, logical system. Judges do not make law: they merely declare the law which, in some Platonic sense, exists. The judicial function has nothing to do with the adaptation of rules of law to changing conditions; it is restricted to the discovery of what the true rules of law are and indeed always have been."); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606 (1908) ("[T]he effect of a scientific legal system upon the courts and upon the legal system is more subtle and far-reaching. The effect of all system is apt to be petrifaction of the subject systematized."). On the vast array of varieties of formalism and the incorrectness of this picture, see Paul B. Miller, *The New Formalism in Private Law*, 66 AM. J. JURISPR. (forthcoming 2021), https://ssrn.com/abstract=3908595.

48. *See, e.g.*, Gerald Postema, *Law's System: The Necessity of System in Common Law*, 2014 NEW ZEALAND L. REV. 69 (2014) (arguing that non-deductive type of system is compatible with common law reasoning); Jeremy Waldron, *"Transcendental Nonsense" and System in the Law*, 100 COLUM. L. REV. 16, 25 (2000) (discerning in law "a form of interconnectedness (flagged by a corresponding technical vocabulary) that we might refer to not just as coherence but as doctrinal systematicity—the way that, in specific areas of law . . . rules of different kinds fit together in a structured and articulated whole as part of a system").

49. FRIEDRICH CARL VON SAVIGNY, VON SAVIGNY'S TREATISE ON POSSESSION; OR THE JUS POSSESSIONS OF THE CIVIL LAW (Sir Erskine Perry trans., London, R. Sweet, 6th ed. 1848).

50. Richard A. Posner, *Savigny, Holmes, and the Law and Economics of Possession*, 86 VA. L. REV. 535 (2000).

51. *See* Joseph W. Bingham, *The Nature and Importance of Legal Possession*, 13 MICH. L. REV. 535 (1915); Burke Shartel, *Meanings of Possession*, 16 MINN. L. REV. 611 (1932).

These criticisms of extreme notions of deductive system are well taken, but they can be mistakenly extended to kinds of system that can prove their worth. The law should not try as a matter of book learning to capture the nature of possessory control for each resource in the world, which is more a matter of social fact upon which the law draws. Moreover, we can avoid abstractions like "constructive possession," if we recognize (as did Albert Kocourek) that possession concepts can be useful if we allow them to specialize.[52] If "possession" is a matter close to facts in the world,[53] and we make many legal rights turn on the "right to possess," we can capture the law in a looser but still somewhat systematic way. Moreover, some such structure reflects the path of legal development, with possession and rights to possess layered on top of each other as a matter first of custom and then of law.[54] At the same time, as Carol Rose has shown, possession is directed at an audience of sometimes socially close and at other times socially distant potential duty bearers.[55] Such communication must be modulated in terms of its degree of formalism (versus contextualism).[56]

3. Formalism and Standardization as Categorical or Along a Spectrum. System is often associated with formalism, because a deductive system operates in a fashion relatively free from context. (We define what is in the system and what is not.) Supposedly, formalists see law as an autonomous discipline and law as hermetically sealed from politics—and perhaps some do. As Paul Miller has shown, "formalism" has come to mean many things ranging from the ridiculous (a matter of caricature) to the highly nuanced.[57] Here is not the place to explore all these notions of formalism, but I do want to point out how we can avoid needlessly dichotomizing formalism and contextualism, and thereby can open ourselves to true complexity.

---

52. ALBERT KOCOUREK, JURAL RELATIONS 364–71 (2d ed. 1928). For a compatible approach to civil law, see Yun-chien Chang, *The Economy of Concept and Possession*, *in* LAW AND ECONOMICS OF POSSESSION 103 (Yun-chien Chang ed., 2015).

53. EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 379–80 (W. Moll trans., 1936) (1913) (providing an account of possession as resting on social facts).

54. Henry E. Smith, *The Elements of Possession*, *in* LAW AND ECONOMICS OF POSSESSION 65 (Yun-chien Chang ed., 2015).

55. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 78 (1985).

56. Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1115–25 (2003).

57. Miller, *supra* note 47.

Formalism is not—as it is often taken to be—all or nothing. It is often assumed that law is either totally deductive and autonomous or it cannot be formal at all. Intractable complexity might point away from formalism (but which way would it point?). Perhaps as in early conceptions of the environment, everything is connected to everything else and context always matters, which would preclude the use of shortcut or system of any kind.[58] Clearly context matters a great deal and interconnections are important, in the environment and in law.[59] The question is how to manage the challenge, and a degree of formalism can sometimes be a part of the solution rather than always the problem.

Although formalism takes many forms, it is surprisingly possible to give general characterizations of formalism. Francis Heylighen defines formalism as relative invariance to context.[60] This definition can be used in language (computer languages versus human language, formal versus informal speech), scientific theories, and mathematical notation (published proofs versus everyday work). Most interesting for our purposes is the role of formality in communicating with socially distant audiences who cannot be presumed to bring as much background knowledge or common norms to the communication. In rem versus in personam can be seen as an important example.[61]

If we take complexity seriously, we should treat formalism as being a matter of degree—a matter of when, how much, and why. Within the law, we should not expect the same degree of formalism everywhere. When it comes to the most impersonal contexts, where an in rem right is being asserted against people generally ("against the world"), requiring duty bearers to process a lot of contextual information is not realistic.[62] Famously, James Penner argued for the importance of in rem rights and the formal (not substantive) centrality of

58. ALDO LEOPOLD, A SAND COUNTY ALMANAC 239–40 (1949); JOHN MUIR, MY FIRST SUMMER IN THE SIERRA 211 (1911); Steven J. Eagle, *The Common Law and the Environment*, 58 CASE W. RSRV. L. REV. 583, 594–95 (2008) (discussing the views of Aldo Leopold and John Muir).

59. Henry E. Smith, *The Ecology of the Common Law*, 9 BRIGHAM-KANNER PROP. RTS. J. 153 (2020).

60. Francis Heylighen, *Advantages and Limitations of Formal Expression*, 4 FOUND. SCI. 25, 26–28, 49–53 (1999); *see also* Smith, *supra* note 56, at 1148–57.

61. Smith, *supra* note 56, at 1139–67.

62. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 55 (2000); Henry E. Smith, *Toward an Economic Theory of Property in Information*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 104 (Kenneth Ayotte & Henry E. Smith eds., 2011).

the right to exclude in property through the example of a parking lot: duty bearers need to know not to take or meddle with cars, but they need not know anything about the owner, the owner's plans, whether the car is borrowed from the user's sister-in-law, etc.[63] By contrast to such in rem relations, where people are contracting between themselves, we can expect and allow a lot more (but not unlimited) idiosyncrasy, and it makes more sense to take context into account. And between these poles (if that's what they are), we get a lot of variation. As Merrill and I have shown, there are many property institutions that fall in between.[64] Here the duty bearers and other potentially interested parties are numerous but definite or non-numerous but indefinite, making the audience of intermediate social distance. And in these "intermediate" situations, we find intermediate degrees of standardization.[65] And within such intermediate institutions, like landlord-tenant, bailments, security interests, and trusts, we find an intermediate degree of formalism with standardization of the more in rem aspects and more tailoring and use of context in the more in personam aspects.[66] Boilerplate in contract law falls between the in rem and in personam, and it exhibits a semi-formal modular structure.[67]

Indeed, this differential formalism based on varieties of audience is very general.[68] It occurs within human language, and even in realms we might not expect it. For example, within the world of mathematical communication, which is sometimes taken to be totally formal, degrees of formalism are crucial to the course of mathematical understanding itself.[69]

---

63. J.E. PENNER, THE IDEA OF PROPERTY IN LAW 75–76 (1997).

64. Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001) [hereinafter Merrill & Smith, *The Property/Contract Interface*].

65. *Id.*

66. *Id.* at 809–51.

67. Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1180 (2006); Cathy Hwang, *Unbundled Bargains: Multi-Agreement Dealmaking in Complex Mergers and Acquisitions*, 164 U. PA. L. REV. 1403, 1420 (2016); *see also* Erik F. Gerding, *Contract as Pattern Language*, 88 WASH. L. REV. 1323 (2013). This is not to say that such contractual provisions are totally modular or that modularization comes without cost. *See, e.g.*, Matthew Jennejohn, *The Architecture of Contract Innovation*, 59 B.C. L. REV. 71 (2018); Tal Kastner, *Systemic Risk of Contract* (June 17, 2021), B.Y.U. L. REV. (forthcoming), https://ssrn.com/abstract=3869216.

68. Smith, *supra* note 56, at 1125–67.

69. William P. Thurston, *Proof and Progress in Mathematics*, 30 BULL. AM. MATH. SOC'Y 161 (1994).

Formalism sometimes manifests as standardization, and among areas of private law, property is more standardized than most. Which is not to say that it is always standardized or that the degree of standardization is constant over time and place. Tom Merrill and I offered a theory of standardization in property, known by the civil-law term "*numerus clausus*," based on the benefits and costs of information implicated by in rem versus in personam rights.[70] As mentioned earlier, in rem audiences (of duty bearers and potential acquirers) are more distant than those involved in corresponding in personam scenarios. Moreover, someone creating an in rem right does not necessarily face all the information costs thrown off by a new form: an idiosyncratic form may cause everyone else to be on the lookout for unwanted features along a variety of margins and to fear surprises along unknown ones.[71] Title records can help, but it is an empirical question how much and when.[72] And it is noteworthy that systems of registration often have a stricter, not a looser, *numerus clausus*. If, as some have argued, notice really cured all—any detail in the land records provides sufficient opportunity for notice—then we would expect freedom of creation should reign, and registration, which gives the best notice, would allow more idiosyncrasies.[73] Instead, if anything, we find the opposite, and it is not hard to guess why: if the registrar must make a pronouncement on title, the registrar stands in for the "in rem" public and will not want to incur high information costs evaluating idiosyncratic interests.[74] (Interestingly, when New Zealand tried to automate its Torrens registration system, it had to standardize even further.[75]) Consistently with complexity economics, information is a way of framing a substantive problem: in rem rights are nonconsensual, and we

70. Merrill & Smith, *supra* note 62.

71. *Id.* at 32.

72. Henry E. Smith, *Standardization in Property Law*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 148, 165–67 (Kenneth Ayotte & Henry E. Smith eds., 2011).

73. For an argument to this effect, see Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353 (1982); *see also* Alfred F. Conard, *Easement Novelties*, 30 CAL. L. REV. 125, 131–33 (1942) (arguing that novel easements should be enforceable as long as there is notice).

74. Benito Arruñada, *Property Enforcement as Organized Consent*, 19 J.L. ECON. & ORG. 401, 416–20 (2003).

75. Benito Arruñada, *Leaky Title Syndrome?*, 2010 N.Z. L.J. 115 (April 2010).

should hesitate in imposing on in rem audiences who do not agree to be bound by idiosyncratic duties.[76]

Standardization varies over time in a complex way, but often not in the way sometimes portrayed. It is said that some countries have the opposite of the *numerus clausus*, a "*numerus apertus*" or open set of property rights—free customization. This turns out to be somewhere between overblown and false: such systems, including those of Norway, South Africa, and Spain, in practice are more standardized than they are in theory.[77] On the other hand, in more close-knit groups we can expect much less standardization, as we find with customary regimes.[78] Indeed, the question of how much a society-wide, more impersonal legal system should recognize community custom is perhaps the most controversial aspect of the *numerus clausus*.[79]

At the level of law, it is possible to be a functionally oriented partial formalist.[80] That is, the pattern of when formalism is (and is not) desirable can be grounded in functional considerations (not usually associated with strong forms of formalism). In personam and in rem would be but one example. Thus, external perspectives like functionalism need not read the concepts important to internal perspectives entirely out of the law: concepts like possession can be justified by their function in a system, a function that is not merely given. By the same token, internal perspectives theorize from the perspective of system participants and are often grounded in local kinds of morality like corrective justice. These internal perspectives

---

76. *See, e.g.*, Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597 (2008); Avihay Dorfman, *Property and Collective Undertaking: The Principle of* Numerus Clausus, 61 U. TORONTO L.J. 467 (2011); Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2009).

77. Yun-chien Chang & Henry E. Smith, *Convergence and Divergence in Systems of Property Law: Theoretical and Empirical Analyses*, 92 S. CAL. L. REV. 785, 798 & nn.36–38 (2019) (discussing and citing sources for Norway, South Africa, and Spain).

78. *See* Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5 (2009). For this reason and because modularity is endogenous in the architectural theory, I do not see this as a "modernist" project or geared exclusively to modern property systems. *Cf.* Carol M. Rose, *Modularity, Modernist Property, and the Modern Architecture of Property*, 10 BRIGHAM-KANNER PROP. RTS. J. 69 (2021) (detecting a modernist theme in the architectural theory). Perhaps the baroque would be a better architectural and cultural analogy?

79. *See* Henry E. Smith & Yun-chien Chang, *The* Numerus Clausus *Principle, Property Customs, and the Emergence of New Property Forms*, 100 IOWA L. REV. 2275 (2015).

80. Smith, *supra* note 22, at 158; ("Applying systems theory to private law . . . allows us to take seriously some of the structures of private law for functional reasons."); *see also* Wyman, *supra* note 46, at 206 (discussing functionally motivated formalism or functional formalism).

should be open to functional considerations—to the way that the functioning of concepts in society helps shape legal concepts. Thus, both external and internal perspectives can converge to some degree on a more varied picture of formalism.[81]

4. Information Costs. Related to system and formalism is the notion of information costs. While not the sole or even the main focus of property law, information costs are a source of potential flattening in property they if they are not handled properly. They also shape property law in characteristic ways.

Information costs are a broad category. They include much more than the verification costs a party incurs in order to evaluate whether rights are valid.[82] Measurement costs of all kinds are information costs, including the costs of figuring out the contours of rights and their various implications.[83] Highly interactive rights—where the interactions can have consequences but are not that valuable overall—present a complexity problem. The emerging field of complexity economics sees many of the benefits and costs of economic activity in terms of information, a trend consistent with developments in the natural sciences.[84]

Complexity gives rise to information costs. Complexity causes uncertainty which can be measured in terms of entropy.[85] That is, complexity carries a lot of information both in the sense that it would require a long description and that it has a lot of surprise value. From a practical standpoint these aspects of complexity give rise to costs: the resources for dealing with complexity or the losses incurred because of it can be classed as information costs. And different modes of delineation are differentially costly. Just as we reserve a signal

81. On how complexity considerations point toward a partial convergence of external and internal perspectives, see Gold & Smith, *supra* note 12.

82. If we focus only on verification costs to the exclusion of other information costs, the problem of standardization in property looks much narrower than it actually is. *See* Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373, S416 (2002).

83. *See* Yoram Barzel, *Measurement Cost and the Organization of Markets*, 25 J. L. & ECON. 27 (1982).

84. *See, e.g.*, CÉSAR HIDALGO, WHY INFORMATION GROWS: THE EVOLUTION OF ORDER FROM ATOMS TO ECONOMIES (2015); HANDBOOK OF RESEARCH ON COMPLEXITY (J. Barkeley Rosser, Jr. ed., 2009).

85. Ted M. Sichelman, *Quantifying Legal Entropy* (forthcoming 2021), *in* THE PHYSICS OF THE LAW: LEGAL SYSTEMS THROUGH THE PRISM OF COMPLEXITY SCIENCE.

like a light being on or a siren going off for the less probable state (higher entropy in an informational sense), so we use the least cost delineation for the "default" set of rights, such as the fees simple or full ownership. This does not make them more important. It just means that we can make property law serve our purposes at lower cost. For all these reasons, formalism—a matter of degree—can be seen as a response to information costs, and in my previous work I have explored some of these implications.

It should be said that despite my architectural approach sometimes being called (included by me) an "information cost" theory, I have never claimed that the be-all-and-end-all or even the main purpose of property is to lower information costs. The model is a benefit-cost model (and even here I do not adopt such a model as any kind of philosophical utilitarian).[86] The point is to handle complexity: to make it serve our purposes—and for present purposes I take these purposes to be plural—without causing excessive problems, however those are cast. Part of the point of emphasizing information costs is that until recently they were often assumed away, to the detriment of explanatory power. This is not unrelated to the bundle picture and the reflexive dismissal of formalism of all kinds. It is true that some of property's characteristic devices are shaped by the cost of in rem rights—costs incurred in achieving the benefits—and that this causes property to be different in interesting ways from contract.

86. Smith, *supra* note 15, at 1725 ("I am not arguing for utilitarian foundations in a philosophical sense. If explanations based on information costs, complexity, and the nearly decomposable system of social interactions dovetail with moral theories, it is quite likely not an accident. This convergence is a consequence of complexity. As Herbert Simon pointed out, complexity can lead us to be "in-principle" reductionists and "practical" holists."); Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 974 (2009) ("Undoubtedly, one can find convinced utilitarians and consequentialists, but I suspect for many, including myself, utilitarianism is a method of communication more than anything else."); *see also* Thomas W. Merrill & Henry E Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850–51 (2007) ("But it seems highly unlikely that such a morality will be captured by many forms of utilitarianism. Pragmatism is too uncertain, and case-specific cost-benefit analysis too demanding and error-prone, to supply the kind of robust and widely accepted moral understanding needed to sustain a system of property."); Thomas W. Merrill & Henry E. Smith, *The Architecture of Property*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORIES 134, 136 (Hanoch Dagan & Benjamin Zipursky eds., 2020) ("We do not claim that these purposes can be reduced to a single metric (such as utility), although we do think that the kind of quasi-utilitarianism of law and economics can serve as a provisional lingua franca or integrating tool of analysis (analogously to the way cost-benefit analysis serves a role in the regulatory context).") (footnote omitted).

Indeed, one may even say that these characteristic devices, including a large role for exclusion in modern property systems, are an "essential role" of property law in the sense of Henry Hansmann and Reinier Kraakman's work on organizations: these devices in property law do something that could not feasibly be replicated by contract.[87] Nevertheless, information costs are but part of the picture.

As with complexity, the problem of information costs and resultant partial formalism is far from limited to property. Similar patterns of "audience design" are reflected in natural language, with more formal "high delineation cost" speech used for socially distant audiences and more informal implicit communication for those closer in social context.[88] Closely related to this is how custom tends to be partially formalized and simplified if it is taken up into the law and applied beyond its community of origin.[89] Even in an enterprise that has a clear-cut deductive image like mathematics the very same patterns of communication can be seen.[90]

The need to achieve property's purposes at reasonable cost helps explain why the trust works the way it does and why it is such an important legal innovation. Because the trustee has legal title, for most purposes third parties can interact with the property in the usual way. The trustee is subject to equitable duties (prominently loyalty and prudence, but also accounting, information, etc.) to the beneficiary.[91] These can be very intense and context-specific because they are mainly of relevance to these two parties. The one exception is that if the trustee transfers to a third party who does not give value (no reliance) or knows that the transfer is in breach of trust, then the third party will be treated as a constructive trustee with a duty to convey to the appropriate party.[92] The beneficial interest is

87. *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 390 (2000) (arguing that asset-partitioning is not achievable by contract, making it the "essential role" of organizational law); Brian Angelo Lee & Henry E. Smith, *The Nature of Coasean Property*, 59 INT'L REV. ECON. 145 (2012).

88. Smith, *supra* note 56, at 1133–39.

89. Smith, *supra* note 78.

90. Thurston, *supra* note 69.

91. *See, e.g.*, Ben McFarlane & Robert Stevens, *The Nature of Equitable Property*, 4 J. EQUITY 1, 1 (2010); J.E. Penner, *An Untheory of the Law of Trusts, or Some Notes Towards Understanding the Structure of Trusts Law Doctrine*, 63 CURRENT LEGAL PROBS. 653, 665–66 (2010); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621 (2004).

92. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 (AM. L. INST. 2011).

therefore "in personam plus." The arrangement achieves much of the benefit of property for the beneficiary in a way that facilitates expert management and the like, but does not present large information costs for third parties.

The trust exemplifies how attention to complexity and information costs can help us to see that the law achieves its purposes, here quite important and sometimes idiosyncratic purposes, through specialized structures. The traditional debates about whether trusts are contract or property miss how it is a unique hybrid that makes it possible to achieve many of the benefits of property (and more) using mechanisms that in a sense hardly go beyond contract.[93] The trust is quite special, and its uniqueness is easy to miss if we are looking for flattened law. Trusts help us break out of Flatland.

5. Purpose in Property Beyond the Mirror Principle. The flip side of this more complete picture of where information costs come from and why they (but not they alone) matter is the question of purpose in property law. Conventionally, property theory gets straight to the purpose by expecting each component, including each stick in the bundle and each "rule" of property law to reflect some purpose directly.[94] Systems need not work this way.[95] This expectation that property law's purposes are close to the surface has deep roots in Legal Realism and beyond. In characteristically pithy fashion, Oliver Wendell Holmes proclaimed that "a body of law is more rational and

---

93. *Compare* F.W. MAITLAND, EQUITY: A COURSE OF LECTURES 29 (A.H. Chaytor & W.J. Whittaker eds., 1936) ("[T]he Chancellor begins to enforce a personal right . . . which in truth is a contractual right, a right created by a promise."); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627, 669 (1995) (acknowledging that "[t]rust is a hybrid of contract and property," but maintaining that at bottom "[t]rusts are contracts") *with* Austin Wakeman Scott, *The Nature of the Rights of the* Cestui Que *Trust*, 17 COLUM. L. REV. 269, 289 (1917) ("[T]he rights of the *cestui que trust* . . . are treated like property rights rather than like obligations."); Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Anal*ysis, 73 N.Y.U. L. REV. 434, 454–59 (1998) (arguing for a property-based account of trusts); *see also* Merrill & Smith, *The Property/Contract Interface*, *supra* note 64, at 843–49 (analyzing trust as an institution between in rem and in personam); Yun-chien Chang & Henry E. Smith, *An Economic Analysis of Civil Versus Common Law Property*, 88 NOTRE DAME L. REV. 1, 13 (2012) (discussing trusts in context of styles of legal systems).

94. *See, e.g.*, Smith, *supra* note 86.

95. *See* GERALD M. WEINBERG & DANIELA WEINBERG, ON THE DESIGN OF STABLE SYSTEMS 299 (1979) ("[P]eople persist in the fallacy that mechanisms and variables are in one-to-one-correspondence.").

more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words."[96] And the external and functional perspective advocated by the Realists and their successors usually involved this rule-by-rule approach. Much of law and economics, especially in its first generation, canvassed the rules of the common law for efficiency.[97] And this kind of reductionism is furthered by the reductionism of the bundle of rights: drawing on Coase (who adopted it for different purposes), law and economics employs the separability of the sticks and the consequent ease of optimization to make it more straightforward to evaluate and reshape the property bundle by the metric of efficiency.[98]

Just as we should neither assume that sticks are always easily separable in practice, likewise we should be open to the idea that rules or other constituents of the law and legal institutions might work synergistically. Law is not just a heap of rules. Such a heap would leave out the whole problem of complexity: sticks and rules might be connected—might work together, might work at cross-purposes, etc.

Thus, when we come at it from the end of purpose—of ends, if you will—we should not necessarily expect that a purpose will be achieved directly by some single component of the legal system, whether it be a stick in the bundle or a "rule" of law. Yes, this sometimes happens, as where we might consider the implied warranty of habitability in isolation. The implied warranty of habitability is embedded in the lease and in landlord-tenant law more generally, but it is more separable from the bundle than would be the notion of possession or the right to repel gross physical invasions under the law of trespass. Transacting behavior, such as in landlord-tenant and real property

96. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

97. This is what led Arthur Leff in his review of the first edition of Richard Posner's *Economic Analysis of Law* to identify Posner's book as a picaresque novel in which "the eponymous hero sets out into a world of complexity and brings to bear on successive segments of it the power of his own particular personal vision." Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 451 (1974). One theme of Leff's review is the problem of complexity and how Posner's method, like any nominalism, assumes it away. *See, e.g.*, the section entitled "Avoiding Complexity." *Id.* at 469–77.

98. On Coase's adoption of the bundle of rights and its pervasiveness in law and economics, see Merrill & Smith, *supra* note 33; Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON. S77 (2011).

sales, is easier to regulate under antidiscrimination law than invocations of trespass at the proverbial dinner party. And, it should be remembered, the intertwining of a "stick" is not a reason to avoid touching it: the purpose or policy can be important enough to overcome the attendant complications. Thus, however integral to their conception of ownership racially restrictive covenants were to those who employed them, such covenants should not be enforced and should be banned.[99] Again, the what and the how of property's purposes are two sides of the coin.

And stepping back to a comparative perspective, we see the residue of these kinds of considerations of system and purpose. Having just said that all else is not equal at the micro level—we need to compare purposes and means for achieving them—in the large we should expect aspects of the law in its initial or earlier states to be stickier if they are more integrated or interconnected with the rest of the system of property law.[100] Yun-Chien Chang and I find evidence suggestive of a pattern of convergence and divergence in property law across systems that reflects the architecture of the law. Aspects of the law that serve functions relatively directly—"structural aspects"—can be expected to converge if they respond to similar conditions. More tellingly, those aspects of the law that are characteristic of a legal regime but could easily be otherwise—the stylistic aspects of law—will, if they start out from different initial states, tend to persist if they are more interconnected.[101] Thus, doctrines relating to management of property, which are more intertwined with other aspects of the law and property institutions in an ongoing relationship, tend to diverge more across jurisdictions than the rules for judicial partition, which are more discrete (ending the relationship).[102]

Much of the flattening of property law shows up as a series of dichotomies revolving in one way or another around the bundle picture, system, formalism, information costs, and purposes. Each seems to be an all-or-nothing choice. These dichotomies seem to be built into property law and theory because we have downplayed or

99. *See* RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS (2013).

100. Henry E. Smith, *The Persistence of System in Property Law*, 163 U. PA. L. REV. 2055 (2015).

101. Chang & Smith, *supra* note 77, at 804–08.

102. *Id.*

overlooked the web of interconnections that lends property—and the world—its organized complexity.

II. VARIETIES OF SYSTEM IN PROPERTY LAW

If the world in which property law is embedded is complex, it is to be expected that property law and institutions would be shaped by that complexity. And, as we have seen, complexity comes in different kinds. Those aspects of the world relevant to property law could be simple or chaotic—or far more likely they could feature Weaver's organized complexity.[103] Resource attributes, their values, actors' activities with respect to them, and so on, are connected but not completely, and the pattern of connections exhibits some clustering (attributes into "things" more or less, and legal relations into legal interests). And if the kind of complexity we're talking about is organized complexity, we might expect property to show a response to that kind of complexity and exhibit a kind of organized complexity itself. The world in general and property institutions in particular are complex systems in which organized complexity plays a large role.

Consistently with organized complexity, when it comes to property law, the system is not purely deductive, but it is structured.[104] Interactions that are dense but not maximal and that show some clustering cause the system of property law to be neither simple nor chaotic, but rather to exhibit Weaver's organized complexity.[105] System is a matter of degree, including in how much it facilitates or impedes dynamic change. Arms or gliding structures evolve into wings but not eyes. And as we have seen, relatively detached features of property law like partition evolve more readily than more connected facets like management doctrines.[106] We can ensure that needed change happens more effectively by paying attention to complexity—by having a more realistic and less nominalist view of what's going on.

To start with, we need to drop the assumption that property must be homogeneous, and thus flat in that sense. Sticks may cover all manner of content, but their role according to the conventional

103. *See* Weaver, *supra* note 6.

104. This idea of system as being a way to overcome complexity and not necessarily through deduction has deep roots, going back to Leibniz. *See* Smith, *supra* note 13.

105. *See* Weaver, *supra* note 6.

106. *See supra* notes 101–02 and accompanying text.

bundle picture is much of a muchness. Such a picture of fully independent sticks and additive rules portrays property as more homogeneous than it is. Also, to assume that there must be one optimal degree of formalism for all of property law (or all of law) is to make the same mistake. Once we confront our theories with the complex reality, it becomes clearer how we can do better.

Let me now briefly survey certain aspects of the system of property law that show nontrivial structure—that are anything but flat.

1. Exclusion Versus Governance. Let's start with the question of how property rights are delineated. These strategies can be placed along a spectrum according to how much they focus in on specific uses.[107] An exclusion strategy employs rough proxies that are relatively easy to monitor (e.g., boundary crossings) but that are under- and especially over-inclusive when it comes to regulating use.[108] By giving possessors and owners the power to control access, they can protect a wide range of uses that need not be spelled out or justified to a court (and harm need not be measured to get an injunction), but given positive transaction costs, this power also prevents access by those who would not do any harm.[109] By contrast, governance involves proxies closely tied to use, as in an easement (a right to use) and the more fine-grained aspects of nuisance, covenants and zoning. As this last list indicates, governance can be supplied by various institutions, including contract, tort, zoning, and the like. And if we include self-help, social norms, and even "vibes,"[110] some of which

107. Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002).

108. And so are formal in Heylighen's sense. *See* Heylighen, *supra* note 60, at 49–53.

109. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1327–28 (1993). For theories that emphasize the right to exclude, which is one way to implement an exclusion strategy, *see, e.g.*, J.W. HARRIS, PROPERTY AND JUSTICE 30–32 (1996); J.E. PENNER, PROPERTY RIGHTS: A RE-EXAMINATION 139–56 (2020); PENNER, *supra* note 63, at 68–74; Shyamkrishna Balganesh, *Demystifying the* Right *to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593 (2008); Eric R. Claeys, *Exclusion and Exclusivity in* Gridlock, 53 ARIZ. L. REV. 9, 17–28 (2011) (book review); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998); Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1 (2014); *see also* Henry E. Smith, *The Thing about Exclusion*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 95 (2014) (distinguishing the right to exclude from exclusion strategies).

110. Such vibes are especially likely to be problematic if they are designed to get around legal prohibitions on or social disapproval of discrimination. In addition to exclusionary vibes,

can be violent or immoral, exclusion strategies are not tied to any one institutional source. Exclusion and governance are strategies, or legal technologies, that fall along a spectrum defined by the degree to which they zero in on specific uses.

Different resources call for different combinations of exclusion and governance at different times. It is often thought that the Demseztian evolution of property rights with increased value of and pressure on a resource is one toward greater reliance on exclusion (and Demsetz's article can be read that way), but depending on the costs and benefits an increase in use governance can be the best response to new or increased externalities.[111] Thus, the "Demseztian" evolution of property rights might take the form of increased governance,[112] as it did in many historic grazing commons, with the addition and strengthening of "stinting" rules among common grazers.[113]

Moreover, some resources call for a greater reliance on governance, and governance is especially important when it comes to what I call "fluid" property.[114] In an analog to physical fluids, which deform continuously under shearing stress and flow in characteristic ways, some resources are correspondingly hard to "bound." These include water, radio spectrum, and the subject matter of intellectual property. For these resources, particularly where uses are not only hard

---

Strahilevitz identifies "exclusionary amenities" as well. Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1861–98 (2006); *see also* LIOR J. STRAHILEVITZ, INFORMATION AND EXCLUSION (2011). Self-help can easily get out of hand, as can informal enforcement of social norms. *See, e.g.*, Carol M. Rose, *Introduction: Property and Language, or, the Ghost of the Fifth Panel*, 18 YALE J.L. & HUMANS. 1, 13–15 (2006) (discussing violent and symbolically violent efforts at exclusion in settings ranging from lobster gangs to neighborhoods with racially restrictive covenants). Different devices can work together, sometimes for bad ends. *See* BROOKS & ROSE, *supra* note 99, at 187–210 (discussing signaling function of racially restrictive covenants).

111. Smith, *supra* note 107, at S453–56, S464, S483; *see also* Rose, *supra* note 31, at 9–12, 19–21 (setting out theory of management strategies for common resources use including "RIGHTWAY").

112. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967); Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163, 170 (1975) (proposing model for degree of property rights activity); *see also* Smith, *supra* note 107, at S468–78 (arguing that increased property rights might take the form of more governance).

113. *See* ELINOR OSTROM, GOVERNING THE COMMONS 61–69 (1990); Karen J. Friedman, *Fencing, Herding, and Tethering in Denmark, from Open-Field Agriculture to Enclosure*, 58 AGRIC. HIST. 584, 591–92 (1984).

114. Henry E. Smith, *Semicommons in Fluid Resources*, 20 MARQ. INTELL. PROP. L. REV. 195 (2016).

to disentangle but also hard to treat as a group and for which multiple access is valuable, we see the expected heavy reliance on governance relative to exclusion.[115]

Governance also shades off into more complex forms of property we can call "entity property." Another way to put this is that property is the law of partial separation, sometimes into modules.[116] Just as things are partially separated from their context and packages of rights over them are partially separated from other relations, there can be separation within packages of rights in quite sophisticated ways. As we will see in the next Subsection, property regimes (private, common, and public) can be mixed into hybrids, and we can also see even within private property forms of property that separate out clusters of functions. In "entity property" we have separation of possession and management (common interest communities and, in a functional sense, leases) and separation of beneficial interests from management (trusts, corporations and other business organizations), with much internal governance.[117]

We should also expect exclusion and governance to work in tandem. Focusing in on certain uses through governance can increase the effectiveness of exclusion strategies. Governance of uses works better when exclusion takes care of many obvious problems based on limiting access to the resource. Without such specialization, a homogeneous strategy would always be entangled in "intermediate" cases. An extreme version would be a universal balancing test for every trespass.[118]

---

115. Henry E. Smith, *Governing Intellectual Property*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW: VOLUME 1: THEORY 47 (Ben Depoorter et al. eds., 2019). In this respect patent law is more property-like than copyright and many other areas of intellectual property. By covering generic use it comes closer to an exclusion regime, which may find its explanation in the difficulty of specifying the set of uses in advance and the importance of commercialization and thus rights transfers. *See* Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1799–1819 (2007).

116. Henry E. Smith, *The Economics of Property Law*, *in* THE OXFORD HANDBOOK OF LAW AND ECONOMICS, VOLUME 2: PRIVATE AND COMMERCIAL LAW 148 (Francesco Parisi ed., 2017) (analyzing property law as involving partial separation of various kinds).

117. *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES & POLICIES 641–799 (3d ed. 2017) (chapter on "Entity Property"); THOMAS W. MERRILL & HENRY E. SMITH, OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 123–58 (2010) (chapter on "Governing Property").

118. For a proposal somewhat in this direction, see Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090 (2011).

2. Hybrids of Private, Common, and Public Property. Property is not all of a piece. We need to distinguish private, common, and public property, and different resources are best held in different ways at different times.[119] This goes beyond the shift from one mode to another (eminent domain as private to public, enclosure movement as common to private), but also includes mixing elements of private, common, and public ownership with respect to the same resource. Different attributes or even different uses of the same resource might fall under different regimes.

Complexity is inevitable where two regimes come together.[120] Even what we think of as the tragedy of the commons only has its tragic tendency because common property abuts private property.[121] If fish taken from a common pond were still common property (assuming that could be enforced in the face of efforts at concealment), then there would be no incentive to overfish.[122] Likewise, if the whole pond were under single ownership there is no such incentive.[123]

This complexity of two regimes coming together has to be offset against the benefits of the two separate regimes. The relationship of the regimes might be synergistic but will often be one of conflict, especially in terms of strategic behavior.

Where two regimes of common and private property come together and interact intensively, we have what I call a semicommons.[124] The

---

119. *See, e.g.*, Lee Anne Fennell, *Commons, Anticommons, Semicommons*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 35 (Kenneth Ayotte & Henry E. Smith, eds., 2011); Carol M. Rose, *Thinking About the Commons*, 14 INT'L J. COMMONS 557 (2020).

120. Streets and other public places often show complex interactions of private and public elements, with concomitant strategic behavior. *See* Vanessa Casado Perez, *The Street View of Property*, 70 HASTINGS L.J. 367 (2019).

121. Jens Warming, *Om "Grundrente" af Fiskegrunde*, NATIONALÖKONOMISK TIDSSKRIFT 495 (1911), Jens Warming, *Aalgaardsretten*, NATIONALÖKONOMISK TIDSSKRIFT 151 (1931), *transl. in* P. Anderson, *"On Rent of Fishing Grounds": A Translation of Jens Warming's 1911 Article, with an Introduction*, 15 HIST. POL. ECON. 391 (1983); H.S. Gordon, *The Economic Theory of a Common Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954); Steven N.S. Cheung, *The Structure of a Contract and the Theory of a Non-Exclusive Resource*, 13 J. L. & ECON. 49, 66–67 (1970).

122. Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 675 (1998).

123. Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J. LEGAL STUD. 393, 422 (1995).

124. Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131 (2000); *see also* Fennell, *supra* note 119, at 46–49; Rose, *supra* note 119, at 563–64.

problem in the semicommons is that people may face even worse incentives than in the commons, because they may try to benefit themselves in the private property regime by using their access in the commons regime to impose costs on others—and likewise to appropriate benefits. The two regimes may be so intertwined that in addition to governance one may see special structures of entitlements to contain the strategic behavior. One such is the configuration of entitlements to make them harder to exploit. I argue that the long, thin, and scattered strips belonging to peasants in the medieval open fields obscured ownership when the strips were combined and thrown open for common grazing.[125] In this seemingly strange configuration, no one could strategically direct "goods" like manure or "bads" like trampling from the combined group of animals onto or away from (respectively) "their" plots in the non-commons period. The benefits of multiple access and the intertwining of use often lead to a semicommons in intellectual property.[126]

Complex governance rules can be used to manage the interface of regimes as well. Indeed, many of the governance rules for the commons are actually there to handle excessive behavior at the interface of common and private property. As we will see in the next Subsection, some more focused governance can take the form of equitable intervention. I have argued elsewhere that one function of traditional equity (loosely associated with equity and not confined to it) is to serve as meta-law—law about law—that will correct the law and modify its results when the law goes off the rails.[127] The need for meta-law is greatest when actors are misusing the law, as in unconscionability. And such misbehavior is especially hard to deal with through regular law when it involves multiple interacting actors and complex resources. So as a response to complexity and uncertainty from polycentric problems, conflicting rights, and strategic behavior—all of which are implicated here—it is to be expected

125. Smith, *supra* note 124.

126. BRETT M. FRISCHMANN, INFRASTRUCTURE: THE VALUE OF SHARED RESOURCES 302–03 (2012); Robert A. Heverly, *The Information Semicommons*, 18 BERKELEY TECH. L.J. 1127, 1184 (2003); Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 11 (2005); Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 296–97 (2007); Smith, *supra* note 114, at 210.

127. *See* Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050 (2021).

that equity would be employed to rein in bad behavior at the interface of the commons and private property. A dramatic example is the important role that equity played in dealing with the use of water along a watercourse, a complex and variable resource involving many parties.[128] Likewise with borders across time, strategic behavior can be addressed through equity, as in the law of waste.[129]

3. Differential Formalism and Law Versus Equity. Above we encountered differential formalism as a general matter,[130] and it would take us too far afield to canvas the ways in which property law exhibits more formalism in some of its parts than in others. To the extent that it does, property law cannot be said to be homogeneous. Moreover, differences in formalism may be a sign that modular components are interacting. One component may be more formal than another, or we may be comparing a more formal interface with interactions within a module, which are more intensive and so more contextually sensitive—and so less formal.

Law and equity might, after the fusion of law and equity, seem a somewhat surprising example of different subsystems of the law that differ in their degree of formalism. In other work, I identify a function loosely associated with equity, namely meta-law.[131] Meta-law is a system that operates on the law—supplements it, aids it, suppresses its results, even sometimes modifies it—without the reverse being true: the first level system ("regular law") does not make reference to equity. I said that this meta-law function is loosely associated with equity, because the term "equity" and even equitable jurisdictional pedigree are not perfectly correlated with meta-law. Parts of the legal system called "equity" that trace their pedigree to equity jurisdiction are not meta-law (for example, certain purely technical rules of trust law). By the same token, there are parts of the law (doctrines like coming to the nuisance and modes like judicial

128. This is even true of prior appropriation, which is more use based and context specific than is usually thought. *See* Henry E. Smith, *Governing Water: The Semicommons of Fluid Property Rights*, 50 ARIZ. L. REV. 445 (2008). And equity plays a big role here too. Duane Rudolph, *Why Prior Appropriation Needs Equity*, 18 U. DENV. WATER L. REV. 348, 363 (2015).

129. Duane Rudolph, *How Equity and Custom Transformed American Waste Law*, 2 CHARLOTTE SCH. L. PROP. J. 1 (2015).

130. *See supra* notes 62–69 and accompanying text.

131. Smith, *supra* note 127.

common law-making) that are meta-law.[132] Nevertheless, from remedies like the injunction to doctrines of unconscionability and constructive fraud, from anti-forfeiture principles to equitable defenses, equity kicks in when certain triggers—based on some combination of bad faith, disproportionate hardship and vulnerability—push us into a system of more direct and open-ended scrutiny for morality and fairness.[133] In systems generally, it is great uncertainty and complexity that call for meta systems. In the law, problems of polycentricity (many connected parties or elements), conflicting rights, and especially opportunism are especially amenable to such treatment. The expense and uncertainty of going to a higher level can be more than offset by the benefits of targeted specialization, among which is the ability of regular law to be simpler and more general than it would be if it had to anticipate or react to all sorts of complexity, especially that arising from opportunism.

When it comes to equity, we are dealing with a different dimension of structure than the modules of property law we have been considering so far. If those are "horizontal," then equity in its major theme of meta-law is "vertical," in the sense of being law about law and intervening into the law, rather than from "within" it.

4. Degrees of Modularity. Because of the challenges of complexity, including the need to communicate in rem rights to a large and indefinite audience, property shows a characteristic modularity. One aspect of this modularity is the importance of a legal thing in property, making property law in some sense a law of things.[134] Nevertheless, this does not mean that modularity is absolute or that things are exogenously given.

Modularity is a method of managing complexity.[135] If a system permits interaction to be more intense within than across modules, operations within modules and even changes to a module can happen without massive ripple effects. This relates to the phenomenon of organized complexity leading to a rugged fitness landscape, rather

132. *See* John C.P. Goldberg & Henry E. Smith, *Wrongful Fusion: Equity and Torts*, *in* EQUITY AND LAW: FUSION AND FISSION 309 (John C.P. Goldberg et al. eds., 2019).

133. Smith, *supra* note 127; Henry E. Smith, *Equitable Defences as Meta-Law*, *in* DEFENCES IN EQUITY 17 (Paul S. Davies et al. eds., 2018).

134. Smith, *supra* note 15.

135. BALDWIN & CLARK, *supra* note 8; Langlois, *supra* note 8.

than a random one.[136] Organization (and ruggedness) come in degrees, and the property system is not fully but nearly decomposable.[137] Take legal things, which are not identical to physical things, and can indeed cover non-physical resources. The idea is to find collections of resource attributes that go together, usually in the sense of being complementary, and that as a group interact less—even if they do interact—with the outside context (e.g., neighboring parcels, the environment).[138]

One attraction of the architectural approach is that it points to variables that can be operationalized. Using network models we can measure the degree of modularity and show how bundles and legal things might emerge endogenously as tight collections, not just aggregations of Hohfeldian legal relations.[139] And such a theory built on information can employ the tools of information theory.[140]

Returning to the legal thing, we see that far from being monolithic or absolute, we can endogenize legal thinghood itself and make it a matter of degree. And thinghood can undergo redefinition, in incremental fashion in courts and in a more thoroughgoing way through legislation.[141]

---

136. Alston & Mueller, *supra* note 41, at 2265–67.

137. Smith, *supra* note 15, at 1701–02. On near decomposability, SIMON, *supra* note 4, at 195–98.

138. For a recognition of the role of complementarities, *see, e.g.*, LEE ANNE FENNELL, SLICES AND LUMPS: DIVISION AND AGGREGATION IN LAW AND LIFE (2019); Lee Anne Fennell, *Property as the Law of Complements*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORIES 155 (Hanoch Dagan & Benjamin Zipursky eds., 2020); Smith, *supra* note 107, at S267–74 (analyzing "organizational dimension" of property); Smith, *supra* note 15, at 1693, 1703–04 (discussing clustering of complementary attributes); *see also* BARZEL, *supra* note 45, at 3–16 (setting forth theory of property rights based on resource attributes).

139. See sources cited *supra* note 40. Classically, modules would not overlap, and this can be an advantage, but the architectural approach can leave that question open. *Cf.* James Y. Stern, *The Essential Structure of Property Law*, 115 MICH. L. REV. 1167 (2017) (arguing for central role of thing-exclusivity in property).

140. Sichelman, *supra* note 85; *see also* Smith, *supra* note 56, at 1125–57. Even possession is a technology for delineating things that is nonessential on an information-based theory that endogenizes legal things. *See* João Marinotti, *Tangibility as Technology*, 37 GA. ST. U. L. REV. 671 (2021).

141. *See, e.g.*, Smith, *supra* note 100, at 2069. Thus, the shifting tides of thinghood are consistent with this approach rather than posing a problem for it. *See* Meghan L. Morris, Property and the Social Life of Things (draft) (on file with author). Morris's examples are a mix of land and water and show some characteristics of "fluid property." *See supra* notes 114–15 and accompanying text.

5. Spontaneous Versus Directed Evolution. Often property theorists come down in favor of seeing evolution in the law as spontaneous or directed. Sometimes the former is associated with the common law and the latter with legislation, but the Legal Realists could be taken as asking judges to engage in direct reengineering of property law. By the same token, libertarians and classical liberals often argue for the merits of what they see as spontaneous common-law evolution, even an evolution that tracks and in turn facilitates custom and private ordering outside the law.[142]

I want to suggest that reality is . . . more complex.[143] Property law is a mixture of spontaneous and directed evolution. Custom does feature importantly in the law,[144] and sometimes some changes are big enough to require legislation. This is particularly true in property where system effects (not least from in rem rights) are important. This is not a counsel of despair or a plea for the untouchability of property law—which brings us to the question of institutional sources of innovation in property law.

6. Common Law and Legislation. Another hybrid relevant to property is institutional. Property law is shaped both by courts and legislatures (sometimes acting through agencies). When it comes to major changes in the menu of property rights, legislation has many advantages, and by and large the *numerus clausus* does also stand for a tendency for legislatures to take the lead in major innovations in property law.[145] These advantages include clarity, universality, comprehensiveness, stability, prospectivity, and implicit compensation, and are reminiscent of Lon Fuller's criteria for the rule of law.[146] And compared to other areas of private law, legislation has a long history in property extending back to the Middle Ages. Also, given

142. FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY 46–47 (1973); Richard A. Epstein, International News Service v. Associated Press*: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 101–02 (1992).

143. Perhaps the kind of complexity I have in mind is close to that explored by Eugen Ehrlich. *See* EHRLICH, *supra* note 53; David Nelken, *Eugen Ehrlich, Living Law, and Plural Legalities*, 9 THEORETICAL INQUIRIES IN LAW 443 (2008) (arguing that Ehrlich's living law captured the interdependence of official and unofficial law).

144. David L. Callies & Ian Wesley-Smith, *Beyond Blackstone: The Modern Emergence of Customary Law*, 4 BRIGHAM-KANNER PROP. RTS. CONF. J. 151 (2015).

145. Merrill & Smith, *supra* note 62, at 58–68.

146. LON FULLER, THE MORALITY OF LAW 38–91 (rev. ed. 1969) (discussing criteria of generality, clarity, non-contradiction, constancy, and non-retroactivity).

the rugged fitness landscape from organized complexity and the difficulty of reaching some maxima though incremental change, legislation has been the source of major remodularizations and changes in legal style.[147]

This hybrid institutional sourcing of property law helps make sense of some puzzles and complaints in certain areas. Common law courts are not good at coming up with quantified regulations and have limited ability to craft entire regulatory regimes. Thus, in oil and gas, common law courts have been criticized for not doing more to combat the tragedy of the commons, and the fault is laid at the door of myopic formalism (again!),[148] with its false analogies like *ferae naturae* ("fugitive" resources are like wild animals).[149] This has things backwards. The analogy expresses the difficulty for common-law rules to deal with fluid resources, which is very different from denying the problem.[150] Instead, what the common law can do is target the most flagrant abuses and serve as a platform for further legislation and regulation, as has happened in oil and gas.[151]

This relationship of loose but nontrivial common law concepts and other institutions can be generalized. We will encounter it in Part III again in connection with aerial trespass.

---

147. Yun-chien Chang & Henry E. Smith, *Structure and Style in Comparative Property Law*, *in* COMPARATIVE LAW AND ECONOMICS 131–60 (Theodore Eisenberg & Giovanni B. Ramello eds., 2017).

148. *See, e.g.*, BRUCE M. KRAMER & PATRICK H. MARTIN, THE LAW OF POOLING AND UNITIZATION 2–5 (3d ed. 1989); Laura H. Burney, *A Pragmatic Approach to Decision Making in the Next Era of Oil and Gas Jurisprudence*, 16 J. ENERGY NAT. RES. & ENV'T L. 1, 11 (1996) ("To clarify the contours of the pragmatic approach I envision, and to demonstrate its value, I will contrast it to two formalistic approaches used throughout the Great Era. As noted above, by analogizing to the law of wild animals, many early judges myopically adhered to common-law rules rather than venturing to fashion a unique jurisprudence for oil and gas law."); John Parmerlee, *Mines and Minerals-Leases-Rentals Accruing Under a Subterranean Gas Storage Lease*, 21 U. KAN. CITY L. REV. 217, 219–20 (1953) ("If the law pertaining to minerals in this country is to retain its stability and uniformity it is mandatory that this vicious analogy drawn between natural gas and animals ferae naturae which has reared its ugly head be destroyed without delay."); Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 354–57 (1980) (portraying the *ferae naturae* "rule" as an inadequate way station between an absolutist conception of property and an emerging reasonableness rule).

149. *See, e.g.*, Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965 (2004); Rance L. Craft, *Of Reservoir Hogs and Pelt Fiction: Defending the* Ferae Naturae *Analogy Between Petroleum and Wildlife*, 44 EMORY L.J. 697, 699, 713–14 (1995) (documenting hostility and collecting references).

150. Smith, *supra* note 149; Craft, *supra* note 149.

151. Smith, *supra* note 149, at 1027–37.

***

Returning to my invocation of Flatland, the problem with flattening the law is that everything starts looking flat. Thus, when it is proposed that we need a complex hybrid of exclusion and governance, it looks like exclusive focus on exclusion. When complexes of private, common, and public property are put forth, they can look like privatization to some and collectivism to others. Differential formalism is still formalism and so we are back to caricatures of Langdell and such bogeymen. And by falling short of homogeneous formalism, the architectural approach seems to have opened the door to the Chancellor's Foot.[152] Or modularity can be taken as hermetically sealed, a priori monolithic concepts that are unchanging—when they are exactly the opposite and ironically promise to capture legal evolution better than supposedly more nuanced theories.[153] Or thinghood can be taken as too protean to be meaningful (as it would be if there were no theory to endogenize it).[154] Indeed, any realistic theory is going to have to come to grips with the blend of spontaneous and directed evolution and the mix of institutional providers that we actually see—and to one degree or another are almost bound to see.

Nonetheless, the architectural framework is not a fudgy "middle way" or split-the-difference waffling. It asks us to see complexity where we ignore it, and to allow for structure in dimensions we typically rule out of bounds without comment. Whether or not information-based, complexity-oriented architectural theories will make headway in measuring relevant quantities and making fine-grained predictions, such theories do clear away some Flatland-style preconceptions and thereby allow for a, yes, more realistic, view of property institutions. It is to the reality of property we now turn.

---

152. *See, e.g.*, Robert E. Scott, *Contract Design and the Shading Problem*, 99 MARQ. L. REV. 1, 11–12 (2015); Robert E. Scott & Jody P. Kraus, *The Case Against Equity in American Contract Law*, 93 S. CAL. L. REV. 1323 (2020).

153. *Compare* Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853, 1855 n.3 (2012) (arguing that architectural theory cannot handle "governance property") *with* Smith, *supra* note 100, at 2073 n.71 (showing that governance in the architectural theory is not limited to external relations and so its notion of "entity property" is similar to Alexander's "governance property"); *see also* David A. Dana & Nadav Shoked, *Property's Edges*, 60 B.C. L. REV. 753 (2019).

154. Wyman, *supra* note 46.

III. PROPERTY'S ARCHITECTURE IN PRACTICE

The real test of the architectural framework in property is like that of architecture itself: how does it fare in the real world? For one thing, does it hold up—or fall down? Does it allow us to serve our purposes more effectively?[155]

1. Possession. Let me return to the concept of possession and how it plays out in practice. Possession has been notoriously hard to pin down because it is impossible to come up with a definition that covers when someone is in control, when someone maintains such control, and at the same time gives standing to sue to "possessors" for purposes of trespass, nuisance, and the like. As a result, great effort is put into trying to show how some extended kind of control is maintained when, say someone parks a car on the street and walks blocks away or leaves a vacation home over the winter.[156] Notions of "constructive possession" start to abound, and the Realist critique that possession is an empty and totally protean notion gains some plausibility.

What we need are specialized and interacting notions of possession. First, the law must draw on social norms and context in the establishment of possession: what counts as control and manifested intent to control sufficient for a claim of a legal status of possession

155. Architecture itself has seen debates over the role of modularity in design. *See* CHRISTOPHER ALEXANDER ET AL., A PATTERN LANGUAGE: TOWNS, BUILDINGS, CONSTRUCTION (1977); Christiane Herr, *Generative Architectural Design and Complexity Theory*, INTERNATIONAL CONFERENCE ON GENERATIVE ART (2002), https://www.researchgate.net/publication/30870757/download; *see also* Henry E. Smith, *Restating the Architecture of Property*, *in* 10 MODERN STUDIES IN PROPERTY LAW 19, 25 (Sinéad Agnew & Ben McFarlane eds., 2019). Perhaps in law there is an analog to the contrast between the era of empirical rules of thumb and the emergence of engineering based on mathematical formulas. A. Rupert Hall, *Engineering and the Scientific Revolution*, 2 TECH. & CULTURE 333 (1961). One suspects that, when it comes to law, we are still mostly in the earlier phase.

156. For a variety of approaches, *see, e.g.*, HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY § 20 (3d ed. 1939) ("speaking generally . . . one is in possession of land when he is in occupation thereof, with the intention, actually realized, of excluding occupation by others, or when not in actual occupation, he claims the right of exclusive occupation, and no person is in occupation opposing his claim"); GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 13.03(a) (1939) ("Possession, whether actual or constructive, is said to be the right of exclusive physical control, coupled with the intent to possess."); 3 AMERICAN LAW OF PROPERTY 765 (A. James Casner ed., 1952) ("[A]ctual and legal possession of land exists when an actual *possessio pedis* is established with the degree of actual use and enjoyment of the parcel of land . . . which the average owner would exercise over similar property under like circumstances.").

and a right to possess.[157] And while Kocourek thought we could mostly make do with a concrete notion of possession and the right to possess, current case law treats someone who has established control as being "in possession" on an ongoing basis.[158] That is, if someone establishes possession (as in the concrete notion of possession) and no one else takes possession, this status of "possession" continues even if the facts of control no longer obtain. So if I park my car and walk away, I am in possession until someone takes it (e.g., a converter). Beyond that, one can lose possession and have only the right to possess, or one can acquire ownership and along with it a right to possess. A right to possess is not possession, but the right to be put in possession. This notion is at the heart of ejectment and replevin.

2. Aerial Trespass. To see how these notions can combine in subtle ways, consider the law of aerial trespass.[159] The law of aerial trespass became controversial in the 1920s and 1930s because landowners brought trespass claims, seeking injunctions, against overflights. They

---

157. *See, e.g.*, MICHAEL J.R. CRAWFORD, AN EXPRESSIVE THEORY OF POSSESSION 60–121 (2020); LUKE ROSTILL, POSSESSION, RELATIVE TITLE, AND OWNERSHIP IN ENGLISH LAW 7–24 (2021); Thomas W. Merrill, *Ownership and Possession*, *in* LAW AND ECONOMICS OF POSSESSION 9 (Yun-chien Chang ed., 2015).

158. *See* KOCOUREK, *supra* note 52, at 365–71. RESTATEMENT OF THE LAW SECOND, TORTS (AM. LAW INST. 1965):

> § 157. Definition of Possession
>
> In the Restatement of this Subject, a person who is in possession of land includes only one who (a) is in occupancy of land with intent to control it, or (b) has been but no longer is in occupancy of land with intent to control it, if, after he has ceased his occupancy without abandoning the land, no other person has obtained possession as stated in Clause (a), or
>
> (c) has the right as against all persons to immediate occupancy of land, if no other person is in possession as stated in Clauses (a) and (b).

RESTATEMENT OF THE LAW SECOND, TORTS (AM. LAW INST. 1965):

> § 216. Definition of Possession of Chattel
>
> In the Restatement of this Subject, a person who is in "possession of a chattel" is one who has physical control of the chattel with the intent to exercise such control on his own behalf, or on behalf of another.

159. STUART BANNER, WHO OWNS THE SKY?: THE STRUGGLE TO CONTROL AIRSPACE FROM THE WRIGHT BROTHERS ON (2008); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 13–16, 258–59 (3d ed. 2017); WILLIAM B. STOEBUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN 155–62 (1977); Eric R. Claeys, *On the Use and Abuse of Overflight Column Doctrine*, 2 BRIGHAM-KANNER PROP. RTS. CONF. J. 61 (2013); Richard A. Epstein, Intel v. Hamidi: *The Role of Self-Help in Cyberspace?*, 1 J.L. ECON. & POL'Y 147, 154–55 (2005); Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459, 467 (2009); Christopher M. Newman, *Using Things, Defining Property*, *in* PROPERTY THEORY 69, 89–98 (James Penner & Michael Otsuka eds., 2018); Smith, *supra* note 100, at 2079–80.

invoked the strictness of trespass—no harm need be shown—and the hoary maxim *cujus est solum, ejus est usque ad coelum et ad inferos* ("whoever owns the soil owns also to the sky and to the depths"), or *ad coelum* for short. Before that, it had not mattered whether or in what sense owners claimed upward because the only kinds of invasions possible were close enough to the surface to interfere with the owner's own activities. Because use of airspace for airplane flights entering the column of space did not seriously interact with owners' activities except at low altitudes, extreme and literal invocations of trespass made little sense. Courts were further worried that recognizing anything close to that would lead to takings claims, which likewise made little sense. This might even be true if a federal navigation servitude were recognized but in derogation of owners' rights. As a result, courts pronounced that *ad coelum* was never the rule.[160] This probably meant not that owners had no claims upward (and downward) but that the literal versions of *ad coelum* being pushed by landowners were never true. Instead, owners could claim in the ordinary sense only what they could actually possess, and they would have to show substantial harm as part of a trespass case based on an invasion of effectively unpossessed superjacent airspace.[161] At the same time, courts recognized owners' priority in the unpossessed airspace in the sense of having a right to build up further (as long as it was not spiteful).[162] Aircraft operators could not complain about

---

160. United States v. Causby, 328 U.S. 256 (1946), in which Justice Douglas offered his famous dictum:

> It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

Id. at 260–61; *see also* Hinman v. Pacific Air Transp., 84 F.2d 755 (9th Cir. 1936); Swetland v. Curtiss Airports Corp., 41 F.2d (N.D. Ohio 1930), *modified on other grounds*, 55 F.2d 201 (6th Cir. 1932); Thrasher v. City of Atlanta, 173 S.E. 817 (Ga. 1934); Smith v. New Eng. Aircraft Co., 170 N.E. 385 (Mass. 1930); Johnson v. Curtiss Northwest Airplane Co. (Minn. Dist. Ct. 1923), *reprinted in Current Topics and Notes,* 57 AM. L. REV. 905, 908–11 (1923); Gay v. Taylor, 19 Pa. D. & C. 31 (1932); Commonwealth v. Nevin, 2 Pa. D. & C. 241 (1922).

161. *See, e.g.*, *Hinman*, 84 F.2d at 759 ("Appellants do not, therefore, in their bill state a case of trespass, unless they allege a case of actual and substantial damage."). For a strong version of this, see RESTATEMENT SECOND, TORTS § 159(2) (AM. LAW INST. 1965).

162. *See, e.g.*, *Causby*, 328 U.S. at 260–61; Smith v. New Eng. Aircraft, 170 N.E. at 389–90;

new buildings unless they had an easement. Further, there are slight hints that the substantial-harm requirement was not meant to narrow the notion of actual possession: invasions of airspace, especially permanent ones, were still per se trespasses.[163]

In rejecting the extreme version of the "title" theory of *ad coelum*, the courts are probably best seen as clarifying rather than reconfiguring the rights to airspace. Traditional invocations of *ad coelum* were a shorthand that did not need to take account of air travel. The

---

cf. 3775 Genesee St., Inc. v. State, 415 N.Y.S.2d 575, 577 (Ct. Cl. 1979) (finding no taking where landowner had no reasonable possibility of building into the stratum of airspace subject to the condemned avigation easement). After his high-price offers were refused, the plaintiff in *Hinman* erected some blocking structures, which were enjoined as a private and public nuisance in subsequent litigation. *See* United Airports Co. of Cal. v. Hinman et al., 1940 U.S. Av. Rep. 1 (S.D. Cal. 1939). Thanks to Brian Lee for this discovery.

163. Even in *Causby*, Justice Douglas made it clear that possession and ordinary trespass as on the surface do not end at literal physical occupation by plaintiff's structures and such:

> We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case of overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. *See Hinman v. Pacific Air Transport*, 9 Cir., 84 F.2d 755. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.

Causby, 328 U.S. at 264–65 (1946) (footnotes omitted). *See also* Smith v. New Eng. Aircraft Co., 170 N.E. 385 (Mass. 1930); *see also* Smith v. New Eng. Aircraft Co., 270 Mass. 511, 522, 170 N.E. 385, 390 (1930) ("For the purposes of this decision we assume that private ownership of airspace extends to all reasonable heights above the underlying land. It would be vain to treat property in airspace upon the same footing as property which can be seized, touched, occupied, handled, cultivated, built upon and utilized in its every feature.").

regime for aircraft that emerged early in the era of air travel clarified an ambiguity, although landowners may not have seen it that way.[164]

In this flurry of judicial activity, what was left a little unclear was whether an airplane flying super low would be subject to the substantial-harm requirement. For that matter, there was an idea, based on early legislation, that 500 feet was some kind of zone in which normal possession and trespass would apply, but that was never clearly spelled out.[165] Presumably against a defendant flying an airplane one inch from a structure it would be easy to prove substantial harm, so this really was not an issue, apart from procedural issues, like making out summary judgment.

Until now. With the advent of drones (or unmanned aircraft systems), just such issues are coming to the fore.[166] Because drones can hover and typically fly closer to the ground, we need a way of reconciling the navigation servitude and ordinary notions of possession along with the per se/substantial harm divide within the law of trespass to land. One method would be to declare a height limit below which per se trespass would apply, but, again, courts are not good at this type of rule, and it is clear that a single height (say 200 feet) would not be universally appropriate. On the other hand, the idea of extending the "substantial harm" regime down to the grass tops and the paint on the top of buildings seems too unprotective of owners. And it is hard to deny that owners could build further upward if they chose to.

To address this problem in common law fashion and leave room for legislation and regulation, we can exploit the specialization of different possession-related notions and their interrelations. Working upward, per se trespass applies at the surface. Step a toe onto someone's land and you've trespassed. Displacing the landowner's physical objects is also per se trespass. Coming into the envelope of an activity—space regularly occupied by that activity—is also a trespass per se. The space between two nearby towers would be trespass

164. Smith, *supra* note 100, at 2079–80; *see also* Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015 (2008).

165. Troy A. Rule, *Airspace in an Age of Drones*, 95 B.U. L. REV. 155, 166, 168–69 (2015).

166. *See, e.g.*, Dana & Shoked, *supra* note 153, at 802–08; Robert A. Heverly, *The State of Drones: State Authority to Regulate Drones*, 8 ALBANY GOV'T L. REV. 29 (2015); Lane Page, *Drone Trespass and the Line Separating the National Airspace and Private Property*, 86 GEO. WASH. L. REV. 1152 (2018); Rule, *supra* note 165.

per se. And a bubble around buildings and activities that would be needed for normal function should also be a per se trespass. Beyond that, the owner is not in (current) possession but has only a right to possess, which peters out at an indefinite height. Within the right-to-possess zone, the owner has first dibs on using the space and also can sue for invasions of this space that cause substantial harm to the subjacent airspace and or surface (or conceivably the subsurface). Any interferences not in superjacent airspace would fall under the law of nuisance (or negligence) at most.[167]

3. Nuisance. The law of nuisance is especially interesting from an architectural point of view. It lies at the shift from exclusion to governance strategies.[168] Thus, invasion is important but not always. Nuisance also involves conflicting presumptive rights, which invites meta-law, whether this is denominated equity or not.[169]

Nuisance naturally leads to borderline cases. In his paper in this Symposium, Bob Ellickson sets out a recent controversy over an apartment building in Houston.[170] Houston has no zoning and relies heavily on covenants. A developer proposed replacing a two-story apartment house in a residential area with a twenty-three-story, mixed-use condominium building. The trial court denied an injunction but awarded the successful plaintiffs $1.2 million in damages.[171] The appellate court reversed on the grounds that the nuisance, assuming there was one, was prospective.[172] This doesn't answer the question we want answered: once built, would the apartment building be a nuisance? It should be noted at the outset that traditionally nuisance law does not see apartment buildings as nuisances.[173] An apartment building is not invasive (not that that ends the inquiry, but it is strike one), and courts in this country have rejected the idea of being able to acquire rights to light and air prescriptively (unlike

167. *See* RESTATEMENT (FOURTH) OF PROPERTY vol. 2, div. I, ch. 1. § 1.2A (AM. LAW INST., Council Draft No. 2, Nov. 27, 2019).

168. Smith, *supra* note 149.

169. Goldberg & Smith, *supra* note 132, at 315–21.

170. Robert C. Ellickson, *Can an Apartment Building Be a Nuisance? An Essay for Henry Smith*, 10 BRIGHAM-KANNER PROP. RTS. J. 57 (2021).

171. Loughhead v. 1717 Bissonnet, L.L.C., 2014 WL 8774079 (Tex. Dist. Ct. 2014).

172. 1717 Bissonnet, LLC v. Loughhead, 500 S.W.3d 488 (Tex. Civ. App. 2016).

173. Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609 (2021); Ellickson, *supra* note 170.

the doctrine, albeit quite limited, in England of "ancient lights").[174] According to the reconciliation of conflicting rights, the fact that an activity lowers the market value of another parcel does not automatically make the activity a nuisance. Nevertheless, reasonableness in nuisance law is more oriented to the effect on the potential plaintiff than the merits or conduct of the defendant and its activity.[175] Moreover, the history of labeling apartment buildings possible or near nuisances has bad overtones.[176] As mentioned earlier, numeric height limits are also not the forte of common law courts.[177] Not surprisingly, covenants and zoning have been the tools to achieve height restrictions. Indeed, common law courts have acted to prevent runaway dependencies, and hence complexity, at the interfaces between packages of rights.[178]

4. Integration of Property. Finally, let me sketch another application of the complexity approach. Returning to the bundle of rights,

174. Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So.2d 357 (Fla. Dist. Ct. App. 1959); *but see* Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982) (holding that blocking solar access can be a nuisance); s*ee generally* Sara C. Bronin, *Solar Rights*, 89 B.U. L. REV. 1217 (2009); Troy A. Rule, *Shadows on the Cathedral: Solar Access Laws in a Different Light*, 2010 U. ILL. L. REV. 851 (2010). The building of the addition to the Fontainebleau was motivated in part by spite, and as Lynda Butler argues, a court could have curbed the malicious interference without holding that solar rights could be acquired by prescription or implication. Butler, *supra* note 22, at 85–86. If we resuscitate the notion of equity, I wonder if activity like that in *Fontainebleau* might be addressable: even though the addition was not purely out of spite, and so would not count as a spite structure under current doctrine, certain aspects of it—its location and lack of windows—were purely spiteful. Might we be able to see some aspects as separable?

175. This is evident in a range of approaches in scholarship from outside the United States. *See, e.g.*, PENNER, *supra* note 109, at 143–56; Christopher Essert, *Nuisance and the Normative Boundaries of Ownership*, 52 TULSA L. REV. 85 (2016); Donal Nolan, *The Essence of Private Nuisance*, 10 MODERN STUDIES IN PROPERTY LAW 71 (Sinéad Agnew & Ben McFarlane eds., 2018).

176. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394–95 (1926) ("[I]n such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. . . . Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances."); David Callies, Village of Euclid v. Ambler Realty Co., *in* PROPERTY STORIES (Gerald Korngold & Andrew P. Morriss eds., 2d ed., 2009); Richard H. Chused, Euclid*'s Historical Imagery*, 51 CASE W. RSRV. L. REV. 597 (2001); *see also* Brady, *supra* note 173.

177. It is true that the proposed building was much larger than any previous structure, and I do not absolutely rule out the possibility that in some area a crystalized custom of restraint in building might be provable. This is highly unlikely, especially in the case at hand.

178. *See infra* notes 183–87 and accompanying text. *See also* Smith, *supra* note 13. Such dependencies can be transmitted through liability for damages, which also counts against the result in the trial court in *Loughead*.

it is worth noting that there are subtle differences recognized in law as to how integrated a stick (if you will) is into the bundle. Easements are add-ons to the bundle of rights, and they can be created through a grant or by various other means including prescription and implication. Covenants are more contractual, but servitude law lends them some of the attributes of property, most prominent the ability to run to successors. The requirements for running, including the touch and concern test, may have to do with keeping bundles from becoming complex and hard to evaluate in the presence of imperfect land markets.[179] Appurtenant easements automatically run, but under traditional servitudes law, covenants only run if they satisfy a list of requirements including intent and touch and concern.[180] This last requirement guarantees a close association—I would say dense epistatic connections—with the rest of the bundle.[181] By contrast, even more integrated than easements in terms of integration with the bundle are so-called natural rights, which are like easements but are automatically part of the bundle and cannot be abandoned though lack of use.[182] These include lateral support and natural drainage in a defined channel. These rights are if anything more epistatically connected with the bundle than the typical easement. And finally we have various other legal relations that are not even analogized to easements because they are so integral to the package, such as the right to possession, and many that are implicit, such as various privileges of use that are indirectly protected by the right to exclude.

One implication of viewing the bundle as one of structured complexity is that it helps explain why the law pushes for coherent bundles and disfavors "extraneous" bundling. If the sticks in the bundle are not entirely separable, valuation and assessment are more complex and uncertain than where there is separability.[183] Far

179. *See* Antony Dnes & Dean Lueck, *Asymmetric Information and the Law of Servitudes Governing Land*, 38 J. LEGAL STUD. 89 (2009); Smith, *supra* note 13. The key to the complexity involved is inseparability, which can cause the kinds of wild swings in fitness associated with unorganized complexity. Otto A. Davis & Andrew Whinston, *Externalities, Welfare, and the Theory of Games*, 70 J. POL. ECON. 241 (1962).

180. *See, e.g.*, CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH THE LAND" (2d ed. 1947).

181. Smith, *supra* note 13.

182. *See, e.g.*, Duenow v. Lindeman, 27 N.W.2d 421 (Minn. 1947); Kleinberg v. Ratett, 169 N.E. 289 (N.Y. 1929); Scriver v. Smith, 3 N.E. 675 (N.Y 1885); *see also* Smith, *supra* note 13 (discussing natural servitudes).

183. *See* Davis & Whinston, *supra* note 179.

from being limited to the *numerus clausus*, the law more controversially prevents people from tailoring packages of property rights through the addition of extraneous covenants. The right to a weekly haircut may seem innocent enough, but doctrines like touch and concern prevent interdependencies from getting out of hand even if someone sees fit to create them.[184]

This worry about information and complexity can help justify the law's approach to personal property servitudes as well. With some ambiguity, the law has generally disfavored and even disallowed servitudes in personal property.[185] These kinds of servitudes certainly pose a problem of notice.[186] As with touch and concern and real covenants, the law tries to keep legal things and the packages of rights over them in manageable units.[187]

Taking a step back, the hypothesis that property law is shaped by organized complexity leaves a lot of room for further work. How interconnected are the attributes of resources and the activities of actors, and what patterns do they actually fall in—or should fall in? And although seeing a role for organized complexity does provide a partial rationale for some traditional doctrines, it is not Pollyannish in any sense. Organized complexity is not chaos, and it not the case that any intervention into property law will cause more problems than it solves. By the same token, though, the law is not so simple that successful tinkering along any margin will necessarily improve matters. Reflecting organized complexity, we need to find a mix of spontaneous and directed change that will get us to reachable maxima. We must ask how law and institutions are both simple and complex and how they transcend the conventional reductionist dichotomies. A

184. Smith, *supra* note 13. In contrast to the haircut covenant, private transfer fee covenants present a clearer complexity problem. *See id.*; *see also* R. Wilson Freyermuth, *Private Transfer Fee Covenants: Cleaning Up the Mess*, 45 REAL PROP., TRUST & ESTATE L.J. 419 (2010) (setting forth problems presented by private transfer fee covenants and evaluating and proposing solutions).

185. Zechariah Chafee, Jr., *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945 (1928); Zechariah Chafee, Jr., *The Music Goes Round and Round: Equitable Servitudes and Chattels*, 69 HARV. L. REV. 1250 (1956) (commenting on a decision departing from the general understanding).

186. Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2008).

187. *See* Christopher Newman, *Using Things, Defining Property*, *in* PROPERTY THEORY: LEGAL AND POLITICAL PERSPECTIVES 69 (James Penner & Michael Otsuka eds., 2018); Matt Corriel, *Up for Grabs: A Workable System for the Unilateral Acquisition of Chattels*, 161 U. PA. L. REV. 807 (2013); *see also* Robert C. Ellickson, *The Inevitable Trend Toward Universally Recognizable Signals of Property Claims: An Essay for Carol Rose*, 19 WM. & MARY BILL RTS. J. 1015 (2011).

loosely connected set of sometimes formal, sometimes contextualist legal concepts is likely to be a big part of the picture.[188]

CONCLUSION

We live in a reductionist age. In property theory, our discourse is so all-encompassing that its flatness itself has been obscured. We can wind up explaining our theoretical intuitions instead of coming to grips with the real world.

The world is not flat and neither should be property theory. The unfortunate current flatness of property theory shows up in its assumptions about complexity and leads us to expect more homogeneity and less structure in the law than we find—and should expect to find. This flattening and dichotomous approach characterizes the bundle of rights as usually conceived; the allergy to system in property and private law generally; assumptions about all or no (and preferably no) formalism; mistaking the architectural theory as exclusively focused on information costs; and expectations that property law will mirror the complex world directly. Instead of passively reflecting the world's complexity, property law employs devices familiar from complex systems theory to manage complexity in order to attain favorable combinations of information costs and benefits. These include the spectrum of delineation devices running from exclusion to governance; hybrids of private, common, and public property; differential formalism and law versus equity; degrees of modularity; combinations of spontaneous and directed evolution of property law and institutions; and reliance on both common law and legislation. Property is more than the sum of its parts.

We need to leave Flatland. And the first step is to put more—not all—of the complexity of the world back into our theories. Especially now that complex systems theory, network analysis, and complexity economics give us more tools, we have less excuse for the extreme reductionism of the flattest versions of the bundle of rights, mishmashes of property and contract, equity-less law, and the like. Property needs architecture.

---

188. *See* Deakin, *supra* note 23; Lawson, *supra* note 23; Smith, *supra* note 23. This view of property law thus has close affinities with comparative institutional analysis and the New Private Law. *See* Barak Richman, *New Institutional Economics*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW, *supra* note 22, at 103 (comparing the New Insitutional Economics and the New Private Law).

CAN AN APARTMENT BUILDING BE A NUISANCE? AN ESSAY FOR HENRY SMITH

ROBERT C. ELLICKSON*

In 1926, Justice Sutherland asserted in *Village of Euclid v. Ambler Realty Co*. that, in a single-family neighborhood, "apartment houses . . . come very near to being nuisances."[1] The legal issue remains alive. In 2014, a jury in Houston, Texas, awarded damages to homeowners challenging a proposed high-rise condominium tower near Rice University. The issue serves to illuminate the views of Henry Smith, the much-deserved recipient of the Brigham-Kanner Property Rights Prize. In his writings, Henry has addressed many topics, nuisance law among them.[2]

As it happens, my first major article also dealt with nuisance law.[3] There I compared that body of precedent to other systems of land use control, especially municipal zoning. The zoning ordinances of the 1920s, in my view, addressed a genuine problem. A landowner's decision on the use of urban land typically affects the value of adjacent properties. Although private bargaining may internalize some of these externalities, in many cases it will fail to do so.[4] Zoning regulations, if wisely crafted, therefore can raise aggregate property values. A zoning government, however, also can inflict damage on the urban landscape. By the 1930s, local governments increasingly had begun to use zoning as an exclusionary device. Exclusionary zoning segregates urban neighborhoods by social class, and raises the cost of housing.[5] Economists assert that municipal zoning, as actually

* Walter E. Meyer Professor Emeritus of Property and Urban Law and Professorial Lecturer in Law, Yale Law School.

1. 272 U.S. 365, 395 (1926).

2. Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965 (2004).

3. Robert C. Ellickson, *Alternatives to Zoning*: *Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

4. *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (discussing the possibility of bargaining).

5. *See* Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395 (2021). I plan to incorporate that article into AMERICA'S FROZEN NEIGHBORHOODS, a book that Yale University Press will publish in 2022.

practiced today in the United States, massively damages the national economy.[6] This Essay reveals my disagreement with Henry about how the Texas courts should have decided the recent Houston nuisance case. My pessimism about how local governments actually zone cities may underlie our disagreement.

Henry Smith is a phenom, more than the equal of one of his apparent heroes, the short-lived Wesley Hohfeld.[7] Henry's writings have repeatedly jolted the field of property law. One of his earliest articles, on property rights in medieval open-field villages, shows his strengths as an historian and institutional analyst.[8] Especially early in the twenty-first century, Henry often collaborated with Tom Merrill, then a colleague at Northwestern University School of Law. Their opening salvo, the *Numerus Clausus*, dazzled with its many innovations.[9] Their collaboration includes the brilliantly conceived, and impressively conceptual, Merrill and Smith casebook, now in its third edition.[10] Smith's work apart from Merrill has been prizeworthy in itself. Henry's 2012 manifesto, *Property as the Law of Things*, continues his unrelenting challenge to various intellectual adversaries: the legal realists, Ronald Coase's conception of causation, and proponents of conventional law-and-economics.[11] The American Law Institute's appointment of Smith as the Reporter of the new Restatement of Property positions him to be, flat out, the most influential property law scholar of our time.

---

6. *See* Kyle F. Herkenhoff et al., *Tarnishing the Golden and Empire States: Land-Use Restrictions and the U.S. Economic Slowdown*, 93 J. MONETARY ECON. 89 (2018); Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J.: MACROECONOMICS 1 (2019); Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?* 102 J. URB. ECON. 76 (2017). For a summary of the various findings, see David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 102–03 (2017).

7. Smith's references to Hohfeld include, for example, Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 780–89 (2001) and Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle? The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681 (2014).

8. Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131 (2000).

9. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 119 YALE L.J. 1 (2000).

10. THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (3d ed. 2017).

11. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

I. THE APARTMENT BUILDING AS NUISANCE

Prior to its *Euclid* decision in 1926, the Supreme Court had sustained, against constitutional challenge, limits on the height of buildings and the location of industrial uses.[12] A frontier issue in *Euclid* was whether the village could set aside zones that banned the construction of apartment buildings. Justice Sutherland held that it could, rebuffing a substantive due process challenge. His opinion identified some possible negative spillover effects of multifamily housing. According to Sutherland, in a neighborhood where detached houses are predominant,

> the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes . . . until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.[13]

Come close, but still fail to win a cigar. Prior to *Euclid*, no U.S. case had ever held that an apartment building, as such, constituted a nuisance.[14] Absent extreme facts, such as those in the Houston case that I describe below, U.S. courts continue to remain reluctant to so rule.[15]

---

12. Welch v. Swasey, 214 U.S. 91 (1909) (sustaining height limit, of perhaps as little as eighty feet); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (sustaining prohibition of brickmaking facility).

13. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394–95 (1926).

14. *See* Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 YALE J. ON REG. 91, 110 (2011); Michael E. Lewyn, *Yes to Infill, No to Nuisance*, 42 FORDHAM URB. L.J. 841, 842, 846 (2015); City of Youngstown v. Kahn Bros. Bldg. Co., 148 N.E. 842, 845 (Ohio 1925) (dictum).

15. After much searching, I have found no U.S. case, other than *Loughhead*, holding that an apartment building constitutes a private nuisance. As Henry has surmised, plaintiffs are more likely to succeed if they assert some sort of physical invasion, perhaps of noise and fumes, across a boundary. *See, e.g.*, Estancias Dallas Corp. v. Schultz, 500 S.W. 2d 217 (Tex. Civ. App. 1973) (affirming injunction against apartment complex's noisy air conditioner). *But*

In *Euclid*, Justice Sutherland's analysis would have supported the Village of Euclid's requirement of mandatory setbacks for an apartment building but not the total exclusion of apartments from almost three-fourths of the area of the city.[16] By demonizing the apartment building, Justice Sutherland may have encouraged cities to engage in harmful exclusionary zoning.

A central issue in nuisance cases is remedy. Should the neighbor of an obnoxious land use be entitled, for example, to enjoin the nuisance, or be limited to the remedy of damages?[17] In one of the classic articles of American property law, Calabresi and Melamed explored these, and other, remedial options.[18] Issues of remedy were central in *Loughhead*, the Houston case that newly poses the possibility that courts might deem an apartment building a nuisance.[19] Houston is famous among property scholars as the only major U.S. city that has declined to enact a zoning ordinance.[20] A zoning ordinance typically includes, among other constraints, a limit on the height of structures. Houston's lack of zoning gave birth to *Loughhead*.

II. THE ASHBY HIGH-RISE CONTROVERSY IN HOUSTON

Locals refer to *Loughhead* as the Ashby high-rise controversy, invoking the name of a street abutting the proposed construction site.[21] The essential facts are these. In 2006, a developer purchased a 1.6-acre lot three miles southwest of downtown Houston and five blocks north of the campus of Rice University. The following year, the developer proposed replacing the two-story apartment building

---

cf. Puritan Holding Co. v. Holloschitz, 372 N.Y.S.2d 500 (N.Y. Sup. Ct. 1975) (holding owner of abandoned apartment building liable for nuisance damages to neighbor).

16. Euclid's 1922 zoning ordinance placed 72.6 percent of the area of the village in either U1 or U2, zones that forbade the construction of an apartment building. Author's calculation, part of research for Ellickson, *supra* note 5.

17. The seminal U.S. decision is Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970) (awarding permanent damages, but refusing to enjoin).

18. Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability*, 85 HARV. L. REV. 1089 (1972).

19. The brothers who established the Lockheed aircraft company were originally named Loughead, with a single *h*. The lead plaintiff in *Loughhead* probably pronounces her name as the two brothers did.

20. *See* ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS 643–46 (4th ed. 2013).

21. *See* STOP THE ASHBY HIGH RISE, https://stopashbyhighrise.org/. Discussions of *Loughhead* include Lewyn, *supra* note 14, and John Mixon, *Four Land Use Vignettes from Unzoned(?) Houston*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 159, 166–72 (2010).

on the site with a twenty-three-story mixed-use condominium structure.[22] The proposed project would have roughly quadrupled the number of dwelling units on the site. No building within a half-mile of the site is more than six stories in height, and the great majority are detached houses of three-stories or less.[23] In 2021, the median value of these houses was about $1.6 million.[24] The Boulevard Oaks Historic District lies just to the north. Homeowners near the proposed high-rise mobilized to block the project, and persuaded Houston's mayor to join the opposition.[25] When the City of Houston refused to approve the project, the developer sued the city. In a 2012 settlement, Houston agreed to permit construction of a twenty-one-story multifamily building with restaurants on the ground floor.

In 2013, before construction had begun, Loughhead and twenty-nine other nearby homeowners filed a nuisance action against the developer. They sought both damages and a permanent injunction. The plaintiffs' attorneys introduced evidence that the proposed development would diminish the value of their houses. They claimed that the high-rise would violate the traditional scale of buildings in the neighborhood, increase traffic, cast shadows, and lessen backyard privacy. The trial judge refused to grant a permanent injunction, but submitted the issue of damages to a jury. The jury found that the proposed building would be a nuisance to twenty of the thirty plaintiffs. The judge entered a judgment awarding a total of $1.2 million to the successful plaintiffs.[26] This award, at the time, likely was less than 10% of the market value of their dwellings.[27] In 2016,

---

22. Mixon, *supra* note 21, at 168 (asserting that the developer intended condominium units).

23. The primary multifamily buildings nearby are two three-story developments immediately east on Bissonnet Street, and a six-story condominium complex, the Chateau Ten on Sunset, two blocks south.

24. On June 11, 2021, the Zillow website, https://www.zillow.com [https://perma.cc/K8P4-7YGZ], reported that the dozen houses closest to the project site had a median asking price of $1.6 million.

25. Mixon, *supra* note 21, at 169 n.53.

26. Loughhead v. 1717 Bissonnet, LLC., 2014 WL 8774079 (Tex. Dist. Ct. 2014).

27. The damage awards averaged $60,000 per plaintiff in 2014. Twelve of the successful plaintiffs owned detached houses, likely worth well over $1 million each in 2020. The remaining eight owned one of the twelve condominium units in Southampton Estates, a three-story structure built in 1993 on a site just east of the proposed Ashby high-rise. In 2020, the market value of a unit in Southampton Estates was around $700,000–$800,000. *See, e.g.*, *5310 Southampton Estates Houston, TX 77005,* HAR.COM, https://www.har.com/homedetail/5310-southampton-est-houston-tx-77005/3599940?sid=4740958; *5300 Southampton Estates, Houston, TX 77005*, GREENWOOD KING, https://www.greenwoodking.com/real-estate/5300-southampton

the Texas Court of Appeals reversed. The appellate court emphasized that the nuisance in this instance was prospective.[28] It affirmed the trial court's denial of a permanent injunction but held that, because the developer had not built the structure, the damage award had been premature. The appellate court stated that its ruling was "without prejudice to [the plaintiffs'] right to seek damages once a cause of action for an existing nuisance accrues."[29] By July 2020, the developer had razed the two-story apartment building on the site, but had not begun to construct the high-rise.

Henry and I have discussed *Loughhead*. He finds the case intriguing and perhaps worthy of a future mention in his casebook with Merrill. In the end, Henry, unlike me, would not hold the proposed Ashby high-rise to be a nuisance. He and I do agree, however, on many remedial issues. We both think that the Texas courts had rightly denied a permanent injunction, and that the appellate court had been right to hold that the trial court's award of damages had been premature. Nonetheless, I favor, as Henry does not, making the high-rise developer liable for nuisance damages to internalize some of the negative externalities that the Ashby high-rise building ultimately would inflict.[30] Allowing this common law remedy would reduce pressure on Houston to adopt a zoning ordinance. Although a zoning measure may be beneficial, many, as I have noted, in fact worsen the urban landscape.

III. CONTRASTING THEMES IN SMITH'S ANALYSIS OF NUISANCE LAW

Portions of Henry's primary article on nuisance law emphasize the connection between nuisance law and an owner's right to exclude.[31] Its final sentence is, "Nuisance is a governance regime resting on a foundation of exclusion."[32] Many classic nuisances do entail the entry of, for example, sound waves or fumes, into a neighboring

-estates-houston-tx-77005/92021441/31442704. On trends in house prices in the Boulevard Oaks neighborhood, *see Boulevard Oaks Real Estate Trends,* HOUSTONPROPERTIES.COM, https://www.houstonproperties.com/houston-neighborhoods/boulevard-oaks/real-estate-trends.

28. 1717 Bissonnet, LLC v. Loughhead, 500 S.W.3d 488, 496–500 (Tex. Civ. App. 2016).

29. *Id.* at 492.

30. *Cf.* Ellickson, *supra* note 3, at 761–72, 777 (recommending monetary liability to internalize the external costs of unneighborly land uses, including tall buildings).

31. Smith, *supra* note 2, at 970.

32. Smith, *supra* note 2, at 1049.

property.[33] The advantage of an exclusion rule, and a recurring theme in Henry's work, is reduction of information costs when people interact.[34] In the Ashby high-rise dispute, none of the negative externalities that troubled the homeowners would have constituted a physical invasion. Construction of a tower visible to outsiders does not entail the crossing of a private boundary. Nor does an increase in traffic on public streets. Nor does loss of privacy or disruption of community character. Henry's assertion that nuisance is intimately related to the right to exclude undoubtedly inclines him to oppose nuisance liability in *Loughhead*.

Henry has affirmed, however, that property law is not entirely about exclusion.[35] In his article on nuisance and other work, he asserts that property law at times adopts a governance regime to supplement the exclusion strategy.[36] Governance rules, according to Henry, "pick out uses and users in more detail, imposing a more intense informational burden on a smaller audience of duty holders."[37] In the Ashby high-rise case, in my view, nuisance liability, but not injunctive relief, would have been cost-justified. A damage award, if properly calculated, would have internalized the negative externalities that the structure would have inflicted. Nuisance liability in *Loughhead* would certainly add to the informational burdens of Houston homeowners, developers, and judges. A benefit-cost analyst nevertheless might

---

33. *See* Richard A. Epstein, *Nuisance Law, Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 57 (1979) (linking nuisances to physical invasions).

34. After Ronald Coase published *The Problem of Social Cost*, *supra* note 4, legal analysts typically used the phrase *transaction cost*, not *information cost*, to describe a barrier to negotiation. Remarkably, thirty-five of Henry's articles include both phrases. *Information costs* has the advantage of being less technocratic, but the disadvantage of being less complete. Outlays that negotiators make to travel to a joint meeting place are hardly information costs. *See* Robert C. Ellickson, *The Case for Coase and Against 'Coaseanism*,*'* 99 YALE L.J. 611, 615–16 (1989). On July 17, 2020, I conducted a WestLaw search of secondary sources. Prior to the year 2000, *transaction cost* appeared over thirty times more frequently than *information cost*. After 2010, the ratio had decreased to four to one. Henry's efforts to promote *information costs* may have had some success.

35. He has stated that "Exclusion is not the most important or 'core' value because it is *not a value at all*." Smith, *supra* note 11, at 1705 (emphasis in original). Instead, the virtue of entitling an owner to exclude is to reduce the information costs of interpersonal interactions.

36. Smith, *supra* note 2, at 975–76, 990–91, 993, 996; *see also* Henry E. Smith, *Exclusion and Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002); MERRILL & SMITH, *supra* note 10, at 31–32. Tom Merrill, in his many previous writings, had never drawn this distinction. The idea seems to have been Smith's. The first reference to it appears in 2001 in Merrill & Smith, *supra* note 7, at 791.

37. Smith, *supra* note 36, at S455.

conclude that nuisance liability in this instance would generate net gains. The benefits of internalizing the high-rise's externalities might exceed any resulting increase in information costs.

Katrina Wyman has analyzed the writings of the "New Essentialist" property theorists, a group in which she places Henry Smith, Tom Merrill, and James Penner.[38] Wyman's central claim is that the New Essentialism is more malleable than its proponents admit, and, in practice, commonly fails to offer hard-edged rules of property rights. Instead, according to Wyman, Smith and the others turn to "an informal, intuitive cost-benefit analysis" to resolve complex questions.[39] The federal government uses benefit-cost analysis as one of its primary methods of policy analysis.[40] Philosophers describe the approach as rule utilitarianism.[41] Many practitioners of law-and-economics are utilitarians. A staple in the teaching of Property is the famous Harold Demsetz article that explicitly assumes that property rights evolve to internalize externalities, generally in a cost-effective manner.[42]

My analysis of *Loughhead* is essentially utilitarian. Henry is less of a utilitarian than I am, and less than Wyman has asserted. He claims that judges in nuisance cases seldom engage in an explicit benefit-cost calculus.[43] Henry has criticized the balance-of-utilities approach to defining a nuisance.[44] He also has written skeptically about recognition of aesthetic nuisances.[45]

As a judge in a retrial of *Loughhead*, I would rule that a six-story building would *not* have constituted a nuisance. The city is Houston, after all, and two or three blocks south of the Ashby site are two existing six-story structures.[46] The developer, however,

---

38. Katrina M. Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183 (2017).

39. *Id.* at 186; *see also id.* at 202.

40. *See* Exec. Order No. 12,866 § 1 (1993), 3 C.F.R. 638–40 (1994).

41. *See* Wyman, *supra* note 38, at 212 n.83.

42. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS & PROC. 347 (1967).

43. Smith, *supra* note 11, at 1716.

44. Smith, *supra* note 2, at 984. *See also* J.E. Penner, *Nuisance and the Character of the Neighbourhood*, 5 J. ENVTL. L. 1 (1993) (criticizing balancing utilities in nuisance cases).

45. Smith, *supra* note 2, at 1000.

46. The two are a medical clinic and Chateau Ten on Sunset, a condominium building. A height of six stories may be emerging as a focal point. New Zealand has enacted a statute that requires its largest cities to allow buildings of up to six stories in their central areas and near mass transit. Michael Hayward, *Christchurch Skyline Could be Transformed as Building*

ultimately proposed a twenty-one-story building, utterly out of scale in a neighborhood of houses.[47] Texas courts properly could impose nuisance liability for the *incremental* damage that a building of more than six stories would have inflicted. I suspect that the benefits of internalizing the tower's negative externalities likely would exceed the increase in information costs that this expansion of Texas nuisance liability would cause. In *Loughhead*, the risk of nuisance liability *ex post* would have encouraged the parties to agree to a compromise on height *ex ante*. Imposing liability for damages also would have reduced the pressure on Houston to adopt a zoning ordinance, a path that has commonly led to government overregulation.

IV. NON-UTILITARIAN VALUES

In an important article in the *William & Mary Law Review*, Merrill and Smith emphasize that a legal system must base its property rules, if they are to function successfully, on a morality that most individuals accept.[48] The authors state that they doubt that utilitarianism underlies that morality.[49] *Loughhead* poses the possible relevance of a particular non-utilitarian value: distributive justice. A ruling that an apartment building might be a nuisance would hand yet another weapon into the hands of NIMBY (Not In My Backyard) forces, such as the homeowners near the proposed Ashby tower. Michael Lewyn has invoked this reasoning to criticize the trial court's handling of *Loughhead*. Lewyn worries that holding a multifamily project to be a nuisance will boost housing prices, especially for poorer households.[50]

Rules Relaxed, STUFF.COM (July 24, 2020, 7:30 PM), https://www.stuff.co.nz/the-press/news/122241812/christchurch-skyline-could-be-transformed-as-building-rules-relaxed.

47. Daniel Herriges is a skeptic of criticizing structures based on their scale. *See* Daniel Herriges, *Is This Development "Out of Scale"?,* STRONG TOWNS.ORG (July 22, 2020), https://www.strongtowns.org/journal/2020/7/21/is-this-development-out-of-scale. The height of the Ashby high-rise, however, definitely helped trigger neighborhood opposition, and likely influenced the jury's damage awards.

48. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007).

49. *Id.* at 1850–51; *see also* Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 974 (2009).

50. Lewyn, *supra* note 14, at 864–66. Even in a locality with zoning, compliance with zoning is not an ironclad defense in a nuisance case. *Id.* at 842 n.4.

Henry might regard distributive justice to be a relevant consideration in *Loughhead*.[51] In several of his writings, however, he has defended "modular," or specialized, approaches to legal problems. This avoids what he calls the fallacy of division, the notion that all parts of a complex system have to promote the same values.[52] Distributive justice issues centrally concern legislators when they engage in designing both tax systems and the welfare state. A modular analyst possibly might conclude that distributive justice considerations therefore should not influence most rules of property law, including nuisance cases such as *Loughhead*.[53]

CONCLUSION

Prior to again praising our deserving honoree, I note another minor disagreement. The title of *Property as the Law of Things* implies that the ownership of human capital falls outside the field of property.[54] Henry took my introductory property course in the spring of 1995. I included in the course materials *Commonwealth v. Aves*, a leading case on the legality of slavery. In 1836, the Supreme Judicial Court of Massachusetts held that the bringing of a slave child from Louisiana to Massachusetts had emancipated the child.[55] In conjunction with *Aves*, I observed in class that human capital represents 70 percent or more of American wealth—vastly more than real estate, personal property, intellectual property, and financial capital in combination. Although slavery thankfully is in deep decline around the world, property scholars, in my view, should feel free to use their analytic tools to point out the numerous advantages of self-ownership of labor.[56]

---

51. *See* Smith, *supra* note 49, at 973 (stating that "it is an open question whether the amount of redistribution we'd collectively like would be best handled in some modules than others . . . ."). Wyman notes that none of the new essentialists is reflexively opposed to redistribution. Wyman, *supra* note 38, at 204–05, 215–17.

52. Smith, *supra* note 49, at 968–73; Smith, *supra* note 11, at 1701–02, 1719.

53. On this contested issue, *see, e.g.*, Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994); Smith, *supra* note 49, at 973 n.71.

54. *But cf.* MERRILL & SMITH, *supra* note 10, at 210–38 (on body parts and the "right of publicity," aspects of human capital).

55. 35 Mass. 193 (18 Pick.) (1836) (Lemuel Shaw, J.).

56. *See also* Robert C. Ellickson, *Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith*, 8 ECON J. WATCH 215, 219 (2011).

Despite occasional differences, I salute Henry's many contributions. He has done as much as anyone to show the influence of information costs on the shape of property institutions.[57] The fee simple, the principal form of U.S. land tenure, is, as its name implies, simple. Henry has repeatedly shown why this is a huge advantage.

57. This is one of Henry's recurring themes. *See, e.g.*, Smith, *supra* note 11, at 1691.

MODULARITY, MODERNIST PROPERTY, AND THE MODERN ARCHITECTURE OF PROPERTY

CAROL M. ROSE*

ABSTRACT

Henry Smith's theory of property revolves around the human need for informational shortcuts in dealing with the claims of others. Property law treats property as *things,* or as he often says, modules—objects whose boundaries people may see and understand as belonging to themselves or others, without having to know the details of their interior interrelationships. Such "things" are protected by exclusion rules with some more fine-tuned governance rules for boundary issues.

Smith's theory is a welcome relief from the unproductive theory of property as "bundles of sticks," but it does raise some questions. Some are these: can property "modules" really be combined like LEGOs, or are some combinations messier, as in unsuccessful corporate takeovers? What, actually, is a "thing"—is it something natural, or is it (also) something like a farm or a condominium, an artifact of property law itself? How stable are the relationships between exclusion rules and governance rules? Can the information-economizing theory of property take more lessons from law and economics? Finally, aside from economizing on information, should a theory of property also leverage other purposes of property, such as the enhancement of effort and wealth, autonomy, and democratic self-government?

INTRODUCTION

Henry Smith is one of the great property law theorists of his generation, perhaps of the entire twenty-first century. At the center of his theory is a vision of property law as architecture. Henry has spent much of his scholarly output in elaborating the ways in which

* Ashby Lohse Professor of Water and Natural Resource Law, University of Arizona Rogers College of Law (emer.); Gordon Bradford Tweedy Professor of Law and Organization (emer.), Yale Law School; JD Univ. of Chicago, 1977; PhD Cornell Univ., 1970. I wrote this commentary without the benefit of Henry's final version of his symposium contribution, in which he has undoubtedly answered all my questions!

the architectural vision of property law can explain many of property law's features, and indeed can reach out into other parts of private law more generally—including torts, contracts, and even customary law. I will not even attempt a comprehensive view of all those ramifications, but instead I will try to explain how powerful the architectural theory is, but also how, in a very few instances, I find myself puzzled or even demurring. (But not many!) I am one of many who think that Henry's vision of property will be at the center of property scholarship for a long time to come.

I. SMITH ON THE MODULAR ARCHITECTURE OF PROPERTY

Henry starts many of his articles with a quick primer on his theory of property law's basic architecture, and so I will do that, too. The driving force of his theory is the fact that human beings have only limited cognitive abilities to grasp the myriad details of reality.[1] People simply cannot know every feature of the world in which they are navigating, and for that reason they need information shortcuts. The institution of property acts as a system to provide those shortcuts, and indeed an exceedingly important and all pervasive one.[2] But Henry asserts that property has an architecture: the basic building blocks of property law are what Henry calls "things," which may, but need not, overlap with physical things.[3] Each "thing" includes a more or less bounded center that can include intensely interacting features, but a boundary or periphery in which each "thing" has very limited interactions with other "things."[4] Property law solidifies this boundary by allocating to the owner the right to exclude, subject to a few exceptions which I will get to in a minute.

But for now, this architecture saves all of us from spending a great deal of time figuring out what we can and cannot do vis-à-vis all kinds of resources.[5] To be sure, and by comparison, contracting

1. Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 793–95 (2001); Henry E. Smith, *The Persistence of System in Property Law*, 163 U. PA. L. REV. 2055, 2057–58 (2015) [hereinafter Smith, *Persistence of System*].

2. Smith, *Persistence of System*, *supra* note 1, at 2057.

3. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1700 (2012) [hereinafter Smith, *Law of Things*].

4. *Id.* at 1700–91.

5. Henry E. Smith, *Institutions and Indirectness in Intellectual Property*, 157 U. PA. L. REV. 2083, 2087–90 (2009).

parties can make their arrangements in a fine-tuned manner, since they themselves negotiate the elements. Somewhat similarly, members of close communities can also understand their mutual rights and obligations in some detail, since everyone knows everyone else and their respective positions.[6] But in the looser and wider social organization of strangers, property's simplified structure permits ordinary activities to proceed without detailed contemplation of every item. Henry frequently uses the example given by the philosopher James Penner: a car is parked in a lot.[7] A passerby need not know anything about the owner or the uses that the owner makes of the car, but simply that it belongs to someone else, and that she, the passerby, is expected and indeed required to keep off. Thus, property law's exclusion rule for "things"—"in rem," good against the world—may be crude, but it creates a powerful simplification of information for all of us.

Now, to the exceptions: the periphery around things (I will henceforth stop putting scare quotes around things) sometimes grows fuzzy and conflicted. Neighbors may disagree about, say, loud noises coming from next door; the public may be threatened by owners' claims to pour poisonous materials into nearby streams; someone in an emergency may be endangered by the owner's refusal to permit even the slightest intrusion over the property line. In that fuzzy zone of occasional conflict, overreach, or misunderstanding, property law may adopt what Henry calls a governance strategy as opposed to the normal exclusion strategy—basically a more fine-toothed refinement of what the owner may and may not do on his or her property.[8]

Henry's work stands in opposition to another view of property, a view that is older and quite widely known: property as a "bundle of sticks," a view that he associates particularly with the Legal Realists, although to some degree with law and economics as well.[9] Henry

6. *See* Henry E. Smith, *Custom in American Property Law: A Vanishing Act*, 48 TEX. INT'L. L. J. 507, 514–16 (2013) (observing that particular communities can generate customs understandable among the members but not others); Henry E. Smith, *Community and Custom in Property*, 10 THEOR. INQ. L. 5, 21–22, 41 (2009) [hereinafter Smith, *Community and Custom*] (same).

7. *See, e.g.*, Smith, *Law of Things*, *supra* note 3, at 1703 n.47.

8. *Id.* at 1710.

9. *See, e.g.*, Henry E. Smith, *Mind the Gap: The Indirect Relation between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 962–63 (2009) [hereinafter Smith, *Mind the Gap*] (observing the Realists' failure to recognize indirect contribution of property and flawed assessment of property doctrines as if applied directly to welfare); Henry E. Smith

regards the "bundle" version as defective in a number of ways, and he frequently tells his readers what those defects are. Among other matters, he thinks both the Realists and the law and economics writers make a fatal error in treating all the rights and duties engaged by property as matters of equal weight in the so-called bundle. In making this equation, they fail to recognize the special role of exclusion as a "first cut," curtailing the voluminous information costs that would be required to learn all those rights and duties before acting. Similarly, he accuses the Legal Realists in particular of mischaracterizing the right to exclude as a goal in itself. No one but a fetishist, he says, would want to exclude for its own sake.[10] According to Henry, the central right in property is *use*, whereas the right to exclude, while critically important, is so because it acts as an indirect assurance that allows the owner to proceed undisturbed with his or her various uses—while, of course, reducing the need of non-owners to decipher every element of the owner's claims and their own duties.

Perhaps most important, Henry argues, the bundle of sticks view gives no theoretical leverage.[11] In its bland addition of stick after stick, it effectively goes nowhere in explaining how the different parts of property are constructed. On the other hand, the architectural, center/periphery picture of property as *things*, Henry argues, lets us understand the modular architecture of property and shows how different modules can be stacked, mixed, and matched.[12]

Essential to the modular architecture of property things is the modular character of property law itself. Property law economizes on information costs by constraining the number of recognizably standardized legal blocks that will count as property interests. In the common law, the best known are the estates in land, along with a limited number of servitudes like easements and mortgages; in the civil law, constraints on the numbers and types of property forms are collectively known as the *numerus clausus*, closed number, a

& Thomas W. Merrill, *Making Coasean Property More Coasean*, 54 J. L. & ECON. 77, 90–91 (2011) (criticizing law and economics literature for failure to see unique character of property, among other matters).

10. *See* Smith, *Mind the Gap*, *supra* note 9, at 964 (asserting that the right to exclude would only be valuable for its own sake to a fetishist); Smith, *Law of Things*, *supra* note 3, at 1693 (same).

11. *See* Smith, *Law of Things*, *supra* note 3, at 1696–98 (describing bundle of sticks view of property as descriptive but not a theory).

12. *Id.* at 1701–05.

term now famously revived for property law of all kinds by Henry's article with Tom Merrill in 2000, analyzing what they call optimal standardization in property law.[13] Using these modular forms, those dealing with property can create multiple different combinations by buying and selling, adding and subtracting, mixing and matching to form complex wholes, all without unduly taxing the information-processing ability of human owners—and non-owners as well.

To be sure, the very short-cutting nature of property's modules means that property modules may not always match reality exactly or may be too lumpy to fit together precisely. According to Henry, that is where *governance* rules come in to manage the peripheral problems: externality, overreach, misunderstanding at modular interfaces, and so forth. Nuisance law, unconscionability, and other equitable modifications serve these governance purposes, as in the frequently cited relaxation of *ad coelum* rules in order to permit airplane overflight—all these oversight strategies permit a modicum of relaxation in cases where the crudeness of modularity becomes problematic.[14] But in Henry's view, even governance has a certain formality, most notable in what used to be called the maxims of equity. Yes, he says, equity does pass the laugh test,[15] and its older formal rules deserve more respect than they sometimes get.[16]

II. A FEW QUESTIONS ABOUT MODULARITY IN PROPERTY

At this point, I should turn to some of the issues that I see lurking in Henry's very impressive theory of property law. Henry's analysis of the architecture of property law has influenced thinking in areas of private law far beyond property itself. That wider influence motivates my first issue, concerning the functionality of the modular view

13. Henry E. Smith & Thomas W. Merrill, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000).

14. Smith, *Law of Things*, *supra* note 3, at 1713–16, 1719.

15. Henry E. Smith, *Does Equity Pass the Laugh Test? A Review of Oliar and Sprigman*, 95 VA. L. REV. BRIEF 9 (2009–2010).

16. *See, e.g.*, Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 232–37 (2012) (criticizing Supreme Court's deviation from traditional equity in context of patent case). For Henry's latest discussion of equity, see Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050 (2021) [hereinafter Smith, *Equity as Meta-Law*] (defending and describing the proper understanding of equity as a domain separate from basic law).

of property, or by extension of a modular view of other private law topics, when the modules really are put together in some architectural form. By chance, this issue occurred to me in connection with two recent experiences, both rather prosaic. One was attendance via Zoom at a job talk by an entry-level law school faculty candidate, in which the candidate's paper discussed modularity at length in the management of complex corporate contracts.

The author of this paper cited Henry profusely as a theorist of modularity, albeit focusing on potential problems. I will not elaborate those here, but most could be summed up by saying that the left hand knew not what the right hand was doing when a complex contractual drafting problem was divided into modular parts. According to the presenter, the result was confusion as to which part governed the other parts in later disputes with contractual partners. The other chance experience came when I listened to a broadcast of the National Public Radio program "Planet Money," in which the travails of the Hertz Corporation were a prominent example. According to the interviewee, although it was not Hertz's only problem, the company's fatal mistake lay in acquiring two other car rental firms, Dollar and Thrifty, whose corporate cultures were far out of alignment with Hertz's own. Thereafter, apparently nothing jelled as Hertz and its acquisitions slipped into a corporate morass.[17]

Now, this sounded to me like modularity in action: Module A acquires Module B and Module C. Should it now become Module ABC, or should the whole remain in separate modules, and if the latter, what exactly was the point of the acquisition in the first place? If there was some intermediate mix-and-match, how and why did Hertz botch the interface/governance issues? More generally, the issue in both these examples seemed to me to be this: does the language of modularity suggest an underlying likeness or compatibility among different "things," as if they really are LEGOs, while perhaps understating their potential incompatibilities—or alternatively, understating the need to intervene into the internal character of one or the other or both, in order to create compatibility?[18] Does the idea

17. Planet Money from NPR, *Owner of a Broken Hertz*, NATIONAL PUBLIC RADIO (June 24, 2020), https://www.npr.org/transcripts/883047437 (Host Kenny Malone interviewing Alexxus Harris).

18. *See, e.g.*, Lisa Bernstein & Brad Peterson, *Managerial Contracting: A Preliminary*

of modular building blocks create a false hope of avoiding the problems of managing complexity in social institutions?

Turning to a somewhat more philosophical second issue: what makes any subject a thing, a.k.a. module, anyway? Physical objects certainly seem thing-y enough. But if a thing is defined as something with intense interactions at the center, with few or no interactions with other intense centers/things at the boundary, why are the boundaries where they are? I can see an apple as a thing by nature. An apple tree too. Maybe even an orchard. But what about a farm? True, the farmer plans the details of a farm's management and carries out those plans, doing so without a great deal of interference from the outside. But then, does not property law itself create the possibility for that undisturbed central activity defining the farm? That appears to be the point of Henry's remark in a 2015 article that "legal things are not actual things."[19] Is the legal recognition of property as *things* then a self-referential system? That is, if as Henry formulated the matter a year later, "a legal thing is similar to, but not different from, a physical thing,"[20] is the physical thing something like a natural kind, while the legal thing is an artifact of property law? But if so, why does property law recognize some subjects, whether physical things or not, as legal things or modules but not others?

Henry grapples with this topic in a 2016 article on what he calls fluid resources—water, of course, but also intellectual property.[21] The analogy between physical things and legal things revolves around separability: just as some physical things (like water) are hard to separate into exclusive parts, so some legal things are not easily separated either; a main example is copyright, which leaks (so to speak) into common usage in concepts like "fair use."[22] Henry makes a rather dismissive reference to an umbrella as presenting a trivial difference between physical and legal thinghood,[23] but an umbrella

Study (unpublished manuscript) (on file with author) (workshop paper given to University of Arizona Law College Feb. 4, 2021) (describing emergent managerial strategy whereby suppliers agree to purchasing firm's highly detailed interventions into suppliers' operations).

19. Smith, *Persistence of System*, *supra* note 1, at 2057.

20. Henry E. Smith, *Semicommons in Fluid Resources*, 20 MARQ. INTELL. PROP. L. REV. 195, 197 (2016) [hereinafter Smith, *Fluid Resources*].

21. *Id.*

22. *Id.* at 197; Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 117 YALE L. J. POCKET PART 87, 91 (2007).

23. Smith, *Fluid Resources*, *supra* note 20, at 200.

is actually more interesting than that. Clearly an umbrella is a physical thing, but what kind of a *legal* thing is it? In someone's hand, an umbrella looks like property. Hanging in a restaurant's coat closet it looks like property too, even though we don't know whose. In a street corner wastebasket, it looks as if it is not anyone's property anymore, but rather up for grabs. That is to say, what kind of legal thing it is depends on what it looks like, and what it looks like depends on a number of surrounding circumstances.

It is easier to make some subjects look like legal things than others. A farm is a good example: a farm is not a natural thing like an apple, but the claimant may deploy physical characteristics to make it look like a legal thing. If the farmer can surround the claimed land with a fence and then plow the fields, others are likely to understand that at a minimum it is someone's landed property, and more specifically that it is a farm. But the farm may also rely on more subtle forms of "fencing" that let others recognize it as a legal thing, and those may not be physical at all, or only peripherally physical, like a symbol (a "Jones Farm" sign); or a real estate title. Recording the title requires a whole regime of property titles, and more complex forms of property—say, trademarks or stocks—may only claim recognition as legal things through these kinds of collective property regimes.

I do not think that Henry would disagree with any of the above. But these differing modes of signaling legal thinghood have differences in costs, and that is where it seems to me that Henry might have made more explicit use of some insights drawn from law and economics. I am thinking especially of those pieces that point out that property regimes, while potentially very beneficial, are themselves costly; and that property regimes for different kinds of subjects have different cost and benefit profiles. Harold Demsetz set off a good deal of thought in this direction.[24] Terry Anderson and P.J. Hill colorfully illustrated Demsetz's arguments through their description of evolving property rights in the American West.[25] James Krier observed

24. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON REV. PAPERS & PROC. 347 (1967). Henry is of course well aware of Demsetz's contribution and cites him frequently, though often for other points; *see, e.g.*, Henry E. Smith & Thomas W. Merrill, *Making Coasean Property More Coasean*, 54 J. L. & ECON. S77, 78–79 (2011) (citing Demsetz on point that property rights internalize externalities and affect valuation of resources).

25. Terry Anderson & P. J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J. L. & ECON. 163 (1975).

the widely overlooked element of collective action necessary to create property rights regimes.[26] Gary Libecap analyzed the political stickiness that can impede changes in property regimes once some group of constituents has dug in.[27]

Henry certainly understands the costs of defining and defending property rights in different kinds of resources, as in his observations about the difficulty of creating a simulacrum of thingy-ness in water or intellectual property, and the consequent need for greater predominance of what he calls governance strategies in the legal delineation of these subjects.[28] But I believe his theory, with its stress on information costs and cognitive limitations, leads him to focus more on the costs to the observer or duty-holder when trying to comprehend the rights of others, and less on the costs to the claimant of communicating rights claims—or the costs to the public of creating any kind of overall regime for claiming property rights.[29] I am the last person to criticize an emphasis on the duty-holder in property relations, because my own view is that the duty-holder or non-owner is critical to making property regimes function.[30] Nevertheless, it is costly for individuals to communicate claims, and even costlier for the public to institute collective regimes for communicating claims, and all those costs are relevant to an understanding of what the law recognizes as a property thing. Law and economics scholars have been in the forefront of examining costs of this sort.

My third issue concerns another aspect of Henry's theory, although it harks back to my first issue about modularity. This issue concerns the deployment of exclusion—essential for modularity—as the dominating principle for the center of property things, and governance as the dominating principle at the periphery, the latter principle coming into play primarily in what Henry refers to as "high stakes"

---

26. James E. Krier, *Tragedy of the Commons, Part Two*, 15 HARV. J. L. & PUB. POL'Y 325, 332–39 (1992).

27. GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS 11–12, 21–26 (1989).

28. Smith, *Fluid Resources*, *supra* note 20, at 206–10.

29. I believe Henry has put the costs of creating and operating a property regime under the rubric of "measurement costs," but this phrase has generally left me uncertain about who is measuring what. *See, e.g.*, Smith & Merrill, *supra* note 24, at 94 (using term "measurement costs" in connection with defining and defending rights).

30. *See, e.g.*, Carol M. Rose, *Psychologies of Property (and Why Property is Not a Hawk/Dove Game)*, *in* JAMES PENNER & HENRY E. SMITH, PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 272, 282–83 (2013) (stressing the importance of non-owner recognition of property of others).

situations.[31] My question here is this: how stable is the center/periphery relationship between these management strategies? To begin with, there may be a more even distribution between these strategies than one might conclude from Henry's concentration on exclusion as the dominating strategy for property as the law of things, a.k.a. modules.[32]

Environmental law governs a lot of physical/legal "things" like factories, oil rigs, and autos, but environmental law has quite a trove of both exclusion and governance. If anything, if one understands governance to include detailed governmental supervision of owners' actions, governance strategies have predominated in environmental law to date, as in nuisance law in small-scale disturbances, or as in the very detailed command-and-control regulation of hazardous materials in more complex statutes. Moreover, it is precisely in "high stakes" situations, when environmental damage becomes acute, that commentators and legislators are most apt to turn to modular strategies. Those high stakes prod legislators to experiment with higher-cost but potentially more effective regimes of exclusive property.[33] An important example was the reaction to the damage caused by acid rain; this problem led to the 1990 amendments to the Clean Air Act, which introduced tradable property-like emission rights in sulfur dioxide.[34] Similar exclusion strategies have been proposed or enacted to deal with other environmental issues when threats have become more apparent—among them species decimation, overfishing, and wetlands loss.[35] Perhaps most notably, proposals to diminish

---

31. *See, e.g.*, Smith, *Law of Things*, *supra* note 3, at 1693–94, 1702–03. Henry is careful to note, however, that exclusion is not the "ontological" basis of property; see Henry E. Smith, *The Thing About Exclusion*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 95 (2014). Henry often refers to governance strategies as those applying at the periphery in "high stakes" situations; *see, e.g.*, Smith, *Community and Custom*, *supra* note 6, at 16.

32. In his more recent work, however, Henry has concentrated more on governance strategies, particularly equity. *See* Smith, *Equity as Meta-Law*, *supra* note 16, at 73–75 (arguing that both formal law and contextual equitable modifications are essential to legal system).

33. Carol M. Rose, *Big Roads, Big Rights: Varieties of Public Infrastructure and Their Impact on Environmental Resources*, 50 ARIZ. L. REV. 409, 409–11 (2008) [hereinafter Rose, *Big Roads*, *Big Rights*]; Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 16–24, 28–29 (1991).

34. 42 U.S.C. § 7651 (2000).

35. *See, e.g.*, Jonathan Remy Nash, *Trading Species: A New Direction for Habitat Trading Programs*, 38 ENV'T L. REP. 10539 (2008) (species conservation); Jonathan Adler & Nathaniel Stewart, *Learning How to Fish: Catch Shares and the Future of Fisheries Management*, 31

greenhouse gases include both detailed governance proposals on the one hand, but also and increasingly frequently exclusion strategies like carbon taxes or trades.[36] At the far end of the complexity scale, one might consider ecosystems, the ultimate polycentric resources. "Ecosystems" can designate anything from a mud puddle to the Amazon basin, and they would seem to be particularly resistant to modular approaches. Nevertheless, putting the mud puddle to one side, Amazon forest conservation too has elicited calls both for governance and for exclusion strategies.[37]

Henry does not dispute that governance strategies are important—far from it—but he nevertheless argues there is a "gravitational" pull toward exclusion/modular strategies in property law.[38] I would agree in many cases, but my own view is that the relationship is not so heavily weighted on one side as Henry implies. Henry's theory centers on property in a modern commercial society. Smaller and less commercial economies may well generally lean toward governance strategies for resource management, as in the numerous eighteenth-century Pacific island societies so beautifully described by Stuart Banner, where individual claims were subject to revision through decision by the indigenous community or its leaders.[39] Moreover, even in a modern economy, Henry himself has argued that 'fluid" resources like water and intellectual property do not lend themselves easily to pure exclusion strategies. Even though there are indeed more or less exclusive property rights in water in the American West, the gravitational pull of the law of surface

---

UCLA J. ENV'T L. & POL'Y 150 (2013) (fishing quota); James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607 (2000) (wetlands and other environmental resources).

36. *See, e.g.*, Greg Dotson, *The Carbon Tax Vote You've Never Heard of and What It Portends*, 36 UCLA J. ENV'T L. & POL'Y 167, 179–85 (2018) (describing conservative support for carbon pricing, although blocked in Congress).

37. *See, e.g.*, Howard A. Latin, *Climate Change Mitigation and Decarbonization*, 25 VILL. ENV'T L. J. 1 (2014) (describing and criticizing current mix of regulatory and incentive-based systems, proposing more far-reaching decarbonization).

38. *See, e.g.*, Smith, *Community and Custom*, *supra* note 6, at 27 (describing exclusion measures as having "gravitational" force in property); Henry E. Smith, *Mind the Gap: The Indirect Relation between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 965 (2009) (same).

39. *See, e.g.*, STUART BANNER, POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA 52–53 (2007) (describing Maori methods of land allocation prior to British settlement).

water is toward governance, given the interactions of upstream and downstream claims.

Water, like many resources, is one for which exclusion strategies are costly, as the law and economics scholars remind us. But these scholars also remind us that matters can change: growing (or diminishing) resource demand, new technology, and even politics may push property regimes in one direction or the other.[40] Such changes alter the cost/benefit calculations of different regimes, and they can drive recalibrations in the relationships between exclusion and governance.

If I may indulge in a personal quibble, some time ago, I made the claim that there was another such driver in at least some property relationships, located in an endogenous relationship between exclusion and governance (or rules and standards). I borrowed this idea from Albert Hirschman's 1982 book, *Shifting Involvements*.[41] The gist of it was that as one management strategy grows more dominant, its limitations may become more salient, inducing various players to try the other—but then later, those players or others start to chafe under the second strategy and return to some version of the first, and so on. Several years ago, when I was the recipient of this wonderful Brigham-Kanner Property Rights Prize, Henry gently argued that instead of cycling between what I called "Crystals and Mud," any such patterns in property law might be envisioned as *sedimentation* of rules and structured governance.[42] I have to confess that I see cycling and sedimentation as rather similar, if one sees each layer of sediment as a variant on the one-before-last.

In another metaphor in the same piece, Henry suggested that my view was rather like the thermostat that is first set too high, then too cool, then too high again, ad infinitum.[43] To this I would say, "Well, so what?" We never get some thermostats set just right—even in nature,

---

40. *E.g.*, Anderson & Hill, *supra* note 25, at 169–72 (describing changes in property rights in grazing land in Great Plains in response to greater competition, cattlemen's organization, introduction of barbed wire, and legislative action).

41. ALBERT HIRSCHMAN, SHIFTING INVOLVEMENTS 11, 21, 62, 120 (1982).

42. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) [hereinafter Rose, *Crystals and Mud*]; Henry E. Smith, *Rose's Human Nature of Property*, 19 WM. & MARY BILL RTS. J. 1047, 1052 (2010) [hereinafter Smith, *Rose's Human Nature of Property*]. Some years earlier, Randy Barnette suggested to me that the appropriate metaphor might not be crystals and mud but rather bricks and mortar, which strikes me as a closer metaphor to a modular form.

43. Smith, *Rose's Human Nature of Property*, *supra* note 42, at 1052–53.

as in predator/prey cycles. Voles and snowy owls never seem to get their thermostat set just right either.[44] In any event, I was not making a universal claim, but I do think that in some subjects in property, we do not get the thermostat just right, at least for a time. One of my examples was the title theory of mortgages, reined in by the equity judges' lien theory as strict rules resulted in undue losses to borrowers, to be subverted anew by the installment land contract as parties looked for more rapid and predictable rules, then re-regulated into the lien theory once again[45]—and in recent years re-subverted into the title approach by the rent-to-own signs that I have seen all over Tucson, Arizona. But as Hirschman's *Shifting Involvements* argues, cycling is a feature of many aspects of life.[46] It would be unseemly of me to carry this debate further here, but if my Crystals and Mud view holds any water (so to speak), endogenous cycling may be another driver of a changing relation between exclusion and governance.[47]

Let me sum up this issue about the stability of the mix between exclusion versus governance in property. One might think property law itself has a center and periphery. The modular model may dominate the central resources, like land, but the governance strategies seep in more and more as one approaches the nether poles of what we consider to be property: think water.[48] Moreover, it does seem that the proportions between the two strategies can change. The law and economics scholars link this kind of change to cost/benefit fluctuations that are driven by resource demand, technology, and patterns of entrenchment: all can lead to different mixes of governance and exclusion with respect to property. And of course, I would add that cycling is another driver at least some of the time: an increasingly frustrating experience with one strategy may lead the relevant actors to turn to the other—and then vice versa.

---

44. *See "Snowy Owl,"* THE PEREGRINE FUND, *available at* https://peregrinefund.org/explore-raptors-species/owls/snowy-owl (linking snowy owl population to populations of voles and lemmings and vice versa).

45. Rose, *Crystals and Mud*, *supra* note 42, at 583–85.

46. *E.g.*, HIRSCHMAN, *supra* note 41, at 11, 21, 62, and 120 (describing cycling political involvements).

47. I am happy to see Henry may agree; *see* Smith, *Equity as Meta-Law*, *supra* note 16, at 49 (noting that law and equity may cycle).

48. *See* Carol M. Rose, *From H2O to CO2: Lessons of Water Rights for Carbon Trading*, 50 ARIZ. L. REV. 91 (2008) (describing impediments to exclusive property rights regimes in water and air pollutants).

My last issue shifts to the goals of property regimes. In theorizing an architecture of property, Henry's overwhelmingly dominant concern is information cost, and he argues that its reduction through property's exclusion rules (modified by structured governance strategies at the periphery) make interactions possible. To this I would again say, "Well, yes and no." Once again, those smaller traditionalist societies offer a contrast in which more fine-grained governance dominates; people in these societies know a lot about one another, so that information is not so costly; and they manage to get along, even though they do so without great accumulations of wealth. The Smithean architecture of property, on the other hand, generally presumes what I have called a "modernist" economy, characterized by frequent interactions among strangers, widespread commerce, and the vastly increased "wealth of nations" that accompanies commerce. A modernist economy like this requires modernist property forms: simple, modular, standardized forms that reduce otherwise overwhelming information costs among far-flung market participants.[49]

But then the question becomes, which economic form is better? For some thinkers, the traditionalist small-scale economy of an intimate community certainly has a romantic appeal.[50] (But see Marx, the author of the telling phrase, "the idiocy of rural life.")[51] The even less regimented life of nomadic herders or hunter/gatherers appeals as well, to the point that some persons initially taken by force into such communities later have not wished to leave.[52] Yes, information cost reduction is essential to the modernist economy, but by what measures is the modernist economy superior to the traditionalist one? To be sure, the modernist economy has proved to be evolutionarily more powerful and in that sense perhaps inevitable; traditionalist economies often fail to survive the encroachments of widespread

49. Rose, *Big Roads*, *Big Rights*, *supra* note 33, at 410–11.

50. *See, e.g.*, DAVID BOLLIER, THINK LIKE A COMMONER 147–59 (2014) (describing commons as a new life form replacing capitalism and the liberal state); *but see* Carol M. Rose, *Commons and Cognition*, 19 THEOR. INQ. L. 587, 601–02 (2018) (noting criticism of a romantic view of commons).

51. KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY ch. 1 (1848), *available at* https://www.marxists.org/archive/marx/works/1848/communist-manifesto/ch01.htm#:~:text=The%20bourgeoisie%20has%20subjected%20the,the%20idiocy%20of%20rural%20life.

52. James Axtell, *The White Indians of Colonial America*, 32 WM. & MARY Q. 55, 55–58 (1975).

commerce, and even if they do, their generally modest ability to generate wealth puts them behind in any kind of arms race.[53]

But is superior strength the only point of a modernist, modular property regime? Is that why we want it to be easy for anyone in the whole world to understand the basic message: Thing X may belong to me, but all those Thing Ys out there belong to someone else? It is slightly surprising to me that Henry, in his heavy focus on property's information-cost advantages, says only a little about other reasons why we might prefer a modernist regime to a traditionalist one. The most obvious reason is wealth itself, through property's encouragement of industry and effort, mightily enhanced by trade; Henry does mention this occasionally. But in Henry's work I see little mention of the libertarians' emphasis on property's role in according independence and autonomy to individuals.[54]

The same goes for other aspects of property rights that seem to me exceedingly important. Henry and I are on the same page in thinking that the person whose perspective to be accounted for is not the owner, but rather the non-owner, or as Henry calls her, the duty-holder. Those persons' respect for the property of others makes the entire property regime function. Henry's goal is to structure property law so that any one of these persons can recognize that X is a Thing, and Thing X belongs to someone else. I would go on to suggest that there is a reason beyond commerce for encouraging this kind of recognition, even agreeing that commerce and its wealth production are important. Another hugely important reason is that property gives lessons for conducting one's self in a democratic regime: if a person can recognize the property of others, she can learn to respect the rights of others more generally. In that sense, property is a vivid educator about what it means to have and to recognize rights.[55] Moreover, property and trade can induce habits whereby people are willing to try out relationships with others who differ from themselves;

---

53. *See, e.g.*, BANNER, *supra* note 39, at 53 (describing traditional Maori practices as generating little tradable wealth); Carol M. Rose, *Property's Relation to Human Rights*, *in* ECONOMIC LIBERTIES AND HUMAN RIGHTS 80–81 (Jahel Queralt & Bas van der Vossen eds., 2019) [hereinafter Rose, *Property's Relation to Human Rights*] (observing traditional communities' products as generally low economic value compared to those of a modernist economy).

54. *Cf.* Smith, *Law of Things*, *supra* note 3, at 1693 (briefly mentioning interest in autonomy in property).

55. Rose, *Property's Relation to Human Rights*, *supra* note 53, at 69–70, 88.

whereby they put force to one side and instead appeal to the voluntary agreement of others; whereby they learn to downplay irrelevant disagreements and instead concentrate on coming to terms on matters of mutual benefit. In these ways, as I have argued elsewhere, open regimes of property and trade help to produce a culture that supports democratic self-government.[56]

Henry is undoubtedly right that property's reduction of information cost is a sine qua non of modernist economies. More than anyone so far, he has induced scholars to take information costs seriously in the institutional construction of private law. But beyond all that, it would be gratifying to hear, at least from time to time, why the flourishing of a modernist private law matters to our *public* life as well.

56. Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 363–64 (1996).

SHELTER, MOBILITY, AND THE VOUCHER PROGRAM

EZRA ROSSER*

INTRODUCTION

What is to be done about the poor and about poor neighborhoods? When it comes to housing policy, the current hope is that the Housing Choice Voucher Program (formerly the Section 8 Voucher Program) can provide an—or ambitiously—*the* answer to this perennial societal question. By piggybacking on the private rental market, the voucher program supposedly has numerous advantages over traditional, project-based, public housing. Not only is it less costly to house poor people in privately owned units compared to the cost of constructing and maintaining public housing,[1] but the voucher program also offers the possibility of deconcentrating the poor. Because vouchers can theoretically be placed anywhere, the poor can use them to move out of impoverished areas and into higher opportunity neighborhoods. At least in theory, vouchers thus offer a two-for-one punch: a more efficient way of providing housing support and a way to offer families a chance at economic mobility. A new book by Professor Eva Rosen offers a more nuanced appraisal of the ability of vouchers and voucher holders to live up to the multiple expectations placed upon them. *The Voucher Promise: "Section 8" and the Fate of an American Neighborhood* pulls back the curtain on the voucher program, letting readers into the lives of poor families and landlords whose lives are shaped by the program.[2] "Section 8" remains the popular name for the program in much the same way that people still refer to "food stamps" instead of the Supplemental Nutrition Assistance Program. As Rosen shows, even though the voucher program may fail to deliver

* Professor of Law, American University Washington College of Law. Thanks to Susan Bennett and Brandon Weiss for providing feedback on an earlier draft. And thanks to Lynda Butler and the other organizers of the Brigham-Kanner Property Rights Conference for inviting me to participate in a great event.

1. For discussion of the high cost of building and maintaining housing projects, see Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 995–1001 (2010).

2. EVA ROSEN, THE VOUCHER PROMISE: "SECTION 8" AND THE FATE OF AN AMERICAN NEIGHBORHOOD 1–27 (2020).

on all of the mobility expectations associated with it, vouchers considerably improve the lives of recipients. Even as the stature of economic mobility within poverty law solidifies and the consequent need to include mobility appraisal in the evaluation of anti-poverty programs evolves, scholars and policymakers should not lose sight of welfare gains associated with programs, even if the same programs cannot support the weight of mobility-tied expectations.

Before going into details, it is worth providing, just as *The Voucher Promise* does in the introductory chapter, a summary of the voucher program and the forces that led to its ascendency. Vouchers are a form of rental subsidy. Poor people lucky enough to get a voucher and find a private landlord willing to accept the voucher end up paying only a small fraction of their rent out of pocket, and the vast majority is paid for out of government funds.[3] However, unlike food stamps, no one has a right to a voucher; instead they are allocated by local housing authorities through complicated formulas that take into account applicant's personal characteristics (his or her need) as well as how long he or she has been waiting for assistance.[4] Indeed, across the country, one of the defining features of the voucher program is the wait-list. In some cities, the wait-list for a voucher is closed and has been for years.[5] The opening of the wait-lists, often for only brief periods of time, generates a flood of new applicants.[6] It can take years to get off the wait-list. Once someone gets off the wait-list, they have a limited amount of time to place the voucher—to find a landlord willing to have the recipient as a tenant and accept the voucher.[7] If they fail to place the voucher, it can be lost, given to the next person on the wait-list. Though comparisons across welfare programs are fraught with impossible value judgments (how can one compare food assistance to housing assistance), given the cost of even modest housing and the nature of the voucher subsidy, the voucher program provides a uniquely deep benefit. Though it reaches only a tiny fraction of those who need such support, getting off the wait-list can be truly transformative for poor individuals and families.[8]

---

3. *Id.* at 14–16.
4. *See id.* at 102–03.
5. *Id.* at 104.
6. *Id.* at 103.
7. *Id.* at 115.
8. Only one-quarter of very low-income households receive any form of housing assistance.

Today, the voucher program is the largest housing assistance program serving poor people in the United States. (The largest housing assistance program in terms of overall expense, the mortgage interest deduction, primarily benefits the upper-middle class and the wealthy.[9]) The current iteration of the voucher program, the Housing Choice Voucher ("HCV") Program, replaced the Section 8 Voucher Program, which began with the Housing Act of 1974 but took on added importance as the United States moved away from public housing.[10] The United States embarked on an ambitious effort to build public housing starting just before World War II and continuing beyond President Johnson' s War on Poverty.[11] The Housing Act of 1949 declared the federal goal as "a decent home and suitable living environment for every American family."[12] But these efforts were beset with problems. Inadequate funding left local housing authorities unable to keep up with maintenance expenses.[13] Tenant selection at the time favored the neediest, which meant both that it was impossible to charge tenants to cover those expenses and that housing projects became sites of concentrated poverty.[14] Tall and dense concrete apartment buildings were not the only type of public housing built, but such complexes, including their very names—Robert Taylor Homes, Pruitt-Igoe, and Cabrini-Green—came to symbolize *all* public housing. Popular awareness of some of the problems prevalent in these large complexes, including gang and drug activity, together with academic research emphasizing the economic and cultural effects of concentrated poverty, pushed policymakers to look for ways

---

JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2020 6 (2020). *See also* Abraham Gutman et al., *Health, Housing, and the Law*, 11 N.E. U. L. REV. 251, 298 (2019) (praising the program and noting, "the most obvious defect in the program is that it is chronically, and substantially, underfunded").

9. For an excellent article on the inequities of the mortgage interest deduction (written before the Trump tax reform changed the calculus to lessen the overall reach of the deduction while also making it even more skewed towards the wealthy), see Matthew Desmond, *How Homeownership Became the Engine of American Inequality*, N.Y. TIMES (May 9, 2017), https://www.nytimes.com/2017/05/09/magazine/how-homeownership-became-the-engine-of-american-inequality.html.

10. ROSEN, *supra* note 2, at 14.

11. Ellickson, *supra* note 1, at 989.

12. Congressional Declaration of National Housing Policy, 42 U.S.C.S. § 1441 (2020).

13. *See* Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 GEO. J. ON POVERTY L. & POL'Y 35, 38–39 (2002) (discussing the problems caused by inadequate funding).

14. *Id.* at 40.

to fix public housing.[15] One solution, which began under President George H.W. Bush and became a central feature of housing policy under President Clinton, was to demolish existing housing projects and replace them with less dense projects built on the same sites.[16] Not only were these Hope VI projects nicer than stereotypical public housing, but housing authorities also moved away from populating these new units based on greatest need and instead prioritized a mixed-income approach when selecting tenants. The other reaction to problems, real and perceived, in public housing was to move away from government funding of brick-and-mortar construction and toward rental subsidies, i.e., vouchers.

Vouchers allow the government to get out of both the landlord business and the business of telling poor people where they must live. At least in theory, vouchers leverage the power of the private rental market, allowing poor people to look for housing within their budget (which in this case is determined by their budget and the applicable caps on the per month voucher payment) across the area serviced by the local housing authority and potentially across an even wider area. Studies demonstrate that on a per unit basis, vouchers are cheaper than public housing units over the same time period.[17] The economic attractiveness of vouchers is but part of the explanation for their rise. The other major factor was the belief that the ability to move to better neighborhoods would provide the poor

15. The scholar whose work most advanced the idea that concentrated poverty is especially harmful is William J. Wilson. *See* WILLIAM J. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (2d ed. 1987); WILLIAM J. WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1996). For a short retrospective that highlights the troubled nature of these projects and looks at what happened after they were torn down, see Susan J. Popkin, *Hard Lessons from Chicago's Public Housing Reform*, BLOOMBERG CITYLAB (Feb. 7, 2017, 5:23 PM), https://www.bloomberg.com/news/articles/2017-02-07/lessons-from-chicago-s-public-housing-reform.

16. As Susan Bennett observed when discussing Hope VI, "Few raise their hands in support of public housing. People even like to blow it up." Susan Bennett, *"The Possibility of a Beloved Place": Residents and Placemaking in Public Housing Communities*, 19 ST. LOUIS UNIV. PUB. L. REV. 259, 264 (2000). For a critique of the Hope VI program, see NAT'L HOUS. L. PROJECT ET AL., FALSE HOPE: A CRITICAL ASSESSMENT OF THE HOPE VI PUBLIC HOUSING REDEVELOPMENT PROGRAM (2002), https://www.nhlp.org/files/FalseHOPE.pdf.

17. Ellickson, *supra* note 1, at 997–98 (comparing the cost of public housing projects with the cost of vouchers). *See also* U.S. GENERAL ACCOUNTING OFFICE, FEDERAL HOUSING ASSISTANCE: COMPARING THE CHARACTERISTICS AND COSTS OF HOUSING PROGRAMS, GAO-02-76 (2002) (finding vouchers are cheaper over a thirty-year period but noting that construction of larger complexes can lessen the gap between voucher costs and public housing costs).

with access to the sorts of benefits—in terms of everything from employment opportunities and quality education to reduced exposure to crime and increased social capital—that were and often are (rightly or wrong) associated with living in those wealthier areas.[18] The widely touted success of the *Gautreaux* settlement, which provided vouchers and support for poor, predominantly African-American recipients to move to lower-poverty neighborhoods, provided the push needed for the federal government to roll out the Moving to Opportunity ("MTO") voucher experiment, which looked at the effect of mobility on recipient well-being.[19] At least since the MTO study, the rhetoric around vouchers embraces a dual purpose for these subsidies: a means of providing direct assistance in order to shelter the poor and a tool to enable the poor to relocate to higher-income neighborhoods.[20]

The Voucher Promise shows that though voucher programs provide invaluable support for families in need, recipients often place their vouchers in the type of low-income neighborhoods that theoretically vouchers should help recipients escape.[21] By focusing on a poor part of Baltimore with a relatively high portion of voucher-supported

---

18. *See* Stacey Seicshnaydre, *Missed Opportunity: Furthering Fair Housing in the Housing Choice Voucher Program*, 79 L. & CONTEMP. PROBS. 173, 175 (2016) ("The HCV Program, as the current name suggests, provides the potential for greater housing choice and socioeconomic mobility for low-income families that participate. Vouchers create the possibility that families, armed with data and information, can exercise choices about where to live. By extension, such choices might open up areas of greater opportunity for families than traditionally available to them, such as neighborhoods with fewer environmental and health hazards, higher quality schools, and job growth.").

19. *See* Jamie Alison Lee, *Poverty, Dignity, and Public Housing*, 47 COLUM. HUM. RTS. L. REV. 97, 143–48 (2015) (providing an overview of these voucher experiments and related research findings); David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 104–05 (2017) (summarizing these voucher experiments and collecting sources).

20. Tellingly, one summary of the Obama administration's approach to urban poverty argues that it was founded on two principles: "first, that concentrated poverty—particularly racially concentrated poverty—is unacceptable and demands an affirmative response from the federal government; and second, that individuals living in ghettos deserve both an adequate physical place to live and the ability to live in a community of opportunity." Sara Aronchick Solow, *Racial Justice at Home: The Case for Opportunity-Housing Vouchers*, 28 YALE L. & POL'Y REV. 481, 482 (2010). However, when it comes to the vouchers and mobility, "the HSV program has never fulfilled its promise of expanding housing choice for low-income families." Sara Pratt, *Civil Rights Strategies to Increase Mobility*, 127 YALE L.J. F. 498, 513 (2017).

21. *See also* Gutman et al., *supra* note 8, at 299 ("while it is clear that the program achieves the goal of helping voucher holders pay rent, it is unclear whether the program allows for mobility").

households, Rosen lets readers glimpse some of the messiness that complicates rosy predictions regarding the transformative potential of vouchers. Landlords whose business relies on voucher tenants steer recipients to poorer areas with high profit margins.[22] Legal and logistical barriers also keep recipients from fully exploring the possibility of moving to higher-income areas. But these areas, for all their faults, can also provide a sense of community. Rosen describes the bonds that can exist between tenants, as well as the ways homeowners sometimes exclude voucher holders from a community of long-term residents.[23] By bringing readers into the lives of those most impacted, tenants and landlords alike, *The Voucher Promise* contributes to a vibrant literature on vouchers and on the role neighborhood characteristics play on resident welfare and economic mobility.

Part I of this Article is devoted to *The Voucher Promise*. It brings out the major lessons Rosen drew from her field work and highlights a few areas left uncertain. As Part I's coverage hopefully makes clear, *The Voucher Promise* is worthy of careful consideration by anyone interested in housing policy and in the importance of place. Zooming out from Rosen's study of a Baltimore neighborhood to a more general perspective, Part II explores the relationship between location and opportunity. Drawing on the work of Raj Chetty and others, Part II discusses what is known and what remains unknown about this relationship, especially when it comes to moves by poor people. As will be shown, a growing pile of evidence supports the idea that location matters when it comes to economic opportunity. The Article ends by connecting this opportunity research with the question of whether the voucher program should have to bear the weight of both providing necessary public housing assistance and leading the poor to move to high-income areas. Ultimately, the voucher program should be recognized as a success and (massively) expanded, even if it does not meet the secondary mobility goal, because of the tremendous need among the poor for subsidized housing.

I. LIVING WITH VOUCHERS

The *Voucher Promise* is a portrait of both people and a community. Rosen, now a professor at Georgetown, did the field work leading up

22. ROSEN, *supra* note 2, at 140.
23. *Id.* at 170–74.

to the book as part of her PhD in Sociology from Harvard and it shows, in a good way. Following the introductory chapter's tightly written and thoughtful summary of how housing policy has changed over time, Chapter 1 provides a rich description of the Park Heights neighborhood that is reminiscent of past work by William J. Wilson and Richard B. Taub.[24] Told through a mix of quotes from neighborhood residents as well as statistics and the author's own observations, the reader is allowed entrance into the Park Heights community.[25] Many of the long-term homeowners arrived when the neighborhood was first opened up to African Americans.[26] Though some Jewish residents did not move out, real estate agents used blockbusting tactics to generate turnover and whites left the area for better-off areas in the Baltimore metropolitan region.[27] The neighborhood changed from white to black and has "stabilized as a black homeowning community with a newer renter population."[28] Long-term residents recall the Park Heights of the 1970s with fondness and nostalgia, but as time passed many of the businesses and community institutions disappeared.[29] Residents who introduced Park Heights to Rosen could point to visible reminders, such as dirt-filled swimming pools,[30] row homes now standing vacant,[31] and sites where schools once stood,[32] of what the community once was.

Residents in Park Heights experience the community differently. "[T]he feel of the neighborhood changed block by block," Rosen observed, with "three distinct ecological areas or 'microneighborhoods,' characterized by different patterns of residential status, length of residency, and geographic boundaries."[33] According to Rosen, Park Heights can be divided into *homeowner havens*, *transitional areas*, and *voucher enclaves*, and each type of neighborhood has distinct

24. *See* WILLIAM JULIUS WILSON & RICHARD B. TAUB, THERE GOES THE NEIGHBORHOOD: RACIAL, ETHNIC, AND CLASS TENSIONS IN FOUR CHICAGO NEIGHBORHOODS AND THEIR MEANING FOR AMERICA 3–13 (2006).

25. *Id.*

26. ROSEN, *supra* note 2, at 30.

27. *Id.* at 30.

28. *Id.* at 237.

29. *Id.* at 34–36.

30. *Id.* at 54–56.

31. *Id.* at 38.

32. ROSEN, *supra* note 2, at 45.

33. *Id.* at 57.

characteristics.[34] For residents, differences across these neighborhood types matter because "social capital operates differently in different part of the [Park Heights] neighborhood," as do "[m]echanisms of social control."[35] The first of these, homeowner havens, are areas sheltered from other parts of the community, with "strict norms around trash collection, litter, loitering, and drug selling."[36] Long-term homeowners, often older residents who bought into the neighborhood decades earlier, have tight relationships among themselves but "stigmatiz[e] voucher holders and blam[e] them" for negative changes in the neighborhood.[37] This "us versus them" dynamic is even more pronounced in transitional areas where homeowners believe "that these 'Section eights' are responsible for trashing the homes on [their] street" in ways that hurt property values.[38] As the name implies, transitional areas have "older homeowners, newer homeowners . . ., newer renters, and some vacant property," and residents can have different levels of commitment to the neighborhood.[39] As Rosen notes, in transitional areas, "voucher status—or the perception of it—becomes a symbolic boundary that serves as a more distinction," excluding voucher holders from full participation in the existing community.[40]

It is the third neighborhood category, voucher enclaves, that has an especially high concentration of voucher-supported households. The voucher enclave archetype is a low-income apartment complex owned by a landlord who actively seeks voucher holders as tenants. Lacking long-term homeowners to exercise informal community control over such areas, voucher enclaves rely on video surveillance and property managers to deal with everything from trash to the maintenance of safety.[41] In these apartment complexes, technology, professional management, and the police provide institutionalized oversight, but reliance on these "formal mechanisms of control . . . [works] to the

34. *Id.* at 57–59.

35. *Id.* at 173.

36. *Id.* at 173.

37. *Id.* at 176. *See also id.* at 241 ("There is a widely pervasive myth that voucher holders bring with them crime and disorderliness. The stigma and myth surrounding housing vouchers is woven through our popular and even intellectual discourse.").

38. ROSEN, *supra* note 2, at 177.

39. *Id.* at 177.

40. *Id.* at 180.

41. *Id.* at 198–200.

detriment of informal, ground-up forms of social control."[42] In the apartment complex that Rosen studied in depth, Oakland Terrace, residents reported that while the surveillance cameras "made the complex safer overall, they have not promoted a sense of trust among residents."[43] The sort of monitoring and correction that takes place in homeowner havens depends on social capital among residents, and in transitional areas as well as voucher enclaves, such informal policing is not available so colder alternatives act as substitutes.[44] Within this sliding scale of resident permanence, "division within the neighborhood is reinforced from the top down by neighborhood institutions and organizations" that serve homeowners and long-term residents but not voucher holders.[45]

But *The Voucher Promise* is not a detached theoretical work. Rosen brings readers along to meet the tenants who live in Park Heights. Destiny Stevens, for example, lives "in a modern-day rooming house," with her fiancé and her boys, a five-year-old and a five-month-old.[46] Though the demise of the single room occupancy ("SRO"), especially YMCA housing, is a recurring observation among academics, Stevens's family pays $600 per month for a room in a single-family home that she shares with three other tenants.[47] As Rosen observes, by renting the house by the room, Stevens' "landlord is bringing in $1,800 a month for a house that . . . he would be hard-pressed to rent for more than $1,000 to a single family."[48] To further illustrate the hardships of insecure housing, Rosen introduces readers to Derrick Thomas and Marilyn No-Last-Name-Given. Thomas, his girlfriend Marlena, and their seven-week-old baby, Rose, rented an upstairs apartment from a known Baltimore drug kingpin who lived downstairs.[49] The couple made do through a combination of SSI, food stamps, odd jobs, and sex work; they tolerated periods without heat in their unit because the landlord was "lenient when they are late on rent" and because they did not have better options.[50] Marilyn's housing

42. *Id.* at 206.
43. *Id.* at 207.
44. ROSEN, *supra* note 2, at 168–69.
45. *Id.* at 207.
46. *Id.* at 63.
47. *Id.* at 62–63.
48. *Id.* at 63.
49. *Id.* at 70–74.
50. ROSEN, *supra* note 2, at 78–79.

situation—a heavily subsidized apartment in a Low-Income Housing Tax Credit ("LIHTC") complex—was considerably better than Thomas's, but her life had not been easy. Marilyn went from using drugs to spending three years in prison after she attempted to transport drugs taped to her body on a flight from Columbia.[51] After her release, she got a job at a clothing store in West Baltimore but then "tragedy struck . . . someone shot and killed her younger son."[52] Drug use and rehabilitation followed, and Marilyn got off a wait-list for LIHTC apartments (her conviction disqualified her from vouchers but not from the LIHTC unit); ever since she moved into the subsidized space, "[t]hings have been very stable for Marilyn."[53] Like most writing about poor people, the stories are not clean; there are messy parts.[54] But the humanity of the people Rosen got to know shines through, as does the tremendous impact affordable housing could have on their lives.

Housing vouchers can make a tremendous difference in the lives of the poor. Rosen notes, "[t]he receipt of a housing voucher can be transformative. Like a winning lottery ticket, a housing voucher radically changes lives, solving problems that can be intractable for unassisted renters."[55] For some recipients, a voucher means the difference between being sheltered or not, but its meaning can take other forms as well: the ability to buy better food or cut back on double shifts.[56] For some parents, a voucher can allow family reunification by demonstrating that parents have "a suitable place for [their] children to live."[57] Vouchers allow parents "to create a real home" for their kids, an invaluable improvement over couch surfing and doubling up with friends and relatives.[58] Studies of voucher recipients show that, not surprisingly, vouchers improve housing conditions and free up money so families can "avoid skipping meals"

---

51. *Id.* at 82–87.

52. *Id.* at 87.

53. *Id.* at 88.

54. For one of the best books illustrating the structural as well as personal aspects of poverty, *see generally* JASON DEPARLE, AMERICAN DREAM: THREE WOMEN, TEN KIDS, AND A NATION'S DRIVE TO END WELFARE (2004).

55. ROSEN, *supra* note 2, at 94.

56. *Id.* at 94.

57. *Id.* at 97. *See also* Gutman et al., *supra* note 8, at 298 ("Children in homeless families that receive vouchers are 42% less likely to be placed into foster care.").

58. ROSEN, *supra* note 2, at 108.

and "eat healthier food."[59] Receipt of a voucher does not suddenly catapult families into the middle class but does provide stability, validation, and "a place to call home."[60]

The positive impact vouchers have for poor recipients is only part of the story and *The Voucher Promise* dedicates equal space to some of the challenges. Following the model that helped lift Matthew Desmond's *Evicted* from academic obscurity to a must-read book,[61] Rosen spent time not only with tenants but with their landlords, trying to understand the motivations and practices of those on the opposite side of the voucher relationship. As Rosen notes, although some cities have passed laws prohibiting sources of income discrimination, across much of the country. it is perfectly legal for a landlord to reject a tenant simply because the landlord does not want to accept a voucher.[62] Although there have been some programmatic changes to permit the maximum value of a voucher to vary by location so that they can be placed in areas with higher rents, in general, vouchers only cover 40 or 50 percent of the city's fair market rent.[63] Landlords renting at the bottom of the market sometimes avoid vouchers because of the minimum quality standards and ongoing inspections tied to acceptance of voucher-holding tenants. But "cumbersome inspections" are not the only reason landlords discriminate against voucher holders; "others turn down vouchers for more insidious reasons."[64] As Rosen observes, in areas where the majority of voucher holders are African-American, "race and voucher status often become conflated, and a landlord's refusal to accept housing vouchers is effectively racial discrimination."[65] Rental rates set below the average fair market rent, program inspections, landlord reticence about participating in the voucher program, and racism combine to limit the reach of vouchers into the private rental market and make it hard for recipients to place their vouchers.

---

59. *Id.* at 111.

60. *Id.* at 113.

61. MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016).

62. *See* ROSEN, *supra* note 2, at 118–19 (discussing source of income discrimination in the Baltimore and Washington, D.C. area). For an extended treatment of source of income discrimination and the voucher program, see Robert G. Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 CASE W. RSRV. L. REV. 573, 584–616 (2020).

63. ROSEN, *supra* note 2, at 138–40.

64. *Id.* at 118.

65. *Id.* at 119.

Vouchers are government subsidies for both sides of the landlord-tenant relationship, so it is not surprising that some landlords build their business around vouchers. Although 40 percent of an area's fair market rent is not enough to afford a unit in a high-end part of town,[66] in poorer parts of town, such a government-guaranteed monthly payment is quite attractive for landlords who otherwise would have to settle for a lower monthly amount and greater payment uncertainty.[67] *The Voucher Promise* contributes to the public housing literature in part by highlighting the ways "landlords select tenants *in*—how they make decisions about desirable tenant characteristics and sort renters into neighborhoods across the city."[68] A recurring question when it comes to vouchers is why is it that "housing voucher recipients do not, by and large, move to the mixed-income, diverse communities that policymakers envisioned as a key outcome of the program"?[69] A partial answer is that landlords actively recruit tenants—going so far as to pass out fliers and offer drives to people after they leave the "Section 8" office—into vacant units in higher-poverty areas.[70] Those landlords who specialize in the voucher program buy up cheap properties, fix them up enough to pass inspections, and seek out voucher holders to fill their units.[71] Sometimes such units are scattered throughout a poor community; other times they take the form of an underperforming apartment complex.[72] Enticements, whether in the form of waived security deposits or cosmetic improvements such as upscale amenities, help persuade perspective tenants to move to poorer parts of town even though theoretically their voucher could take them to better-off areas.[73]

---

66. Pratt, *supra* note 20, at 514 ("[A] voucher often does not cover enough of the high rents in many localities to provide meaningful assistance. Even with recent increases in payment standards, or Fair Market Rent calculations, individuals with vouchers are often priced out of markets other than those located in segregated and poor neighborhoods.").

67. ROSEN, *supra* note 2, at 134.

68. *Id.* at 132–33.

69. *Id.* at 126.

70. *Id.* at 130.

71. *Id.* at 135–36, 145–48. Notably the structure of the voucher program "theoretically enables overcharging," which means that in some markets a landlord can make more money renting to a voucher holder than to a tenant without a voucher. Gutman et al., *supra* note 8, at 302.

72. ROSEN, *supra* note 2, at 142–45.

73. *See id.* at 151–53.

Rosen's account of the role of landlords in the voucher program sheds new light on the program's limited success when it comes to mobility. Though vouchers theoretically enable recipients to move to lower-poverty areas and can help reduce concentrated poverty, in practice, holders often end up placing their vouchers in poor communities. Moreover, "[t]he voucher program's failure to move families to better neighborhoods is especially stark for minority renters."[74] This "failure" is relatively well-known. Less well-known is the role landlords play in preventing voucher holders from moving. Rosen shows how some landlords used tenants' unpaid debt as a way to "maintain control over their tenants" and, indirectly, over the voucher program.[75] While Desmond's work highlights the devastating consequences of eviction, Rosen found that "much of the time, landlords are not scheming of ways to rid themselves of tenants, but rather of ways to *hold on* to tenants."[76] Landlord recruitment and retention tactics, Rosen argues, often amount to discriminatory racial steering which "reinforces segregation across neighborhoods."[77] Although the voucher program is often celebrated as a way for recipients to get the advantages of the private market, "rather than tenants selecting homes and neighborhoods, landlords are selecting tenants."[78] It is this observation and argument that is perhaps the greatest contribution of *The Voucher Promise*.

What does it mean that voucher holders are not moving to dramatically higher-income communities? Poverty scholars have long struggled with the tension between simply identifying problems in a neighborhood and applying an overly broad label to a place where poor people live. Thus, even as poverty scholars highlighted the downsides of concentrated poverty, some public housing residents bristled at accounts that undervalued those same communities or that failed to appreciate the bonds between people even in, or especially in,

74. *Id.* at 126.

75. *Id.* at 153. *See also id.* at 157–60 (describing how landlords use debt to trap tenants in place).

76. *Id.* at 155.

77. *Id.* at 162.

78. ROSEN, *supra* note 2, at 160. *See also* Emily Rees Brown, *Public-Private Partnerships: HUD's Lost Opportunities to Further Fair Housing*, 21 LEWIS & CLARK L. REV. 735, 767 (2017) (critiquing the voucher program because it fails to "do anything to prevent exploitive landlords from luring voucher holders to properties where the HCV subsidy meets or exceeds the fair market rent of the unit.").

poor areas. At one point, Rosen tackles this tension directly, asking one of the residents, "what makes a neighborhood a good neighborhood versus a bad neighborhood?"[79] The answer Roland, an interview subject, gives her is, "people," adding that Park Heights is "in between."[80] Rosen interprets this answer in a way that most academics do these days but resists the urge to apply a single label to neighborhoods.[81] Indeed, the poverty literature is full of "lower-income," "high-crime," and "disadvantaged" neighborhoods, but generally eschews value judgment words like "good" or "bad." But *The Voucher Promise* itself gives reasons to question such scholarly hesitation.

Rosen dedicates a long section of the book to describing the coping strategies that voucher holders use to navigate the violence they encounter in Park Heights. As Rosen explains, even though crime has been on the decline nationwide and across Baltimore, Park Heights residents "bore indelible markers of the physical and symbolic violence that they witnessed or were victims of over their years in high-crime neighborhoods."[82] During her field work, Rosen met a young man with a bullet in his brain and parents with long term drug addictions, people who lost siblings to gang violence and ugly encounters with the police.[83] The coping strategies residents employ vary from "complete social *and* physical withdrawal from the neighborhood" to reliance on knowing others in the community.[84] Roland, the resident who described Park Heights as "in between," told Rosen, that he would feel safe if he or his wife was out and about in the neighborhood because "[i]t's not that treacherous out there."[85] But, if it is possible to put a value-laden label on the neighborhood—something Rosen never does—the stories of two of the residents suggest it would not be a "good" label. One resident, Raven, who put her faith in her neighbors to protect her, later decided to move after an intruder entered her apartment with her neighbors' knowledge.[86] More tragically, Roland, despite his view of the neighborhood's safety,

79. ROSEN, *supra* note 2, at 225.
80. *Id.*
81. *Id.* at 225–26.
82. *Id.* at 212.
83. *Id.* at 213–14.
84. *Id.* at 217.
85. ROSEN, *supra* note 2, at 217.
86. *Id.* at 220–23.

was shot and killed by a robber with a gun as he walked his wife, Vivian, home from visiting a friend a few blocks from where they lived.[87] As Rosen reports, "Vivian, who believed that violence in the neighborhood was rare if she played her cards right, was confronted with an undeniable moment of truth in her husband's death."[88]

The Voucher Promise shows the need to be careful about how much is demanded of a single program when evaluating its effectiveness. Even after the most tragic of events, it was a voucher that gave Vivian the ability to move to a new home, and that move, even though it did not end up being to a better neighborhood and was, therefore, not a move as far as policymakers interested in deconcentrating poverty might have hoped for, was still valuable.[89] Voucher holders, unlike many poor people without such support, have "the chance to pick up and start fresh."[90] Ultimately, vouchers can and should be supported (and their funding expanded dramatically) even if they do not accomplish every policy objective that they ideally would. As Rosen observes, "[w]hile policymakers discuss a number of potential benefits from vouchers, it is difficult to overstate the simple power of providing a home."[91]

II. LOCATION MATTERS

Arguably, the most important branch of poverty research today centers around the relationship between location and economic mobility. Desmond's *Evicted*, along with other works such as H. Luke Shaefer and Kathryn Edin's *$2.00 a Day* and Andrea Elliott's epic reporting about homelessness for the New York Times series *Invisible Child*,[92] helped raise popular consciousness of the hardships faced by the poor in the second half of the Obama administration. Since then, Raj Chetty and his co-authors have probably done the heavy lifting in pushing the academic and public policy needle

87. *Id.* at 226.

88. *Id.* at 230.

89. *See id.* at 231.

90. *Id.* at 233. *See also id.* at 239 ("voucher holders are the only group with the ability—in theory, at least—to get unstuck . . . with the flexibility to respond to life events and crises").

91. ROSEN, *supra* note 2, at 109.

92. KATHRYN EDIN & H. LUKE SHAEFER, $2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA (2015); Andrea Elliott, *Invisible Child*, N.Y. TIMES (Dec. 9, 2013), https://www.nytimes.com/projects/2013/invisible-child/index.html#/?chapt=1.

when it comes to poverty. Though Chetty, a professor of economics at Harvard, is not well known outside of academic circles, his team is on the cutting edge of poverty-related research. They have shown the ways in which economic mobility differs across neighborhoods and have applied their empirical and data-heavy approach to everything from racial disparities to housing policy.[93] Though legal academics have started to take note of Chetty's work, the richness of the data on the significance of location is such that its significance in the poverty law space could, *and should*, increase.

In 2015, Chetty, Nathaniel Hendren, and Lawrence Katz released the results of a study of the Moving to Opportunity ("MTO") program which found that younger children who move to lower-poverty areas as a result of a housing voucher have higher earnings as adults.[94] A randomized housing mobility experiment, MTO involved three recipient groups: "a group offered a housing voucher that could only be used to move to a low-poverty neighborhood, a group offered a traditional Section 8 housing voucher, and a control group."[95] By studying how participants in each group fared, researchers could use statistical methods to calculate the effects of moving on participant outcomes compared to the control group. Most of the MTO studies showed that moving to a better neighborhood was associated with health improvements and a greater sense of security, but the effects on children were more neutral. Some studies even showed a difference between boys and girls, with girls showing academic improvements in the new environment but boys not.[96] Chetty, Hendren, and Katz revisited the MTO data and showed that while "the gains from moving to lower-poverty areas decline steadily with the age of the child at the time of the move," for younger children the benefits of such moves could be substantial.[97] The three Harvard economists

93. Important works by Raj Chetty's team, including papers and data visualizations, can be found on Chetty's personal website. *See generally* RAJ CHETTY, http://www.rajchetty.com/ (last visited Sept. 22, 2021).

94. Raj Chetty, Nathaniel Hendren & Lawrence Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 855–56 (2016).

95. NAT'L BUREAU OF ECON. RSCH., *Moving to Opportunity*, https://www.nber.org/programs-projects/projects-and-centers/moving-opportunity?page=1&perPage=50.

96. Ellickson, *supra* note 1, at 1014.

97. Raj Chetty, Nathaniel Hendren & Lawrence Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, OPPORTUNITY INSIGHTS (May 2015), https://opportunityinsights.org/paper/newmto/.

estimated that "moving a child out of public housing to a low-poverty area when young (at age 8 on average) using a subsidized voucher like the MTO experimental voucher will increase the child's total lifetime earnings by about $302,000."[98] The beauty of the MTO experiment was that the policy intervention was deliberately designed so that academic conclusions about location and outcomes could be reached. A summary of the outcome study research is that "[c]hildren in families who willingly move from extremely poor neighborhoods to low-poverty neighborhoods fare better over time—both economically and academically—thus slowing, reducing, or eliminating the compounding effects of intergenerational poverty."[99]

Moving beyond the MTO experiment, the Census Bureau's Center for Economic studies, working with Chetty, Hendren, and Brown University economist John Friedman, created an "Opportunity Atlas" to explore the effect of location on economic mobility.[100] Drawing on 2000 and 2010 census data, federal tax returns, and American Community Surveys from 2005–2015, the team looked at the life trajectories of children born between 1978–1983.[101] While it is not surprising that their work confirmed that "neighborhoods play a key role in shaping children's outcomes,"[102] quite a few of their findings were surprising. For example, they found, "substantial variance across tracts even within the same school catchment areas."[103] This does not mean that schools are unimportant, only that neighborhood traits are as well. The study found "a positive correlation between the employment rates of adults who live in a tract and rates of upward mobility for children who grow up there," leading the researchers to conclude, "what predicts upward mobility is not proximity to jobs, but growing up around people who have jobs."[104] Not shying away from the cultural wars, the team also found "even stronger correlations between children's outcomes and other socioeconomic

98. *Id.*

99. Brown, *supra* note 78, at 747.

100. U.S. CENSUS BUREAU, *Opportunity Atlas*, https://www.census.gov/programs-surveys/ces/data/analysis-visualization-tools/opportunity-atlas.html (last updated Oct. 26, 2020).

101. *Id.*

102. Raj Chetty et al., *The Opportunity Atlas: Mapping the Childhood Roots of Social Mobility*, 1 (U.S. Census Bureau, Ctr. for Econ. Stud., CES 18-42R, Jan. 2020), *available at* https://www2.census.gov/ces/wp/2018/CES-WP-18-42R.pdf.

103. *Id.* at 3.

104. *Id.* at 3–4.

characteristics of adults in an area, such as mean incomes and the share of single-parent households."[105] Indeed, in a related paper on intergenerational mobility and racial disparities that is based on the same data set, Chetty, Hendren, and two researchers with the Census Bureau, Maggie R. Jones and Sonya R. Porter, found, somewhat counter-intuitively, that "[b]lack father presence at the neighborhood level strongly predicts black boys' outcomes irrespective of whether their own father is present or not."[106] The presence or absence of fathers is not the whole story; as the authors conclude, "[b]lack boys do especially well in low-poverty neighborhoods with a large fraction of fathers at home in black families and low levels of racial bias among whites."[107] Though the focus here is on neighborhood effects, it is worth pausing to highlight the significant role race and racism play in the economic trajectory of African-American boys born into wealthy households. As *New York Times* coverage of the team's work noted, "[w]hite boys who grow up rich are likely to remain that way. Black boys raised at the top, however, are more likely to become poor than to stay wealthy in their own adult households."[108] The story's visualization of the differential rate of downward mobility by race is damning and underlines the fact that racial identity continues to play a major role in shaping economic mobility in ways that cannot be explained simply by isolating other factors.

What these two major studies demonstrate is that race and location matter. While such conclusions risk being dismissed as trivial—akin to a weather reporter saying it is raining outside right now—they offer real promise when it comes to housing policy. If small differences across neighborhoods, even geographically proximate areas, lead to different outcomes, then targeted interventions can potentially have

105. *Id.* at 4.

106. Raj Chetty et al., *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, 135 Q. J. ECON. 711, 717 (2020). Note that this quote is drawn from the version of the paper hosted on the Opportunity Insights website, which varies slightly from the published version, presumably due to updating. *See* Raj Chetty et al., *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, OPPORTUNITY INSIGHTS (Dec. 2019) (manuscript at 5) [hereinafter Chetty et al., *Race and Economic Opportunity*], *available at* https://opportunityinsights.org/wp-content/uploads/2018/04/race_paper.pdf.

107. Chetty et al., *Race and Economic Opportunity*, *supra* note 106, at 776.

108. Emily Badger et al., *Extensive Data Shows Punishing Reach of Racism for Black Boys*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/interactive/2018/03/19/upshot/race-class-white-and-black-men.html.

significant payoffs.[109] Continuing in the same vein as the MTO experiment, the Opportunity Insights team partnered with the Seattle and neighboring King County housing authorities to see if intervening right when voucher recipients start looking for where to place their voucher could make a difference in where recipients ultimately live.[110] Voucher recipients were randomly assigned to either a group that got standard briefings on how to use their voucher or to a group that got specialized assistance and information that focused on "high-opportunity areas."[111] One way to think of this intervention is that half of the recipients were given assistance so that they did not have to rely upon those landlords, described by Rosen, standing outside of the housing authority office whose business involved matching new voucher holders with vacant units in poorer parts of town.

The study was informed by research showing that "children who grow up in low-income (25th percentile) families in the areas [study designers] designated as 'high opportunity' earn about 13.9% ($6,800 per year) more as adults than those who grow up in low-opportunity areas in families with comparable incomes."[112] Recipients could still place their vouchers anywhere—they didn't have to move to a high-opportunity area—but the counseling and assistance such recipients received increased the percentage of families who placed their vouchers in high-opportunity neighborhoods by "37.9 percent, from 15.1% in the control group to 53.0% in the treatment group."[113] These are significant results.[114] One possible explanation for why vouchers do not lead families to move to better areas is that recipients prefer what they know and their existing community, which would reduce

109. *See* Seicshnaydre, *supra* note 18, at 181 ("The mobility research confirms what many already know about housing opportunity: it is linked to many other kinds of transformative life opportunities.").

110. Dylan Matthews, *America Has a Housing Segregation Problem. Seattle May Just Have the Solution.*, VOX (Aug. 4, 2019, 7:00 AM), https://www.vox.com/future-perfect/2019/8/4/20726427/raj-chetty-segregation-moving-opportunity-seattle-experiment.

111. Peter Bergman et al., *Creating Moves to Opportunity: Experimental Evidence on Barriers to Neighborhood Choice* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26164, 2020), *available at* https://www.nber.org/papers/w26164.

112. *Id.*

113. *Id.* at 2–3.

114. Similarly, "movers under a court-approved mobility program in Baltimore" who were given "specialized and supportive counseling" moved away from "deeply segregated and poor areas" and remained in their new communities after the initial move. Pratt, *supra* note 20, at 504.

mobility.[115] But the Seattle/King County results "imply that most low-income families do not have a strong preference to stay in low-opportunity areas; rather, barriers to moving to high-opportunity areas play a central role in explaining neighborhood choice and residential sorting patterns."[116] Equally significant, the barriers are not all that high. The study involved providing the randomly selected group with additional information and limited supplemental financial assistance to cover security deposits and supplemental insurance to convince landlords to participate in the program.[117] The total additional cost of the supplemental services "was approximately $2,660 per family: $1,043 of financial assistance, $1,500 of labor costs for the services, and $118 in additional PHA expenses to administer the program."[118] As *The Voucher Promise* emphasizes, vouchers do a good job on their first objective—providing housing assistance—but often fall short when it comes to mobility, in part because landlords are selecting tenants rather than tenants selecting neighborhoods. But if the mobility goal can be accomplished for less than $3,000 per recipient, a relatively small supplemental expense for a program that covers the majority of each recipient's monthly rent, it is worth scaling up this program nationwide so that all those who get off the wait-list receive such assistance.[119] Without such assistance and targeted counseling of the sort done in the Seattle/King County

115. *See* Brown, *supra* note 78, at 776 (noting voucher holders considering moving to a new neighborhood "may have deep concerns about leaving their social and family networks behind for a new neighborhood where they may face discrimination, loneliness, and isolation and fears about higher costs of transportation, childcare, and groceries"). *But see* Seicshnaydre, *supra* note 18, at 184 (responding to this argument by noting that many minority poor will choose to live in better neighborhoods if given the choice, adding: "Expanding fair housing choice is aimed at reducing economic, racial, and social isolation; increasing freedom of movement; and creating a more balanced menu of housing options for all families. Fair housing is informed choice; it is not presumptive of any particular choice.").

116. Bergman et al., *supra* note 111, at 4.

117. *Id.* at 14. This is exactly the sort of support, a "robust counseling program," that Stacey Seicshnaydre includes as her first suggestion on how to reform the HCV program. Seicshnaydre, *supra* note 18, at 195.

118. Bergman et al., *supra* note 111, at 14.

119. *See* Kriston Capps, *How a Section 8 Experiment Could Reveal a Better Way to Escape Poverty*, BLOOMBERG CITYLAB (Aug. 4, 2019, 6:08 PM), https://www.bloomberg.com/news/articles/2019-08-04/a-cheap-powerful-tool-to-beat-housing-segregation ("The program cost is low—$2,600 per family per voucher issued, on average. That's just a fraction of the cost of the voucher itself. Given an average voucher tenure of 7 years for families with children, the cost of the program as a share of the overall lifetime cost of a voucher is 2.2 percent—a bargain, especially if you consider the massive benefit that families receive.").

experiment, voucher programs are unlikely to lead to racial and economic integration.[120]

Although *The Voucher Promise* and the empirical work on voucher placement give strong support that counseling can further the mobility goal of the voucher program, it is important to address whether it should be a goal of the voucher program to deconcentrate poverty. Put differently, maybe the landlord-tenant matching that leads to vouchers being placed in poor communities is a good thing. Not only is such placement reflective of market forces responding efficiently to the voucher payment guidelines and perhaps to tenant preferences, but efforts to assist tenants in placing vouchers in higher-income areas will also exacerbate the disinvestment of the communities where vouchers are ordinarily placed absent government interference. While the celebration of market-force take is more of a conservative straw-man argument, the same cannot be said of the left-leaning concern that programs that prioritize neighborhoods that provide more opportunity and economic mobility are simply doubling down on tired views of minority poor communities.[121]

For example, after Minneapolis and St. Paul released a regional planning document that identified "opportunity areas" as well as "racially/ethnically concentrated areas of poverty," a coalition organized under the "Equity in Place" banner pushed back.[122] The coalition argued that the cities were wrongly labeling "the region's most diverse communities as problematic areas requiring improvement."[123] As one unnamed activist told a reporter, "[t]he narratives about these neighborhoods usually focus on the negative: their poverty, low-performing schools, etc. Through our work and experience, however, we know that the people who live in these communities benefit from

120. Hendrickson, *supra* note 13, at 63 ("Studies of the Section 8 program have repeatedly confirmed that housing assistance without counseling and support services does not improve racial and economic integration.").

121. *See generally* Edward G. Goetz et al., *Changing the Narrative and Playbook on Racially Concentrated Areas of Poverty*, *in* WHAT WORKS TO PROMOTE INCLUSIVE, EQUITABLE MIXED-INCOME COMMUNITIES (Mark L. Joseph & Amy T. Khare eds., 2020), https://case.edu/socialwork/nimc/resources/what-works-volume (critiquing opportunity-based anti-poverty efforts as reliant on a proximity to whiteness model and presenting a community-based alternative).

122. Edward G. Goetz et al., *'Opportunity Areas' Shouldn't Just Be Places With A Lot of White People*, SHELTERFORCE (Jan. 4, 2021) https://shelterforce.org/2021/01/04/opportunity-areas-shouldnt-just-be-places-with-a-lot-of-white-people/.

123. *Id.*

the cultural connections and social networks they create."[124] Among Equity in Place's beliefs are: "We must create genuine, authentic access to all forms of opportunity in every geography and with/for every cultural community in our region," "Proximity does not equal access," and "The inequities in our communities are not the result of the presence or concentration of people of color and low-wealth people, but rather due to structural and institutional racism and decades of disinvestment."[125] Given such beliefs, it is perhaps not surprising that Equity in Place was initially founded to challenge a Fair Housing complaint which alleged that the "Twin Cities region was using federal housing funding to concentrate affordable housing in high-poverty communities" that had been filed by other faith-based and neighborhood organizations.[126] While superficially a desire to challenge one group of progressives fighting against concentrated poverty seems like an odd reason for a new progressive organization to spring up, the name, "Equity in Place," helps explain this odd posture. Deconcentration and mobility efforts are a threat to the myriad place-based programs and organizations that serve minority poor communities.[127]

Moving beyond this one example, the anti-poverty community includes divergent views when it comes to people versus place. The panglossian view does not take scarcity or, more accurately, political opposition seriously. In an ideal world, government funds would ensure that all neighborhoods had the resources and support necessary to have strong schools, vibrant community centers, and good job opportunities. In such a world, there would be no need to deconcentrate poverty nor to encourage mobility—all neighborhoods would be opportunity areas. We do not live in such a world, so it is not surprising that conflict can arise between those who prioritize place (rebuilding communities, doing community economic development,

124. *Id.*

125. EQUITY IN PLACE, *Our Beliefs and Narratives*, THE ALLIANCE, http://thealliancetc.org/our-work/equity-in-place/#1578514718981-41dd8a91-b4fe.

126. EQUITY IN PLACE, *Why Communities of Color Challenged a Fair Housing Complaint and What We Learned* 1, 1 (2016), http://thealliancetc.org/wp-content/uploads/2016/06/FHAC-Story-Final.pdf.

127. For an overview of place-based anti-poverty programs and strategies, see Edward W. De Barbieri, Opportunism Zones 97-125 (unpublished manuscript) (forthcoming YALE L. & POL'Y REV. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3548210.

and strengthening place-based organizations) and those who emphasize people. Though it is possible to overstate this conflict, it is unrealistic to imagine that such a conflict does not exist. So how should voucher programs respond to this conflict? The answer that comes from Rosen and Chetty's work arguably is that this conflict should be resolved not by bureaucrats but by voucher recipients. Though additional counseling and support did lead to a significant increase in the percentage of voucher holders who moved to high-opportunity areas, some recipients, even with such counseling, chose to live in poorer neighborhoods. That seems appropriate; a voucher program that insisted that rental assistance depended on leaving behind one's community would impinge too far on the freedom recipients should have to choose the best option for themselves and their family. Inserting counseling assistance between recipients and landlords serves a corrective function. While a bit paternalistic, it is, to use a loaded term, a *nudge*, not a mandate and as such allows recipients to decide for themselves where to live.[128] Some residents will decide to stay in parts of town with people and resources (bus routes, jobs, etc.) that they know. Others, after learning about how location relates to economic mobility, will chose to move. But what is important is that the choice is being made by voucher recipients, not by landlords, place-based organizations, or social scientists.

CONCLUSION

There is ample room to improve the voucher program. Source of income discrimination, although illegal in a select number of localities, continues to limit the ability of recipients to place their vouchers, making it harder for them to move to higher-opportunity neighborhoods.[129] Voucher portability exists in theory but moves require passing through bureaucratic hoops in order to move the voucher from one housing authority to the next, in practice limiting the areas recipients search when looking for housing. Payment tinkering has

128. *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008) (arguing that policy should often "nudge" people towards particular decisions but not impose them).

129. Heather R. Abraham, *Fair Housing's Third Act: American Tragedy or Triumph?*, 39 YALE L. & POL'Y REV. (forthcoming 2021) (manuscript at 65–66), *available at* https://digitalcommons.law.yale.edu/ylpr/vol39/iss1/1/.

selectively responded to the need to offer enhanced vouchers if they are to be used to access lower-poverty areas, but the vouchers continue to offer the biggest subsidy to landlords with units in poorer areas where voucher payments can exceed market rents. There are ways to improve the voucher program in these and other areas,[130] but the biggest problems are political and societal. The rhetoric surrounding the voucher program emphasizes that its reliance on the private rental market will help provide both cost-effective shelter for those in need and flexible support for the physical and economic mobility of recipient families. But, as Eva Rosen's *The Voucher Promise* and the work done by Raj Chetty and his co-authors show, mobility cannot be taken as a given. Absent counseling programs and other forms of support that help open up areas associated with greater economic mobility, vouchers are often placed in low-income areas.

How to judge a program that largely fails in one of its two goals? *The Voucher Promise* makes a compelling case that, regardless of where they are placed, vouchers are transformative in the lives of those poor people lucky enough to get off the wait-list. They enable people to create homes, to better take care of their families, and, if necessary, to move away from bad circumstances. The tragedy with the voucher program is not that it does not accomplish all the goals layered upon it, but that our safety net is so frayed and our commitment to improve poor areas so shallow, that we place unreasonably high expectations on a single underfunded program. The work being done by Chetty and others shows that relatively small investments put toward helping recipients after they receive a voucher can open up higher-opportunity areas to poor families who want to live there.[131] The promising results from the Seattle/King County experiment should be celebrated by everyone, including people who tend to prioritize place over people, and, if extended nationwide, appear to offer a path towards greater mobility for many recipient families. Chetty's work is at the cutting edge of anti-poverty efforts. But such

130. For a great overview and list of suggestions, *see generally* Philip Tegeler, *Housing Choice Voucher Reform: A Primer for 2021 and Beyond*, POVERTY & RACE RSCH. ACTION COUNCIL POL'Y BRIEF (Aug. 2020), https://prrac.org/pdf/housing-choice-voucher-reform-agenda.pdf.

131. *See also* URB. INST. & POVERTY & RACE RSCH. ACTION COUNCIL, EXPANDING CHOICE: PRACTICAL STRATEGIES FOR BUILDING A SUCCESSFUL HOUSING MOBILITY PROGRAM (2013), https://www.urban.org/sites/default/files/publication/23301/412745-Expanding-Choice-Practical-Strategies-for-Building-a-Successful-Housing-Mobility-Program.PDF.

successes cannot overshadow the larger story which is that vouchers are only given to a small subset of those in need of such assistance. The larger story—which comes through in the hardships endured by many of those presented in *The Voucher Promise*—is our society's indifference to the harms of poverty and our continued unwillingness to recognize housing as a right. Work on mobility matters, but the most important way of improving the voucher program is to massively ramp up funding so that it switches from being a lottery program to support that is provided as a matter of right.

PROPERTY RIGHTS AND THE MODERN RESURGENCE OF RENT CONTROL

JAMES BURLING*

The Americans couldn't destroy Hanoi, but we have destroyed our city by very low rents. We realized it was stupid and that we must change policy.[1]

INTRODUCTION

In a 1990 survey of professional economists, 93% agreed with the statement that "a ceiling on rents reduces the quantity and quality of housing availability."[2] In a more recent survey of 41 economists, only 2% agreed with the statement: "Local ordinances that limit rent increases for some rental housing units, such as in New York and San Francisco, have had a positive impact over the past three decades on the amount and quality of broadly affordable rental housing in cities that have used them."[3] And yet, in a 2018 survey of Californians asked to identify why housing in California is unaffordable, 28%—more than any other answer—responded that it was the lack of rent control.[4] It is not hard to understand why. Renters naturally think their rents are too high when they are too high. And in a world where nuance is often overshadowed by one-dimensional populist answers to complex questions, rent control is an obvious answer to high rents.

---

* James Burling is the Vice President for Legal Affairs at Pacific Legal Foundation.

1. *Foreign Minister Nguyen Co Thach, Journal of Commerce, quoted in* Dan Seligman, *Keeping Up*, FORTUNE, Feb. 27, 1989 (excerpt from Walter Block*, Rent Control,* THE CONCISE ENCYCLOPEDIA OF ECONOMICS, LIBRARY OF ECONOMICS AND LIBERTY, https://www.econlib.org/library/Enc/RentControl.html).

2. Richard M. Alston, J.R. Kearl & Michael B. Vaughan, Is There a Consensus Among Economists in the 1990 's?, AEA PAPERS AND PROCEEDINGS, 201, 204 (May 1992).

3. *Rent Control*, IGM FORUM (Feb. 7, 2012), https://www.igmchicago.org/surveys/rent-control/?mod=article_inline.

4. Liam Dillon, *Experts say California needs to build a lot more housing. But the public disagrees*, L.A. TIMES (Oct. 21, 2018), https://www.latimes.com/politics/la-pol-ca-residents-housing-polling-20181021-story.html. The USC Dornsife/*Los Angeles Times* survey asked respondents, "Why is California housing unaffordable?" The answers, with weight given for second answers, were: lack of rent control, 28%, lack of funding for low-income housing, 24%, environmental regulation, 17%, foreign buyers, 16%, influence of tech industry, 15%, too little homebuilding, 13%, Wall Street buyers, 10%, restrictive zoning rules, 9%. The margin of error was 3%.

But just as civilian casualties can be collateral damage of wartime bombing, so too the loss of housing stock can be a casualty of rent control. Indeed, as economist Assar Lindbeck drolly noted, "In many cases rent control appears to be the most efficient technique so far known for destroying cities—except for bombing."[5] Not only can rent control take away the incentives for developers to build new apartments that might be subject to rent control, if the rent control is draconian enough it can destroy the ability of landlords to maintain their apartments, leading to decay, abandonment, and eventual destruction. In a 1981 book by the Fraser Institute, there is a series of 15 black and white photographs of post-apocalyptic urban landscapes with the caption: *Bomb Damage or Rent Control?*[6] One must go to the index for the answer because it is otherwise impossible to tell. Comparing a block in the South Bronx to one in Nagasaki or Hiroshima may seem fatuous, but photographs (at least back then) don't lie: rent control can be terribly destructive.

I. Rent Control in the Early Twentieth Century

A little over a century ago, rent control was first imposed as an emergency wartime measure to combat the influx of workers into the Washington, D.C., war machine. Too many apartment seekers and too few apartments led to a call for the government to do something. Rather than building more housing itself, or paying others to do the building, the federal government instead imposed rent control tucked inside a larger statute, the "Food Control and District of Columbia Rents Act."[7] According to the statute, its provisions were "made necessary by emergencies growing out of the war with the Imperial German Government, resulting in rental conditions in the District of Columbia dangerous to public health and burdensome to public officers and employees." It had a two-year expiration date.

A similar situation arose after the first World War in New York City, where many returning soldiers landed and decided to stay. The

5. Assar Lindbeck, The Political Economy of the New Left (Harper & Row eds., 1st ed. 1972), *cited in* Rent Control: Myths and Realities 213, 230 (Walter Block & Edgar Olsen eds., 1981).

6. Rent Control: Myths and Realities, *supra* note 5, at 3, 35, 53, 85, 105, 123, 149, 161, 169, 187, 199, 231, 247, 265, 283.

7. Ch. 20, 41 Stat. 297 (Oct. 22, 1919).

city imposed rent control in 1920. Landlords in both cities sued, and their cases reached the Supreme Court in two cases, *Block v. Hirsh*[8] and *Edgar A. Levy Leasing Company v. New York*.[9] While the lower court in *Block* had rejected the law because it purported to imbue the private activity of leasing private property with the public interest, Justice Holmes rejected that concern. Writing for the Court, and without much of any supporting argument, he wrote that "[h]ousing is a necessary of life. All the elements of a public interest justifying some degree of public control are present."[10] Because housing involved a public interest, it was appropriate that the government could regulate lease terms through rent control. As for the Court's role, it was limited when the government was regulating in the public interest: "The only matter that seems to us open to debate is whether the statute goes too far. For . . . it may be conceded that regulations of the present sort pressed to a certain degree might amount to a taking without due process of law."[11]

Four Justices, led by Justice McKenna, dissented. The dissent was unimpressed by Justice Holmes's argument: "Houses are a necessary of life but other things are as necessary. May they, too, be taken from the direction of their owners and disposed of by the government?" As for the justification that the war made the restrictions on liberty necessary, Justice McKenna quoted from a Civil War era case where a civilian from Indiana was sentenced to death by a military tribunal: "'[T]he Constitution of the United States is a law for rulers and people, equally in war and in peace'" and it's wrong to suggest that "'any of its provisions can be suspended during any of the great exigencies of government.'"[12]

A year after *Block v. Hirsh* was decided, the Court was confronted with New York City's wartime emergency rent control law. In *Edgar A. Levy Leasing Co. v. Siegel*, Jerome Siegel signed a two-year lease starting October 1, 1918, for an apartment at $1,450 per year, payable in monthly installments. In June of 1920, Siegel signed a new lease

8. 256 U.S. 135 (1921).
9. 258 U.S. 242 (1922).
10. *Block*, 256 U.S. at 156.
11. *Id.*
12. *Id.* at 165–66 (quoting *Ex parte* Milligan, 71 U.S. 2, 120–21 (1866)). In *Milligan*, the Court found that the non-combatant civilian living in a non-rebel state was entitled to a trial by jury in a civilian court.

for two more years, this time at $2,160 per year, an increase of nearly $60 per month. When it came time to paying the higher rent in October, Siegel refused. Levy Leasing sued to evict Siegel. But Siegel claimed that he was coerced into signing the lease under threat of eviction. Moreover, he argued that the higher rent was unfair and violated New York City's emergency rent control law that had just been adopted that year.

Levy Leasing responded by arguing that the rent control law was "unconstitutional, in that it impairs the obligation of the contract of lease . . . deprives the plaintiff of its property without due process of law; denies to it the equal protection of the law . . . and takes private property for a private use without compensation."[13] A month before *Block v. Hirsh* was decided, the New York Court of Appeals upheld the law.[14] Unsurprisingly, on appeal and a year after *Block v. Hirsh* was decided, the owner lost again. The Supreme Court of the United States found that the public interest in alleviating the problems and abuses caused by the city's housing shortage outweighed any constitutional objections:

> [A]ll agree: That there was a very great shortage in dwelling house accommodations in the cities of the state to which the acts apply; that this condition was causing widespread distress; that extortion in most oppressive forms was flagrant in rent profiteering; that, for the purpose of increasing rents, legal process was being abused and eviction was being resorted to as never before; and that unreasonable and extortionate increases of rent had frequently resulted in two or more families being obliged to occupy an apartment adequate only for one family, with a consequent overcrowding, which was resulting in insanitary conditions, disease, immorality, discomfort, and widespread social discontent.[15]

The Court never considered whether rent control would remedy any of these problems because it didn't think that was its job. As in *Block v. Hirsh*, the Court just accepted at face value the government's justifications for rent control. But there was not then (nor today) any evidence that rent control cures in any way "insanitary conditions,

13. Edgar A. Levy Leasing Co. v. Siegel, 230 N.Y. 634, 638, 130 N.E. 923, 925 (N.Y. 1921), *aff'd*, 258 U.S. 242, 42 S. Ct. 289 (1922).

14. *Id.*

15. *Edgar A. Levy Leasing Co.*, 258 U.S. at 246.

disease, immorality, discomfort, and widespread social discontent."[16] If a legislative body wishes to tax its citizens to try to solve these problems, so be it. Likewise, if a city wishes to establish health and safety standards, that too can help. In fact, there had already been housing regulations imposed in New York City to put a stop to the construction of lightless and ventilation-free tenements that had proliferated during the 19th century.[17]

The voters can decide easily enough whether the money has been well-spent. But when the costs of such programs are borne not by the general public, but by the distinct minority of people that own rental housing, then it behooves a court to take a careful look at whether impact on the rights of that minority comports with the constitutional standards.

The Framers of our Constitution were acutely aware of the potential for majoritarian overreach and the danger that a democracy could turn on those with more wealth than the majority. As James Madison warned in *The Federalist Papers*, an unchecked democracy can lead to "[a] rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project."[18] For many years following the ratification of the Constitution, judges understood their role to render unconstitutional laws unenforceable.

But there were, at least in the early part of the 20th Century, *some* limits to the Supreme Court's deference to the wartime justification for rent control. After the two-year emergency law ended in Washington, D.C., the act was extended again in October of 1919 and then again in May of 1922. By this time, the great war had joined all prior wars between the pages of history books. Its effects on the lives of Washingtonians had faded. Nevertheless, tenants in an apartment building successfully petitioned the rent board for a rollback of a post-war increase in rents. The apartment owner sued, and when the Supreme Court got the case, it held that with the emergency clearly over, the time for deference had expired. Justice Holmes's opinion began by noting that "a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon

16. *Id.*

17. *See* RICHARD PLUNZ, A HISTORY OF HOUSING IN NEW YORK CITY (1st ed. 1990) (describing the early tenements).

18. THE FEDERALIST NO. 10 (James Madison). A "rage for paper money" refers to popular pressure for governments to print enough paper money to cause inflation which, in turn, would reduce debts.

the truth of what is declared." The opinion continued saying that "[a] law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."[19] The Court sent the case back down to the district court for a factual determination of whether there was still an emergency.

The New York rent control laws died a slower but natural death by economic causation. To alleviate the lack of housing, New York City declared a decade-long tax holiday for new housing construction and exempted new units from rent control. Construction ensued. By 1929, vacancy rates approached 8%. Rent control in New York was abolished. It wasn't necessary or useful anymore.[20]

When the World War I rent controls were removed in New York, there was a massive increase in the construction of new housing:

> The 1920s produced a volume of new housing which has never again been equaled, quantitatively or qualitatively. Between 1921 and 1929, 420,734 new apartments, 106,384 one-family houses, and 111,662 two-family houses were constructed. The total of 658,780 new dwellings averaged 73,198 units per year, a figure unmatched even in the 1960s, also a period of substantial growth. In the most prolific year, 1927, 94,367 dwellings were built, compared with 60,031 in 1963, the peak year since.[21]

The lesson is simple: Removal of government disincentives to building housing will result in more housing and more affordable prices. Free markets work.

It took another world war to forget the lesson and for rent control to be resurrected from its peacetime crypt.

***

World War II threw the economy into high gear, and the federal government's New Deal era penchant for planning was put on a diet of steroids. In 1943, the federal government adopted price controls—including controls on rents because it anticipated housing shortages.

---

19. Chastleton Corp. v. Sinclair, 264 U.S. 543, 547–48 (1924).

20. TIMOTHY COLLINS, AN INTRODUCTION TO THE NEW YORK CITY RENT GUIDELINES BOARD AND THE RENT STABILIZATION SYSTEM, NEW YORK RENT GUIDELINES BOARD 20 (2020), https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/01/intro2020.pdf.

21. PLUNZ, *supra* note 17, at 122.

With sixteen million Americans serving the war effort, and with millions of those overseas, the war probably did not itself cause a housing shortage, except in those local areas in the states serving the war effort. But by the end of 1946, over 7 million soldiers had returned to civilian life.[22] Yet whatever crisis there may have been, it had dissipated enough that Congress let the 1943 Emergency Price Control Act expire, replacing it with the Federal Housing and Rent Act, which kept price controls only on buildings built before 1947. In 1950, the federal act expired, but rent control proved to be incredibly sticky in New York.

Rather than consign rent control to the dustbin of history, New York City carried on the federal program with its own local legislation. As a result, unless they have been converted, many non-luxury apartments built in New York before 1947 have remained under some sort of rent control ever since.[23] Newer buildings had to wait until 1969 before they were to fall under a kinder and gentler form of rent control: so-called rent stabilization.[24] This form of rent control refers to a more recent approach which has some flexibility to allow for inflation-based rent increases. In theory, this less drastic type of rent control is less likely to result in abandoned and derelict rental apartments. In New York City, "rent stabilization" covers those regulated rental units built before 1974 in buildings with six or more units. Rents may increase only in accordance with city guidelines. However, as described in the next section, new legislation adopted in 2019 by the State of New York severely limits the ability of landlords to recoup improvements, and then only for thirty years after the improvement. These and other changes bring rent stabilization a lot closer to the rent control of old and highlight the danger of adopting any form of "rent control lite" because it is only a gateway to the harder drug of punitive rent control.

Rent stabilization in New York was adopted in 1969 under the premise that the low-vacancy rates had created a housing "emergency."[25] Year after year, the city has since renewed its declaration of an emergency—until deciding to end the charade in 2019 by passing

22. ARMY SERVICE FORCES, LOGISTICS IN WORLD WAR II: FINAL REPORT OF THE ARMY SERVICE FORCES, CENTER FOR MILITARY HISTORY 218 (Chart 37, Returns to Civilian Life) (1993), https://history.army.mil/html/books/070/70-29/CMH_Pub_70-29.pdf.

23. COLLINS, *supra* note 20, at 23 n.42.

24. *Id.* at 27.

25. *Id.* at 26–27. *See* N.Y.C. ADMIN. CODE §§ 26-501 to 26-520.

straight-up punitive rent control. But what is an emergency? A flood in the process of inundating a city is an emergency. But water that covers a city for 50 years is no longer an emergency; it is a lake. As shown next, this lake is drowning an increasing number of cities and states.

II. THE MODERN REVIVAL OF THE OLD RENT CONTROL

Starting in the late 1960s and 1970s there was a resurgence of rent control across the nation. Recognizing that old-style rent controls too often led to problems ranging from an absence of new construction to entire buildings being abandoned, the advocates of new rent control tried to repackage their schemes to make them more flexible and palatable. New York calls its program "rent stabilization" and California guarantees a "fair rate of return." Are these differences in semantics or substance? Perhaps, before describing the developments in the various states, a few definitions are in order.

A. Definitions

Rent control. Rent control is the more traditional, and somewhat outdated, approach to rent regulation. In New York City, for example, "rent control" has a precise meaning: limits on rent increases for tenants in rent-controlled buildings constructed before 1947 in which a tenant (or the tenant's family successors) have lived in continuously since 1971.[26] There are very minor adjustments allowed, but rents remain essentially where they were almost fifty years ago. When a unit becomes vacant, it is either deregulated (for apartments with less than six units) or subject to rent stabilization. About 1% of New York City housing is subject to old-style traditional rent control. Being able to benefit from rent control in New York City has much more to do with luck than circumstances. It is a small enough number that many landlords can swallow their losses by requiring their other tenants to pay enough rent to help subsidize the 1%.

---

26. *Directory of NYC Housing Programs, Rent Control*, NYU FURMAN CENTER, https://furmancenter.org/coredata/directory/entry/rent-control (last visited Sept.22, 2021); NEW YORK UNIVERSITY FURMAN CENTER FOR REAL ESTATE & URBAN POLICY, FACT BRIEF, RENT STABILIZATION IN NEW YORK CITY 1 (2011) https://furmancenter.org/files/HVS_Rent_Stabilization_fact_sheet_FINAL_4.pdf.

Rent stabilization. Rent stabilization was the term given to the type of rent control imposed by New York City starting in the 1970s. In theory, it allowed amortization and recoupment of capital improvements, modest yearly rent increases, owner move-in rights, market readjustments with tenant turnover, and tenant income ceilings—above which rent controls would not apply.[27] As discussed below, these rent control "reforms" were largely phased out with amendments in 2019.

Fair return: In some jurisdictions, like California, landlords are guaranteed a "fair rate of return," a term borrowed from the regulation of utility rates.[28] The devil is in the details—such as which costs can be included, who decides which costs are allowable and which are not, and what, exactly, is a "fair rate of return?" A veritable cottage industry has sprung up in California's legal profession where some attorneys specialize in fighting with rent boards over when an investment or improvement cost can be factored into a fair rate of return.

California law also requires a due process mechanism for those seeking a rent increase so a landlord can achieve a fair rate of return.[29] However, if a rent board denies an increase, and if a landlord successfully appeals a denial of a rent increase in court, the rent board is not responsible for any losses; only future rents may be adjusted to recoup the deficiency.[30] If this means the only way to make up for the denied increase is to raise rents above market rates, so be it. The owner has no other recourse.

In New York, one case made it clear that just because an owner was denied a "reasonable return" that didn't necessarily mean that the regulation effected a regulatory taking by denying the "owner's

---

27. *Id.*; *see also* COLLINS, *supra* note 20, at 26–37 (discussion of rent stabilization and subsequent amendments).

28. Birkenfeld v. City of Berkeley, 17 Cal. 3d, 129, 165, 550 P. 2d 1001, 1027 (Cal. 1976) (requiring a "just and reasonable return on their property."); *id.* at 156, 1021 (no exigent circumstances required to justify "price control outside the traditional public utility areas."). *See also* Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 601 (1944) ("'[F]air value' is the end product of the process of rate-making."); MICHAEL ST. JOHN, FAIR RETURN AND THE CALIFORNIA COURTS 15–16, https://www.stjohnandassociates.net/propertyManagementArticles/FRATCC.pdf (last visited Sept. 22, 2021) (discussion of fair return principles in other regulated industries such as public utilities).

29. *Birkenfeld*, 17 Cal. 3d (requiring a "just and reasonable return on their property"); Vega v. City of W. Hollywood, 223 Cal. App. 3d 1342, 1349 (1990).

30. Kavanau v. Santa Monica Rent Control Bd., 16 Cal. 4th 761 (1997), *cert. denied*, 118 S. Ct. 856 (1998).

economically viable use of his land" because the proper standard is "whether the owner is precluded 'from realizing any profit whatsoever.'"[31] And in a recent California case alleging a denial of fair return, a court of appeals rejected consideration of borrowing costs used to acquire the property.[32] Without being able to account for capital costs in the acquisition of property, the market in rental housing will diminish and may result in a reduction of new building.

Vacancy control: Vacancy control means that a new tenant takes the rental unit at the same controlled rent as the prior tenant.[33] When a tenant leaves a rent-controlled apartment, landlords will naturally want to adjust rents to market rates. But tenant advocates often argue that the new tenants should also enjoy the below-market rent-controlled rates as the prior tenants did.

Vacancy control protects tenants from constructive evictions, but it also disincentivizes new rental housing construction or even maintaining existing rental housing stock. The political capital for vacancy controls is also somewhat muted because the strongest support for rent control comes from existing renters, not those who have not yet replaced them.

In jurisdictions with vacancy decontrol in place, the rents of new tenants may be adjusted to market rates. After that, increases are limited by the community's rent control laws.

B. Rent Regulation by State[34]

States either (1) mandate some form of rent regulation on a statewide basis, (2) permit localities to impose rent regulation (with or without statewide rules), (3) prohibit localities from adopting rent

---

31. Rent Stabilization Ass'n v. Dinkins, 805 F. Supp. 159, 163 (S.D.N.Y. 1992), *aff'd* on procedural grounds at 5 F. 3d 591 (2d Cir. 1993) (lack of standing).

32. Colony Cove Properties, LLC v. City of Carson, 888 F.3d 445, 453–54 (9th Cir. 2018).

33. COLLINS, *supra* note 20, at 26 (defining "vacancy decontrol"). *See also* Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. REV. 399, 449 (1988) ("Under vacancy decontrol, a landlord is allowed, to some extent, to raise rents when a vacancy occurs").

34. A good graphic summary of rent regulations in the 50 states, with links to the relevant state and local laws, has been prepared by the National Multifamily Housing Council. *See Rent Control Laws by State*, NAT'L MULTIFAMILY HOUSING COUNCIL (Sept. 2, 2020), https://www.nmhc.org/research-insight/analysis-and-guidance/rent-control-laws-by-state/.

regulation, or (4) have no rules mandating or prohibiting rent regulation.

1. States with Statewide Rent Control

Three states have sweeping statewide rent regulations: New York, California, and Oregon. Of these, New York has the oldest, with their beginnings rooted in the world wars, but was recently made much more tenant-friendly in 2019. California's rent control started out as a city-by-city project of the activists of the 1970s.[35] In 2019 the legislature adopted a statewide measure. Oregon's rent control law is the most recent, having been adopted in 2019. These will be looked at in more detail.

a. California

Following his anti-war-hero days, Tom Hayden of Chicago 7 fame spearheaded a tenants' rights movement in California which led to rent control being adopted by a number of cities, including Los Angeles, San Francisco, San Jose, and Hayden's political base, Santa Monica. In total, 21 California jurisdictions adopted some form of rent control. Their terms varied widely.[36] Some of the existing ordinances, for example, limit rent increases to a *fraction* of the CPI,[37] some regulate apartments only, and others mobile homes only. Landlords complained loudly that their investments were being destroyed—especially in those jurisdictions where rent increases could not keep up with expenses or inflation. They brought a number of lawsuits and had only a mixed record of success. Some of the court failures led to legislative relief. Some of the key developments follow.

Is there a right to exit the rental market?

In *Nash v. Santa Monica*,[38] a landlord tried to exit the regulated rental market by converting his apartment building to condominium

35. Los Angeles adopted rent regulations in 1978, San Francisco in 1979.

36. *See Rent Control Laws by State*, *supra* note 34.

37. Under California law this is okay, even if the rents decline year after year, so long as the landlord receives a fair return—as calculated by the local rent board.

38. Nash v. City of Santa Monica, 37 Cal. 3d 97 (1984).

ownership. He claimed a property right to put his apartment building to some use other than rental. But, the state supreme court held that there is no right to exit the rental business. Once a building is rented out, a city can require it to always be rented out subject, of course, to rent control. In response, the California legislature passed the Ellis Act.[39] The Ellis Act gives landlords the right to exit the rental business, provided tenants are paid "reasonable relocation costs."[40]

These relocation costs have ranged from the payment of a tenant's moving expenses to a forced payment to the tenant of several years' worth of the difference between rent-controlled rents and free-market rents. In San Francisco, an elderly couple owned a small two-story home with a one-bedroom apartment on each floor. In 2014, they sought to move from the upstairs unit to the downstairs apartment so they would no longer have to climb the stairs. San Francisco demanded that they pay the downstairs tenant two years of the difference between rent-controlled apartments and the actual market price—a sum of $118,000. Represented pro bono by attorneys with Pacific Legal Foundation, they sued in *Levin v. City and County of San Francisco*.[41] A federal district court struck down the requirement, holding that it violated the Takings Clause of the Fifth Amendment to the Constitution.

A similar challenge is underway in Oakland. There, Lyndsey and Sharon Ballinger rented out their small house while on a temporary military assignment to Washington, D.C. Upon their return, however, they were told that a new ordinance required them to pay $6,500 to their tenant before they could move in. Here, in *Ballinger v. Oakland*, where the owners are also represented by attorneys with the nonprofit Pacific Legal Foundation, the district court declined to follow the *Levin* case out of San Francisco and upheld the payment scheme.[42] An appeal is pending.

---

39. CAL. GOV'T CODE § 7060.7, *et seq.* (West 1985).

40. *See* Press Release, Assemblyman Richard Bloom, Governor signs measure closing abusive loopholes in the Ellis Act, along with other Tenant protection measures (Oct. 8, 2019) (*available at* https://a50.asmdc.org/press-releases/20191008-governor-signs-measure-closing-abusive-loopholes-ellis-act-along-other).

41. *See* Levin v. San Francisco, 71 F. Supp. 3d 1072, 1074 (N.D. Cal. 2014) (lump sum payment to displaced tenants for relocation costs due under prior ordinance or new enhanced amount that was 24 times the difference between apartments' current monthly rental rate and alleged fair market value of comparable apartments, whichever was greater, effected an unconstitutional monetary exaction).

42. Ballinger v. Oakland, 398 F. Supp. 3d 560 (2019) (appeal pending in 9th Circuit, Case

Newer units are exempt from rent control—for the time being

With rent control ascendant in major California cities, developers avoided apartment house projects in those cities. It soon became apparent that there was a supply problem. In response, the legislature passed the Costa-Hawkins Act.[43] It prohibits local rent-control on single-family homes, condominiums, and units built after 1995.[44] For units subject to rent regulation, the act established vacancy decontrol, allowing a landlord to increase rents as when one set of tenants is replaced by new tenants. Until recently, this law gave developers the assurance that they could recoup their investments in rent-controlled cities. However, in 2018, tenant advocates led by the Aids Healthcare Foundation put Proposition 10 on the ballot. If passed, it would have repealed Costa-Hawkins. It failed by a 20-point margin after $97 million was spent by both sides. The same proponents tried and lost again in 2020 by nearly the same margin. These two propositions proved to be the two most costly ballot fights in the state's history.

Landlords, like utilities, have a right to a reasonable rate of return

In the early days of rent control in California, landlords sued the City of Berkeley, arguing that the city had no right under California law to impose rent control. They failed. In *Birkenfeld v. City of Berkeley*,[45] the California Supreme Court disagreed and upheld the right of cities to impose rent control. However, the court also held that under due process requirements, landlords are entitled to a "just and reasonable return" and the procedures for adjusting rents must likewise provide a meaningful opportunity to ensure such a return. The "fair return" rubric is borrowed directly from the law of utility rate regulations. In other words, owners of apartment buildings are to some degree functionally equivalent to the electric company or other regulated utilities.

No. 19-16550, and argued October 20, 2020). Information about the case can be found here: https://pacificlegal.org/case/ballinger-v-city-of-oakland/.

43. CAL. CIV. CODE § 1954.50, *et seq*. (West 1995).

44. In localities that already had rent regulations, rent regulations apply only to units built before that locality's rent regulation ordinance.

45. 17 Cal. 3d 129 (1976).

There is no meaningful remedy for an unlawfully denied rent increase

In order to raise rents, a landlord must seek permission from a city's rent control board. During proceedings before the board, the landlord must demonstrate that the increase is necessary to ensure a fair rate of return based on the landlord's expenses. If a landlord is wrongly denied a rent increase, he/she may sue. The legal process and appeals, however, can take years. During that time, the lost rents may total substantial sums of money. In *Kavanau v. Santa Monica Rent Control Board*,[46] a landlord, after proving that the rent board had wrongfully denied an adequate rent increase, sought to force the board to pay the lost rents—since seeking the back rents from the tenants would have been a largely futile gesture. The state supreme court disagreed and held that the only remedy was to make up the difference in *future* rentals. In other words, the landlord might have to charge future tenants for rent not paid by past tenants—even if the rents would exceed the market. The problem is, however, that existing tenants may not have been the ones benefitting from the low rents. Moreover, recoupment might not be possible if it would cause the total rent to exceed the market rents.

Does rent control advance any legitimate governmental purpose?

In the standard rent control ordinance in California and elsewhere, cities usually provide a list of reasons for rent control. The ordinances generally claim that rent control will help the poor, minorities, disabled, elderly, less educated, and those otherwise economically and socially disadvantaged. Protecting the interests of such people falls well within the scope of a community's police power. But that begs the question: does rent control meaningfully accomplish any of those goals?

In *Santa Monica Beach v. Superior Court*,[47] a property owner (represented by Pacific Legal Foundation attorneys) contracted for an economic study that compared the demographics of renters in selected rent-regulated jurisdictions with those in neighboring free market jurisdictions.[48] As predicted by economic theory, in every comparison,

46. 16 Cal. 4th 761 (1997), *cert. denied*, 118 S. Ct. 856 (1998).

47. Santa Monica Beach v. Superior Court (Santa Monica Rent Control Board), 19 Cal. 4th 952 (1999).

48. The study is available from the author.

the populations living in rent-regulated jurisdictions were whiter, richer, better educated, and less disadvantaged in all respects. That follows theory because those people with greater stability in their lives—those who are whiter, richer, etc.—are able to stay in a single place for a long enough time to fully reap the benefits of rent control. They are also more adept at working the market to find rent-controlled units when they become available, leaving the poor and less stable populations less able to profit from rent control. In other words, the rent control laws were *harming*, not helping, the vulnerable populations that were supposed to benefit from rent regulation.

Armed with this evidence, an apartment owner in Santa Monica sued and claimed that the city's rent regulation ordinance "failed to substantially advance a legitimate governmental interest," a test for a regulatory taking at that time.[49] While the court of appeal agreed and ruled the ordinance violated the Takings Clause, the California Supreme Court reversed. That court found that rent regulations are subject to a deferential standard of review and that legislative bodies, not the courts, should determine whether a law is working. Moreover, according to the court, the ordinance advanced the general legislative goal of keeping rents low.

Is rent control for mobile homes a special case?

Mobile homes present a unique rent regulation challenge. Tenants own their own homes but lease the space under their homes. Mobile homes, however, are not particularly mobile. Once a home is moved onto a pad with utility hookups in a park, homeowner-tenants cannot easily move their homes, making them more susceptible to market-indifferent rent hikes. But when rent regulation is combined with vacancy control,[50] existing tenants enjoy a windfall premium when selling their homes.

---

49. Later, the U.S. Supreme Court ruled that this test was, in fact, a due process test, not a takings test. The distinction is important because the government gets a more deferential standard of review in due process cases than takings cases. *See infra* text accompanying note 58.

50. Vacancy control means that a new tenant takes the rental unit at the same controlled rent as the prior tenant. This protects tenants from constructive evictions, but it also disincentivizes new rental housing construction or even maintaining existing rental housing stock. The political capital for vacancy controls is also somewhat muted because the strongest support for rent control comes from existing renters, not those who have not yet replaced them.

Existing tenants sell not only their mobile homes but also the right to live in a rent-regulated park where the pad leases will be forever below market value. In regulated apartment buildings this is equivalent to "key money" which is often illegally paid to existing tenants by new tenants in a vacancy-controlled apartment. Because the new mobile-home-owning tenants pay more, often much more, for a used mobile home in a rent-controlled park, the buyers of the used home do not enjoy the same economic rewards of rent regulation that the original tenant enjoyed. Instead, the original tenant often realizes a five or six figure premium when selling a used mobile home coach.

For example, if a used mobile home is worth $50,000 on the open market, the owner may be able to sell it for $150,000 if the coach is located in a rent-controlled park with vacancy control. The extra $100,000 goes directly into the pocket of the mobile homeowner.[51] This premium is essentially the amortized value of the below-market pad rental compared to the same pad in a non-rent-regulated park. In other words, a buyer will be willing to pay a lot more for a coach if he/she understands that the rent payments for the pad space will be forever lower than market value because of rent control. The park owner, who leases out his/her land to the mobile homeowners, does not realize any of these tangible economic benefits realized by the original tenant upon the adoption of rent control. Instead, these benefits come out of the pocket of the park owner. Nor will the home buyer realize any of the economic benefits enjoyed by the owner of the coach when rent control was instituted. Instead, the buyer paid all these benefits in the form of the inflated cost of the coach. These facts have led to some unique takings claims against mobile home rent regulation.

In *Yee v. City of Escondido*,[52] the owners of a mobile home park argued that the rent control constituted a "physical taking." As described by Justice Sandra Day O'Connor, the owners alleged that

> the rent control ordinance has transferred a discrete interest in land—the right to occupy the land indefinitely at a submarket rent—from the park owner to the mobile home owner. Petitioners contend that what has been transferred from park owner to mobile

51. For a discussion of the economics of vacancy decontrol in mobile home parks, see Hirsch & Hirsch, *supra* note 33, at 423.

52. 503 U.S. 519 (1992).

> home owner is no less than a right of physical occupation of the park owner's land.[53]

The Court did not agree. First, it held that there was no physical invasion because the park owners could choose to remove the tenants and exit the business. As the Court wrote, "A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy."[54]

Second, to the argument that the premium garnered by the home owner was the equivalent of the taking of the park owners' cash, the Court likewise was unmoved: "The mobile home owner's ability to sell the mobile home at a premium may make this wealth transfer more visible than in the ordinary case . . . but the existence of the transfer in itself does not convert regulation into physical invasion."[55] Instead, the Court suggested that the transfer might be relevant to the existence of a regulatory taking—the sort of taking that occurs when a regulation takes away the use and value of property.

But the Court was not about to opine on the possibility of a regulatory taking. When the owners asked the Court to review the case, they asked only that the Court review the question whether there had been a physical invasion type taking. They did not ask whether the regulation and premium might constitute a regulatory taking. For that reason, the Court refused to rule on that issue, leaving it for later courts to decide. That would come a decade later in the Ninth Circuit in a case out of Cotati, California, a small city an hour north of San Francisco.

In *Cashman v. City of Cotati*,[56] the owner of a mobile home park argued that allowing the original coach owner to capture a premium upon sale of a mobile home took money from the park owner while doing nothing to alleviate the problem of high rental costs for subsequent tenants. In other words, the ordinance "failed to substantially advance a legitimate governmental interest." That's significant because in an earlier 1979 case, the Supreme Court held in *Agins v.*

---

53. *Id.* at 527.

54. *Id.* at 528.

55. *Id.* at 529–30.

56. 374 F.3d 887 (9th Cir. 2004), *reh'g granted and opinion withdrawn*, 415 F.3d 1027 (9th Cir. 2005). Cashman was represented by attorneys from Pacific Legal Foundation.

Tiburon that if a regulation "failed to advance a legitimate governmental interest" it would be considered a regulatory taking—for which compensation had to be paid.[57] Moreover, the onus was on the government to prove that its regulation made sense.

In *Cashman*, the owners argued that the mobile home rent control law did nothing to alleviate a lack of affordable housing; all it accomplished was to give a windfall to current coach owners who could pocket the premium by charging coach buyers much more money than the coach was worth. The net result was that housing was no less expensive with rent control and therefore, it failed to accomplish its purpose. The Ninth Circuit initially agreed, holding that because the ordinance did not provide a mechanism to prevent the capture of that premium, the law failed to substantially advance a legitimate governmental interest. In other words, under the *Agins* test there was a regulatory taking. But the victory didn't last.

Shortly after the Ninth Circuit decided in favor of the park owners, the Supreme Court took up another takings case involving gas station leases in Hawaii, *Lingle v. Chevron U.S.A. Inc.*[58] Among other things, the high Court there held that it had made a mistake with its earlier "failure to substantially advance" test of *Agins*. It now held that the test was irrelevant to takings cases. It might be a violation of the Constitution's due process clause, but the challengers would have a much heavier burden of proof. As a result, the Ninth Circuit withdrew its original opinion and upheld the ordinance.

More challenges, mostly technical, to rent control in California have come and gone, but rent control remains firmly entrenched in the Golden State. Recently, a panel from the Ninth Circuit scathingly dismissed a rent control challenge by saying: "Simply put, when buying a piece of property, one cannot reasonably expect that property to be free of government regulation such as zoning, tax assessments, or, as here, rent control."[59] The court continued that, "those who buy into a regulated field such as the mobile home park industry cannot object when regulation is later imposed."[60] There is only a reasonable expectation of being paid *some* rent, not a "starry eyed hope of winning the jackpot."

---

57. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).
58. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).
59. Rancho de Calistoga v. City of Calistoga, 800 F.3d 1083, 1091 (9th Cir. 2015).
60. *Id.* (quoting Guggenheim v. City of Goleta, 638 F.3d 1111, 1120 (2010)).

If anything, it's getting only more difficult for landowners with the expansion of rent control by the legislature in 2019.

2019 legislation, AB 1482[61]

In 2018, California voters soundly defeated by 20 points Proposition 10, which would have repealed statutory limitations on rent and vacancy control on apartments built after 1995. Less than a year later, the legislature gave its collective middle finger to the voters by imposing *statewide* rent and vacancy controls for buildings more than 15 years old. In other words, while most local jurisdictions had never adopted rent regulations, they all now will have state-imposed rent regulations.

AB 1482 prohibits landlords from increasing rents in a 12-month period by more than 10% or 5% + CPI, whichever is less. This bill was not opposed by some players in the rental industry, who feared that worse could be passed. The bill prohibits no-cause evictions. For certain no-fault just cause evictions (e.g., landlord move-ins), the landlord must refund the last month's rent. There are exceptions for units less than 15 years old: hospitals, residential care facilities, dormitories, hotels, and single-family homes owned by individuals. No mechanism is provided to increase rents beyond the stated amount, even to reach a fair rate of return or to establish reasonable base rents. The new law went into effect January 1, 2020.

COVID-19

But, just in case landlords thought they could weather AB 1482, COVID-19 has increased their difficulties. The state court Judicial Council first adopted a rule not to hold eviction hearings, thus forcing landlords to allow an increasing number of non-paying tenants to occupy apartments rent-free—without having to even prove a COVID-19 related hardship. Landlords, represented by attorneys from Pacific Legal Foundation, sued the Judicial Council arguing that the courts did not have the power to unilaterally abrogate state statutes.[62] The Judicial Council relented, and rescinded its regulation—effective

61. *The California Tenant Protection Act of 2019, AB-1482* (*available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1482).

62. Christensen v. California Judicial Council, No. BCV-20-101361 (Kern County Superior Court) (filed June 15, 2020).

only after the state legislature adopted AB 3088 which imposes a statewide ban on evictions on tenants with COVID-related hardships. Moreover, there are proposals to extend the no-eviction rules to well beyond the end of the crisis while giving tenants over a year to pay their back rent.

b. New York

For many years, New York state law has permitted larger cities, like New York City, to adopt rent regulations when certain conditions existed, such as low-vacancy rates and pro-forma declarations of emergency. As noted above, New York City has had dual programs of rent control and rent stabilization. Currently, sixty-six jurisdictions in New York state have some form of rent regulation.

New York City began its modern rent stabilization regime in 1969. It established a Rent Guidelines Board and covered units constructed after 1947 (with many of those before 1947 under the older rent control scheme). In 1971, vacancy decontrol was adopted, only to have many of these units re-regulated in 1974. Over the following decades, various laws and political jockeying changed, amended, and changed back various facets of the rent stabilization regime. The city passed new "emergency" ordinances every few years, claiming that low vacancy rates necessitate more of the policies that have been failing for years.

In 2019, everything changed again when the state legislature passed, and governor signed, the Housing Stability and Protection Act of 2019.[63] It is very comprehensive and makes significant changes to the law, including the following.

- Localities with less than 5% vacancy rates may enact rent regulations.
- Rent regulations were made permanent in the sense that no more emergency declarations are necessary. In other words, the continuing fiction of an emergency that had its roots in the wartime emergencies has been set aside.

63. Housing Stability and Tenant Protection Act, 2019 N.Y. ALS 36, 2019 N.Y. Laws 36, 2019 N.Y. SB 6458 (McKinney's 2019) (*available at* https://legislation.nysenate.gov/pdf/bills/2019/S64580).

- The law expands the possibility of rent regulation across New York State.
- Vacancy controls were adopted.
- The new law eliminates the ability to raise "preferential" rents. Those are rents that were set by the landlord at below market but for which the landlord had the option of increasing to market when new tenants moved into the unit or upon a lease renewal. Now, if a tenant vacates voluntarily, rents can be increased only to a regulated maximum.
- The ability to remove units from rent stabilization if the rents were high enough (over $2,775) or if the tenant earned enough (over $200,000) has been eliminated. This removes any pretense that rent regulation is designed to help only financially insecure populations.
- The statute of limitations for challenging overcharges increased from one to six years.
- Deposits are limited to one month's rent.
- "Hardship" extensions may delay evictions for up to one year.
- Fuel pass-alongs are disallowed.
- In New York City, for rent stabilized apartments, rents may be raised only by the lesser of 7.5% or the five-year average approved rent increases as established by the rent board.
- For all nonregulated tenancies, there are requirements for tenant notice if rent increases more than 5%.
- There are limits on eviction fees, despite what a lease may provide (i.e., no attorneys' fees in default judgments).
- No "owner-use" evictions for tenancies over 15 years are permitted.
- The maximum capital improvement for individual apartments for which rent can be recouped is limited to $15,000 over 15 years.
- Rent increases for individual apartment capital improvements must be spread over thirty years after which the increase ends; amortization increases are capped at 1/168 (<35 units) or 1/180 (>35 units); this maxes out capital improvement increases to $89 or $83/month, respectively.
- There is a 2% cap on major apartment building capital improvements with the amortization set at 12/12.5 years (+/- 35 units).

- Tenant "blacklists" are banned.
- Condominium conversions require 51% of tenants to agree (up from 15%).
- Late fees capped at $50 or 5% of total rent.
- Manufactured home rent increases capped at 3% plus expenses.

On July 15, 2019, a coalition of apartment owners filed a complaint in federal district court challenging New York's rent stabilization law plus the new state law. The 121-page complaint in *Community Housing Improvement Program v. City of New York*[64] alleges that the law violates the Due Process Clause and affects both physical and regulatory takings. It doesn't call for compensation for past takings but for an injunction to stop the "application and enforcement" of the rent regulations. The defendants include the city and its agencies, plus state officials responsible for enforcing the state law.

The decision not to ask for damages may have been a political calculation. Because of the magnitude of the economic impacts of rent regulation, and because the primary interest of plaintiffs is to overturn the law, there may have been a fear that some judges would be reluctant to find takings liability if that would involve potential monetary costs to the city.

Another group of landlords filed a second lawsuit, *74 Pinehurst LLC v. State of New York*[65] on November 14, 2019. The 97-page complaint challenges the existing rent stabilization laws as well as the 2019 state legislation on theories of physical and regulatory takings, both facial and as-applied, the Contract Clause, and the Due Process Clause. It seeks declaratory and injunctive relief as well as just compensation.

The federal district court in New York rejected the landlords' claims in both suits. It held that there was no taking because, among other reasons, landlords did not lose all use and value of their properties and they had no reasonable investment-backed expectations that New York wouldn't alter its rent control regulations because most of them had acquired their rental properties when there was some

64. Complaint, Community Housing Improvement Program v. City of New York (No. 19-cv-4087) (E.D.N.Y. 2019).

65. Complaint, 74 Pinehurst LLC v. State of New York (No. 19-cv-6447) (E.D.N.Y. 2019).

form of rent regulation in place. These cases have been appealed to the Second Circuit and briefing was underway in early 2021.

According to the *Wall Street Journal*, there have been drastic devaluations of rental property in New York City because of the new laws. Two months after passage of the new law in 2019, the *Journal* reported, "Two New York landlords with large portfolios of rent-regulated apartments are behind on payments on more than $200 million in real estate loans, a sign that new state rent laws are starting to hurt investors."[66]

Likewise, the *Journal* also reported that with the advent of increased rent control in New York, rental apartment building sales fell by 51% in late 2019.[67] Instead of dealing with rent control, "investors are shifting to parts of the country that face little or no restrictions on rising rents."[68] By reducing investments, this will only make supply shortages worse. As the head of one investment firm put it, "We're not producing enough housing in this country . . . [t]hat continues to drive up rent levels."

What's more, while the value of rent-controlled units has plummeted, the value of buildings free from rent control has risen. Six months into the new law, the *Wall Street Journal* reported, "The near collapse of rent-regulated-building sales also produced some anomalies in residential sales. . . . because of the decline in regulated-building sales, sales of more valuable buildings with market-rate units predominated . . . driving up the average price per square foot tabulated in market reports."[69] In other words, some prices (and

66. Will Parker & Konrad Putzier, *After New York Rent Reform, Some Landlords Are Falling Behind*, WALL ST. J. (Oct. 26, 2019), https://www.wsj.com/articles/after-new-york-rent-reform-some-landlords-are-falling-behind-11572098400. *See also* Josh Barbanel, *New York Landlords Slow Apartment Upgrades, Blame New Rent Law*, WALL ST. J. (Dec. 19, 2019), https://www.wsj.com/articles/new-york-landlords-slow-apartment-upgrades-blame-new-rent-law-11576756800?mod=searchresults&page=2&pos=9 (noting that landlords can no longer fully pass on upgrade costs to tenants); Daniel Geiger, *Blackstone halts Stuy Town upgrades in wake of rent-regs overhaul*, CRAIN'S N.Y. BUS. (July 12, 2019), https://www.crainsnewyork.com/real-estate/blackstone-halts-stuy-town-upgrades-wake-rent-regs-overhaul?mod=article_inline.

67. Peter Grant & Will Parker, *Investors Aim to Avoid Rent Control in New Apartment Deals*, WALL ST. J. (Jan. 21, 2020), https://www.wsj.com/articles/investors-aim-to-avoid-rent-control-in-new-apartment-deals-11579630224.

68. *Id.*

69. Josh Barbanel, *Sales of New York City Rent-Regulated Buildings Plummet After New Law*, WALL ST. J. (Feb. 27, 2020), https://www.wsj.com/amp/articles/sales-of-new-york-city-rent-regulated-buildings-plummet-after-new-law-11582754189.

rents) are increasing more than they otherwise would, making the overall merit of rent control on steroids elusive.

c. Oregon

At one time Oregon, with limited exceptions, prohibited rent regulation, noting "that the imposition of general restrictions on housing rents will disrupt an orderly housing market, increase deferred maintenance of existing housing stock, lead to abandonment of existing rental units and create a property tax shift from rental-owned to owner-occupied housing."[70] But in 2019, Oregon adopted 2019 OR S.B. 608.[71] It applies to buildings fifteen years and older. Key provisions of the law include:

- **No-cause evictions** are eliminated after the first year of occupancy. Cause for evictions can include owner move-in, major rehab, and removal of unit from rental market. No-cause eviction is allowed when an owner lives on a property with two units or less. One month's rent relocation fee must be paid to tenant, except where there are four or fewer units. Notice requirements vary according to circumstances.
- **Rent caps:** A landlord may not increase the rent by more than 7% plus CPI in a 12-month period. No increases are permitted in the first year. A 90-day notice of increase is required.
- **Local rent regulation is preempted.**
- **Impacts**: According to MultiFamily NW, multifamily investment has dropped 38% in the wake of that state's adoption of rent regulations.[72] There is additional concern over a potential legislative push to tighten Oregon's rent regulation provisions even further.[73]

70. OR. REV. STAT. § 91.225 (2020).

71. OR. REV. STAT. § 90.323 (2020).

72. Emily Anderer, *Following Statewide Rent Cap Oregon Multifamily Investment Drops 38%*, MULTIFAMILY NW (June 18, 2019), https://www.multifamilynw.org/news/following-statewide-rent-cap-oregon-multifamily-investment-drops-38.

73. *Id.*

2. States that Lack Statewide Rent Regulations but Permit Local Jurisdictions to Adopt Rent Regulation[74]

Two states, New Jersey and Maryland,[75] as well as the District of Columbia,[76] have rent control on a local basis. New Jersey's history is particularly interesting.

a. New Jersey

In 1957, the state supreme court held in *Wagner v. Newark* that local governments were preempted by state law from adopting rent control.[77]

But when rents in New Jersey began increasing faster than inflation, tenants took notice and a strong tenants' rights movement surfaced in the early 1970s, which agitated for statewide rent control.[78] In this era, Martin Aranow led the tenants' rights movement in New Jersey.[79] He was an unlikely tenants' rights hero: a 33-year-old politically inexperienced "business machine company president who lived in a luxury high-rise in Fort Lee."[80] The tenants' rights movement that he led (until succeeded by his wife after he died an early death) engaged in intense lobbying at state and local levels. While it never resulted in statewide legislation, in time, over 100 local jurisdictions adopted rent control in New Jersey.

While the interests of low-income tenants were not the motivating force behind the movement, the tenants did use the movement to advance their own interests—especially the interests of those living in the public housing projects in Newark.[81] Apparently, one government

74. This is apart from the standard landlord-tenant law that all states have per their common and statutory law. Such laws do not traditionally impose limitations on the rent a landlord may ask of a tenant outside narrow contexts, such as tortious retaliation and unlawful discrimination.

75. For details, *see Rent Stabilization*, TAKOMAPARKMD.GOV, https://takomaparkmd.gov/government/housing-and-community-development/rental-housing/rent-stabilization/.

76. For details, *see* D.C. CODE § 42-3502, *available at* https://code.dccouncil.us/dc/council/code/titles/42/chapters/35/subchapters/II/.

77. Wagner v. Newark, 24 N.J. 467, 132 A.2d 794 (1957).

78. Kenneth K. Baar, *Rent Control in the 1970's: The Case of the New Jersey Tenants' Movement*, 28 HASTINGS L J. 631 (1977). Some of the impetus for statewide controls came in the wake of President Nixon's imposition of wage and price controls, which ended in 1973.

79. *Id.* at 645.

80. *Id.*

81. *Id.* at 644 n.83.

solution to low-income housing, public projects, had become an abject failure with "deplorable" conditions.[82] One politician and leader of low-income tenants said his tenant organization fully backed Aranow's group and "thanked landlords for exploiting highrise residents along with slum dwellers."[83]

This push for rent control took on urgency after President Nixon's imposition of wage and price controls expired in 1973. While the state legislature never adopted a state law, a number of municipalities did, 18 of them, in months following the lifting of President Nixon's order.[84] When challenged, a superior court judge in *Iganmort v. Fort Lee* distinguished the prior Supreme Court decision in *Wagner* and, dispensing with any pretense of judicial neutrality, went on to pontificate that,

> [e]very human being has a right to be housed. And to some degree, he has a continuing right not to be uprooted annually.
>
> . . . .
>
> Statements that rent control will hurt tenants, landlords, builders and homeowners are a myth.
>
> . . . .
>
> Food, clothing and shelter are perhaps more fundamental to life than free speech, freedom of worship and other inalienable rights. . . . [T]he right to food, clothing and shelter are not only inalienable rights, but rights that are essential to life itself. They do not, therefore, require constitutional affirmation.
>
> . . . .
>
> But someone must speak for a membership [i.e., tenants] inarticulate in the law.

---

82. *Id.* The failure of public projects to provide safe housing is beyond the scope of this Article. But the problem continues to this day. *See* Jenna Wang, *New York City Housing Authority Agrees to $2B Settlement Over Massive Health Violations*, FORBES (June 14, 2008), https://www.forbes.com/sites/jennawang/2018/06/14/new-york-city-housing-authority-culpable-for-massive-health-violations-lead-poisoning/?sh=6247bd8822ad.

83. Baar, *supra* note 78, at 644 (quoting THE RECORD (Hackensack, N.J.) Oct. 22, 1969, at B-16, col. 3).

84. *Id.* at 653.

> The judicial imagination, the police power, and the right to shelter should go to greater lengths than ever before in extending the constitutional umbrella over the dignity of a regulated landlord-tenant relationship.[85]

The decision is extraordinary in its willingness to depart from the law and embark on a dissertation of progressive political philosophy. That rent control's potential to cause harm is a "myth" is not a judicially determined fact; it is a political statement that is contradicted by economists of all political persuasions.[86] And the notion that material rights are more important than speech and religious rights is contrary to the fundamentals of Western political thought and classical liberalism.[87] It is the duty of government to allow "life, liberty and the pursuit of happiness" (as stated in the Declaration of Independence). To do that, government provides courts, security, and an environment where people may worship, speak, and pursue an honest living without interference from a tyrannical government—but not free food, free shelter, and free internet.

As Judge Posner put it in a case denying a "right" to public safety,

> The modern expansion of government has led to proposals for reinterpreting the Fourteenth Amendment to guarantee the provision of basic services such as education, poor relief, and, presumably, police protection, even if they are not being withheld discriminatorily. . . . To adopt these proposals, however, would be more than an extension of traditional conceptions of the due process clause. It would turn the clause on its head. It would change it from a protection against coercion by state government to a command that the state use its taxing power to coerce some of its citizens to provide services to others.[88]

---

85. Inganamort v. Fort Lee, 293 A.2d 720, 742, 744 (N.J. L. Div. 1972). The decision was upheld on appeal, albeit without the extreme rhetoric, at 303 A. 2d 298 (NJ 1973).

86. Alston, Kearl & Vaughan, *supra* note 2.

87. *See, e.g.*, JOHN STUART MILL, ON LIBERTY 11 (Hackett Publ'g 1978) (1859) ("the appropriate region of human liberty [includes] "liberty of conscience . . . liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects . . ."); *see also* Judge Posner's discussion in Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) ("The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them.").

88. *Jackson*, 715 F.2d at 1203–04 (citation omitted).

While the New Jersey Supreme Court was right when it later tried to stop exclusionary zoning rules that prevented people from obtaining decent housing,[89] this trial court was quite wrong to suggest here that it should take over the free market in housing. This ruling is far more an exposition of a half-baked Marxist construct than it is a judicial opinion. Nonetheless, this excursion in leftist ideology is in the New Jersey case law.

Several months after the federal wage and price controls were lifted, the state supreme court affirmed the trial court's decision, albeit in less colorful terms, concluding simply that "[t]he police power is vested in local government to the very end that the right of property may be restrained when it ought to be because of a sufficient local need."[90]

Roughly 100 localities in New Jersey now have rent control regulations that vary by local ordinance.[91]

Certainly, rent control in New Jersey did not alone cause the growing unavailability of affordable housing. Much of the blame should be placed on exclusionary zoning policies which the state supreme court later found to be unconstitutional because zoning that kept out the development of modest multifamily housing was contrary to public policy . In striking down an exclusionary zoning ordinance from Mt. Laurel Township, the court reasoned that "all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws" and "must promote public health, safety, morals or the general welfare."[92] Because exclusionary zoning failed to do, it was unlawful.

3. States that Preempt Rent Regulation (and Have No Statewide Controls)

Thirty-one states preempt rent regulation altogether. These include: Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia,

89. S. Burlington County NAACP v. Mt. Laurel, 67 N.J. 151, 336 A. 2d 713 (1975).

90. Inganamort v. Fort Lee, 62 N.J. 521, 303 A.2d 298, 307 (1973).

91. *2009 Rent Control Survey*, N.J. DEP'T CMTY. AFFS., DIV. CODES & STANDARDS, https://www.nj.gov/dca/divisions/codes/publications/pdf_lti/rnt_cntrl_srvy_2009.pdf.

92. S. Burlington NAACP v. Mt. Laurel, 67 N.J. 151, 336 A.2d 713, 725 (1975). The court noted that there was a shortage of 400,000 housing units in New Jersey alone and ten-million nationwide. *Id.* at 203, 740 (Pashman, J., concurring.)

Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin. Recent initiatives to adopt rent regulations in several of these states are worth noting:

a. Florida

Miami adopted a rent control ordinance in 1969. In a 1975 case, *City of Miami Beach v. Forte Towers, Inc.*, the Florida Supreme Court held that as a matter of state constitutional law, rent regulations can be adopted by local governments.[93] However, Miami Beach's rent regulation law was struck down because it delegated too much municipal power to an administrator. Today, as a practical matter, Florida statutes make the adoption of rent regulation very difficult and only of limited duration.

Florida Statutes 125.0103[94] and 166.043[95] severely restrict the ability of county local governments to impose rent regulation. Both statutes begin by prohibiting any local government from "imposing price controls upon a lawful business activity . . . unless specifically provided by general law."[96] With respect to rent regulation, the Florida Statute 125.0103 says:

> (2) No law, ordinance, rule, or other measure which would have the effect of imposing controls on rents shall be adopted or maintained in effect except as provided herein and unless it is found and determined, as hereinafter provided, that such controls are necessary and proper to eliminate an existing housing emergency which is so grave as to constitute a serious menace to the general public.
> (3) Any law, ordinance, rule, or other measure which has the effect of imposing controls on rents shall terminate and expire within

93. 305 So. 2d 764 (Fla. 1974). The supreme court held that the home rule statute, even insofar as it authorized rent regulation measures, was not unconstitutional; and that evidence presented at trial was insufficient to overcome city council's finding that an emergency existed requiring adoption of rent regulation measures, but that the rent regulation measures constituted an unconstitutional delegation of council's powers to the rent regulation administrator.

94. FL. STAT. § 125.0103 (2013), https://www.flsenate.gov/Laws/Statutes/2013/125.0103.

95. FL. STAT. § 166.043 (2013), https://www.flsenate.gov/Laws/Statutes/2013/166.043.

96. *Id.* § 125.0103.

> 1 year and shall not be extended or renewed except by the adoption of a new measure meeting all the requirements of this section.[97]

The section continues with an exception for luxury rentals—defined as those being in excess of $250/month.

Recently, there has been an effort to repeal these restrictions. HB 6013 and SB 1390 would eliminate section 3 of Statutes 125.103 and 166.043. Both bills died in their respective committees without hearings in May of 2019. However, they were reintroduced in October 2019.[98] According to the *Orlando Sentinel*,

> it would restrict the reasons for which landlords can evict tenants; require landlords to provide leases and eviction notices in tenants' preferred language; prohibit evictions during a state of emergency; prevent landlords from charging exorbitant application fees and require them to refund fees when no units are available. It also would require landlords to provide tenants three months of notice if raising rents more than 5%; and protect renters who have been victims of domestic violence or who receive federal housing vouchers from being denied housing, among other things.[99]

The bills died in committee.[100]

b. Illinois

Illinois adopted a ban on rent regulation in 1997.[101] HB 2430, a legislative proposal to lift the ban, was defeated in a House judicial-civil committee by a 4–2 vote in March 2019.[102] Another bill, HB

97. *Id.* § 125.0103(2)–(3).

98. Caroline Glenn, *With Orlando rents averaging $1,217, lawmakers renew push for rent control and tenant protections*, ORLANDO SENTINEL (Oct. 8, 2019), https://www.orlandosentinel.com/business/os-bz-florida-eskamani-rent-control-20191008-kjic6atg5baddhuv4pcbkqsefa-story.html.

99. *Id.*

100. Florida Senate bill history found at https://www.flsenate.gov/Session/Bill/2020/6013 (HB 6013) and http://www.flsenate.gov/session/Bill/2019/1390 (SB 1390).

101. The law states that governmental entities "shall not enact, maintain, or enforce an ordinance or resolution that would have the effect of controlling the amount of rent charged for leasing private residential or commercial property." ILL. COMP. STAT. 825/5 (1997) (*available at* https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=748&ChapterID=11).

102. Steven Stahler, *Bill to lift ban on rent control fails in Springfield*, CRAIN'S CHI. BUS. (Mar. 27, 2019), https://www.chicagobusiness.com/government/bill-lift-ban-rent-control-fails-springfield.

2192, would establish regional boards with power to regulate rents. On March 29, 2019, it was referred to the rules committee.[103] In the meantime, a group calling itself the "Lift the Ban Coalition" is actively agitating for a repeal of the ban with HB 255. Chicago has passed nonbinding resolutions in support of lifting the ban, and the current governor, J.B. Pritzker, has expressed his support for lifting the ban.[104] As of early 2021, the ban remains in place.

c. Massachusetts

In 1969 and 1970, the state of Massachusetts adopted laws allowing Boston, Cambridge, and other cities to adopt rent control laws. In 1994, property owners in Cambridge spearheaded a statewide referendum to ban rent regulation. It passed 51–49. Boston, Brookline, and Cambridge, which had adopted rent regulations, were without rent regulation by early 1995.[105] The repeal had a significant positive effect on housing supply and value. The National Bureau of Economic Research has estimated that from 1994 to 2004, property values in Cambridge rose in value by $1.8 billion, which included $1 billion in spillover value added to never-controlled rental units.[106] According to the study's conclusion:

> Under any reasonable set of assumptions, increases in residential investment stimulated by rent decontrol can explain only a small fraction of these spillover effects. Thus, we conclude that decontrol led to changes in the attributes of Cambridge residents and the production of other localized amenities that made Cambridge a more desirable place to live.[107]

Nevertheless, a push is underway to repeal the ban. HB 3373 was introduced in January of 2019, to institute vacancy control for tenants

103. *See Bill Status of HB2192*, ILL. GEN. ASSEMBLY (Jan. 13, 2021), https://www.ilga.gov/legislation/BillStatus.asp?DocTypeID=HB&DocNum=2192&GAID=15&SessionID=108&LegID=117947.

104. Maya Dukmasova, *Chicago tenants continue to demand "rent control now,"* CHI. READER (Oct. 16, 2019), https://www.ltbcoalition.org/.

105. Jay Fitzgerald, *The End of Rent Control in Cambridge*, NAT'L BUREAU ECON. RSCH., https://www.nber.org/digest/oct12/end-rent-control-cambridge.

106. *Id.* (citing David H. Autor, Christopher J. Palmer & Parag A. Pathak, *Housing Market Spillovers: Evidence from the End of Rent Control in Cambridge Massachusetts* (NBER Working Paper, No. 18125, issued in June 2012), https://www.nber.org/papers/w18125.pdf.

107. Autor, Palmer & Pathak, *supra* note 106, at 31.

over 75 years of age for buildings with six or more units. Another bill, HB 3924, would give local communities the option to impose the full gamut of rent regulations and vacancy controls on apartments and mobile homes.[108] While advocates are pushing for the bill, Governor Charlie Parker has not expressed support, saying instead that the solution to the housing crisis is to build more housing.[109]

For a number of years, various attempts to regulate rents have failed. That has motivated the supporters of rent regulation to go big against the forces of "private property and greed" as characterized by tenant advocate Lisa Owens:

> A lot of our allies got together, saying that what we're asking for is so basic and it's the same forces coming down so strongly on the side of private property and greed . . . . There was this broad consensus after those losses that we have to fight for what's big and bold and what we really need, because if we fight for small things that are incremental, we still get the same forces coming back at us.[110]

As of early 2021, these efforts to eliminate the profit motive in rental housing have been unsuccessful.

d. Washington State

Washington State banned rent regulation in 1981 with RCW 35.21.830.[111] This does not sit well with the Seattle progressive political establishment, which is actively pursuing efforts to repeal the ban. As explained on the city's website:

---

108. Chris Lisinski, *Rent Control Bill About Giving Communities Options, Sponsor Says*, WBUR NEWS (Mar. 27, 2019), https://www.wbur.org/news/2019/03/27/rent-control-bill-about-giving-communities-options-sponsor-says.

109. *Advocates call for a return of rent control in Massachusetts*, WBUR NEWS (Oct. 29, 2019), https://www.wbur.org/news/2019/03/27/rent-control-bill-about-giving-communities-options-sponsor-says.

110. Jared Brey, *Could Rent Control Return to Boston?*, NEXT CITY (Nov. 5, 2019), https://nextcity.org/daily/entry/could-rent-control-return-to-boston.

111. The statute states:

> The imposition of controls on rent is of statewide significance and is preempted by the state. No city or town of any class may enact, maintain, or enforce ordinances or other provisions which regulate the amount of rent to be charged for single-family or multiple-unit residential rental structures or sites.

WASH. REV. CODE § 35.21.830 (2020), https://apps.leg.wa.gov/rcw/default.aspx?cite=35.21.830.

> In addition to rent control, we also need to tax the rich, and big businesses like Amazon to fund a massive expansion of social housing (publicly-owned, permanently-affordable homes) and to fully fund homeless services. Our movement also needs to continue our ongoing successful fight for a full renters bill of rights.
>
> . . . .
>
> The goal is to build mass protests for the next session of the legislature in Olympia to make it clear that working people are not willing to accept continued inaction on the severe affordable housing crisis, and demand serious solutions, not lip service.
>
> Let us begin![112]

In the last six years, the Seattle area has added 400,000 new residents but only 135,000 new homes.[113] But the city politicians don't think more building is the answer. Instead, the city is planning to adopt its own rent and vacancy control ordinance in the event that the statewide ban is lifted: "State law currently prohibits rent control. [City Council Member] Sawant said her legislation, if passed, wouldn't take effect until that ban is repealed. The full city council likely won't take up the matter until December, after budget negotiations have ended."[114]

So far, the legislature has not moved forward with the city's symbolic agenda.

4. States with No Rent Regulation and No Preemption

Seven states have no statewide rent regulation but don't expressly preempt it. These states include: Hawaii, Delaware, Maine, Montana, Nebraska, Ohio, and Wyoming.

---

112. Seattle City Council, *Rent Control FAQ's and Myths*, SEATTLE.GOV, http://www.seattle.gov/council/meet-the-council/kshama-sawant/rent-strike/rent-control/rent-control-faqs-and-myths.

113. Daniel Beekman & Brian Gutman, *Seattle area has undergone record growth. Now voters may reshape its politics.*, SEATTLE TIMES (Nov. 3, 2019), https://www.seattletimes.com/seattle-news/politics/seattle-area-has-undergone-record-growth-now-voters-will-decide-whether-to-reshape-its-politics/.

114. Joel Moreno, *Sawant's rent control proposal takes aim at Seattle's pricey housing market*, KOMO NEWS (Sept. 24, 2019), https://komonews.com/news/local/rent-control-proposal-takes-aim-at-seattles-pricey-housing-market.

Additionally, seven other states have the so called "Dillon Rule,"[115] meaning that while rent regulation is not preempted by state law, if a local government (which may be limited by size) can persuade the state legislature to give the local government permission to adopt rent regulation, they may. These states are Alaska, Nevada, Pennsylvania, Rhode Island, Vermont, Virginia and West Virginia.

C. Federal Rent Regulation Agitation

1. The "A Just Society: A Place to Prosper Act of 2019"—Representative Alexandria Ocasio-Cortez

With the national election season behind us, and with the rise of some progressives in Congress, there has been a call for the imposition of national rent regulation. Representative Alexandria Ocasio-Cortez has submitted the "A Just Society: A Place to Prosper Act of 2019."[116] It did not pass, but we can expect a new version in 2021. The law would have applied to owners with five or more units or mobile home park owners with two or more parks. The proposal would, among other things, impose nationwide rent caps with annual increases tied to the consumer price index or 3%, whichever is greater. It also has vacancy controls, forbids discrimination against Section 8 voucher holders, provides standing to tenants to sue, and overrides any arbitration clause leases. Evictions may not be commenced until a tenant is two months behind in her rent, and there will be a national program of free counsel to tenants facing evictions, with a fund of $6.5 billion annually to pay for the attorneys. It provides that state attorney generals may sue to enforce the act. The bill also would amend the Civil Rights Act to include people who receive income such as Section 8 vouchers to be a "protected class," meaning landlord discrimination against a tenant with such income would be actionable under 42 U.S.C. § 1983.

---

115. The rule is derived from Iowa Supreme Court Justice Dillon's opinion in *City of Clinton v. Cedar Rapids & M.R.R. Co.*, 24 Iowa 455, 1866 WL 173 (1868). As Justice Dillon put it, "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy." 24 Iowa at 475.

116. A copy can be found here: https://ocasio-cortez.house.gov/sites/ocasio-cortez.house.gov/files/A%20Just%20Society-%20A%20Place%20to%20Prosper%20Act.pdf.

Another element of the proposal would require owners with over 1,000 units nationwide, or 100 units in a metropolitan area, to disclose for a public database, any information about their business practices, including statistics on evictions, rents, code violations, standard leases, and details on corporate ownership.

2. Senator Bernie Sanders

Senator Sanders' "Housing for All"[117] plan would do many of the same things as the AOC plan. It would spend $1.4 trillion to restore and build new government housing, end discrimination against Section 8 recipients, impose a national rent cap of 3% or 1.5 times the CPI (whichever is higher) "to help prevent the exploitation of tenants at the hands of private landlords," implement just-cause eviction laws, allow states to adopt more stringent laws, and provide $2 billion for attorneys for tenants facing evictions. There are a host of other restrictions on house flipping, inclusionary zoning, and a tax on vacant homes.

D. Miscellaneous Provisions

Some localities have adopted restrictions on the ability of landlords to use criminal background checks for tenant screening.[118] Others put limits on rent deposits. Tenants represented by Pacific Legal Foundation attorneys have filed challenges to Seattle ordinances that prohibit criminal background checks and require landlords to rent to the first applicant that meets minimum standards. In December, the state supreme court upheld the ordinances. In doing so, the court overturned over a century's worth of precedent that had held the state constitution did more to protect property rights than the federal constitution.[119]

---

117. The "Housing for All" campaign platform can be found at: https://berniesanders.com/issues/housing-all/.

118. *See, e.g.*, Jerimiah Jacobsen & Gordon Severson, *Minneapolis council approves new renter protections*, KARE11 (Sept. 13, 2019), https://www.kare11.com/article/news/local/minneapolis-council-approves-new-renter-protections/89-1cc7a2de-0098-4bf7-9564-fb14f5aa0107.

119. *See* Yim v. City of Seattle, 454 P.3d 694 (Wash. 2019); Chong Yim v. City of Seattle, 454 P.3d 675 (Wash. 2019).

CONCLUSIONS

As much as some politicians might try, no one has figured out a way to repeal the law of supply and demand. There can be no repeal, only workarounds. In some of the old (and current) communist states, the workaround was mass starvation. That lessened demand. Starvation, combined with political repression, staved off collapse. Venezuela has made conditions so miserable that millions have resorted to the workaround of mass emigration, leaving those in charge the masters of a much-diminished nation. And cities in California have had their own workaround: effectively putting the casualties of its housing policies onto the streets. But long term, the law of supply and demand is inexorable: if you restrict prices, supply will diminish, and demand will find substitutes, whether it be the streets, emigration, or death.

Rent control to a housing crisis is like pouring hot soup over a hungry person shivering in the freezing cold. At first it feels great. There's lots of warmth and soup. Then it cools off. The cold penetrates the soup-soaked clothing, and everything feels much colder than before. The food is wasted, the hunger is greater, and the cold is more bitter.

Rent control, whether it be of the traditional type or the more flexible version of rent stabilization, isn't designed just to establish minimum living standards. It is directed toward wealth redistribution that favors a politically active constituency. Where it has been adopted, it has only been effective in the short term. It lowers rents for some. But because it also discourages the only practical means of alleviating high housing costs—an increase in supply through new free market construction—it ends up doing more harm than good.

The rise in progressive activism during the Trump years may have been a reaction to the former president's incendiary politics and rhetoric. Whether progressives succeed on either the state or national level to impose more rent controls during the Biden-Harris administration remains to be seen. Landlords know how to band together and fight back, as they did in California to beat back two statewide initiatives. But so long as there is a housing shortage resulting in rents that are too high, rent control will remain in the hearts and minds of renters everywhere. If they can muster their political forces, they may well succeed. But if they do, will the nation's shortage of affordable housing be alleviated? Probably not.

SOLVING FOR HOMELESSNESS

WENDIE L. KELLINGTON*

INTRODUCTION—THE PROBLEM

Homeless people and homeless encampments are everywhere. The housed look on in horror at the depressing symbols of homelessness—tents on sidewalks, people in wheelchairs talking to no one in particular, the filthy plastic bucket in lieu of a toilet behind a wind-blown decayed tarp; the person who simply relieves themselves on a sidewalk; the person on the street corner screaming epithets at unseen enemies; feral children wandering about like zombies. No one deems the state of affairs tolerable; yet homelessness stubbornly persists despite billions of dollars and countless person-hours devoted to its end.

The premise of this Paper is twofold, that: (1) homelessness must end, and (2) it is a problem too big for the existing patchwork of state and local initiatives to solve. Rather, the federal government must step up to establish a coherent policy paradigm and associated programming that solves it.

As to the first premise, it is beyond debate that homelessness is a dangerous social problem, an indicia of societal decline that our leaders cannot ignore. Homeless people lack basic sanitation resulting in TB resistance (in all homeless communities),[1] Hepatitis-A (San Diego homeless outbreak 2016–18),[2] typhus (Skid Row)[3] and other serious communicable diseases that flourish in unsanitary conditions. Children are raised without access to stable education, in environments risking personal harm and disconnection from society, all of

* Kellington Law Group PC, Lake Oswego, Oregon.

1. *TB in People Experiencing Homelessness*, CENTER FOR DISEASE CONTROL, https://www.cdc.gov/tb/topic/populations/homelessness/default.htm (last visited Sept. 24, 2021).

2. Corey M. Peak et al., *Homelessness and Hepatitis A—San Diego County, 2016–2018*, 71 CLINICAL INFECTIOUS DISEASES 14 (2020) (*available at* https://pubmed.ncbi.nlm.nih.gov/31412358/#:~:text=During%202016%2D2018%2C%20the%20County,risk%20factor%20for%20the%20disease).

3. Dennis Romero & Andrew Blankstein, *'Typhus zone': Rats and trash infest Los Angeles' skid row, fueling disease*, NBC NEWS (Oct. 14, 2018), https://www.nbcnews.com/news/us-news/typhus-zone-rats-trash-infest-los-angeles-skid-row-fueling-n919856.

which contribute to the cycle.[4] Homeless parents do not know where to go for help and are frightened to reach out to social services for fear of losing their children.[5] Homeless women and children are at significantly higher risk of sexual assault and trafficking than the housed population.[6] Access to services is unreasonably complex and, often, where access happens, the result is essentially nothing—a homeless person invariably encounters long waiting lists and delays. Society is unhappy with the situation and has a special dislike for how it treats its homeless veterans for whom the ravages of military service have left them mentally or physically unable to return to society; its treatment of the elderly, who find themselves without adequate funds to live; its foster youth, who age out and join the homeless ranks with no social skills or desire to gain them; and its severely mentally ill citizens, who occupy expensive space in jails and emergency rooms, rather than getting the treatment they need.

As to the second premise for this Paper, the federal government must step in because state and local governments have failed to solve the problem, despite at least two decades to do so. And regardless, the problem is a national one; it is too big to expect state and local governments to solve. The federal government has solved similar problems before. It is uniquely capable and positioned to do so again, and it must.

I. GREAT SOCIAL PROBLEMS REQUIRE NATIONAL SOLUTIONS

Homelessness is a significant national problem. America has dealt with great national problems before. When it did, in the country's

4. *See Child Homelessness: A Growing Crisis*, SAMHSA, https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/child-homelessness-growing-crisis (last visited Sept. 24, 2021).

5. *See* Anne Gowen, *Homeless families who turn to D.C. for help find no room, risk child welfare inquiry*, WASH. POST (June 23, 2012), https://www.washingtonpost.com/local/homeless-families-who-turn-to-dc-for-help-find-no-room-risk-child-welfare-inquiry/2012/06/23/gJQAv9bJyV_story.html.

6. Diane M. Santa Maria et al., *Gaps in Sexual Assault Health Care Among Homeless Young Adults*, 58 AM. J. PREVENTATIVE MED. 191, 191 (2020); Margot B. Kushel et al., *No Door to Lock: Victimization Among Homeless and Marginally Housed Persons*, 163 ARCHIVES OF INTERNAL MED. 2492 (2003) (*available at* https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/216287); Micah Bertoli, *Homeless People at Greater Risk of Suffering Sexual Violence*, INVISIBLE PEOPLE (July 10, 2019), https://invisiblepeople.tv/homeless-people-at-greater-risk-of-suffering-sexual-violence/.

most difficult hour, instead of waiting and hoping that state and local governments would do something, the federal government stepped in and stepped up. Consider the size of the national crisis of 1929–39: the Great Depression. While President Hoover urged Americans to weather the economic storm with "courage and spirit" and told them that the solution to the economic crisis was "not beyond the ability of these thousands of community organizations to solve," President Franklin Delano Roosevelt ("FDR"), elected in 1932, promised intensive federal intervention.[7] By the time of FDR's election in 1932, the American social fabric was in tatters and a serious homeless problem manifested as "Hoovervilles" and "migrant camps" dotted the nation.

These makeshift "towns" were composed of people who had lost everything, including their homes and jobs in the Great Depression, and had nowhere to go.[8] Displacement started earliest for farm laborers who lost farms or farm jobs to foreclosure arising from farm loan overextensions that financed increased production during the recession following WWI. Farm labor job losses were worsened by the seven-year drought between 1931–1938 that caused the "Dust Bowl," bringing ruinous environmental conditions to nineteen states.[9] Americans who relied upon farming for their incomes migrated west, mostly to California to live and work in "migrant camps." Other Americans suffered sudden job losses when business dried up during the Great Depression and somewhere between forty and fifty percent of all mortgages in the United States were in default.[10]

---

7. Herbert Hoover, President of the United States, Message Regarding Unemployment Relief (Oct. 18, 1931), https://millercenter.org/the-presidency/presidential-speeches/october-18-1931-message-regarding-unemployment-relief.

8. *See* Joseph Rose, *Homelessness: Portland's Great Depression Hoovervilles vs. 'Halesvilles' (photos*), THE OREGONIAN (Jan. 9, 2019), https://www.oregonlive.com/history/2016/04/homelessness_portland_hoovervi.html.

9. Robin A. Fanslow, *Voices from the Dust Bowl: the Charles L. Todd and Robert Sonkin Migrant Worker Collection, 1940 to 1941: The Migrant Experience*, LIBRARY OF CONGRESS (Apr. 6, 1998), https://www.loc.gov/collections/todd-and-sonkin-migrant-workers-from-1940-to-1941/articles-and-essays/the-migrant-experience/.

10. *Report for Congress: The Labor Market During the Great Depression and the Current Recession*, CONGRESSIONAL RESEARCH SERVICE (June 19, 2009), https://www.everycrsreport.com/reports/R40655.html; *Housing 1929–1941*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/education/news-and-education-magazines/housing-1929-1941#:~:text=Another%20critical%20housing%20situation%20facing,the%20Great%20Depression%20was%20foreclosure.&text=By%201933%2C%2040%20to%2050,was%20sliding%20toward%20complete%20collapse (last visited Sept. 24, 2021).

Wherever the Depression-era homeless lived, the attendant problems were the same as they are now: conditions were deplorable and unsanitary.[11]

Instead of today's nylon tents and cardboard, Depression-era makeshift shelters were composed of car parts, metal, wood, canvas tents, anything that could be found. America had then what we have now, huge numbers of homeless Americans. The difference is that something was done about it.

11. Robin A. Fanslow, *Voices from the Dust Bowl: the Charles L. Todd and Robert Sonkin Migrant Worker Collection, 1940 to 1941: The Migrant Experience*, LIBRARY OF CONGRESS (Apr. 6, 1998), https://www.loc.gov/collections/todd-and-sonkin-migrant-workers-from-1940-to-1941/articles-and-essays/the-migrant-experience/. H.M. Warner, Photograph of Seattle area Hooverville (1935), *Photo Courtesy of Washington State Archives.*

12

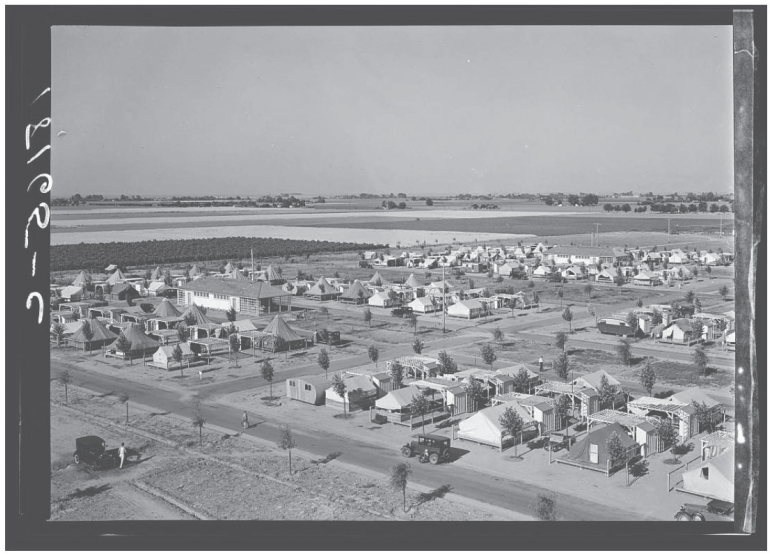
13

12. Dorothea Lange, Photograph of Migratory Mexican Field Worker's Home, Imperial Valley, California, *in Farm Security Administration/Office of War Information Black-and-White Negatives*, LIBRARY OF CONGRESS (1937), https://www.loc.gov/pictures/collection/fsa/item/2017769879/.

13. Dorothea Lange, Photograph of Unemployed lumber worker going with his wife to the bean harvest, *in Farm Security Administration/Office of War Information Black-and-White*

Many federal programs were developed to solve the crisis. Two particularly noteworthy programs are worth recalling as we consider solutions to today's homelessness crisis. While no one suggests the policies of the 1930s were perfect—they were not—it cannot be denied that a less civilized time in our history resulted in the federal government solving great problems that were as bad or worse than those that characterize our great problems today. This tells us that the federal government can certainly step up again.

One noteworthy Depression-era federal program, the Farm Security Program of 1937 ("FSA"), was born from programs of the earlier federal Resettlement Administration (1935). The FSA responded to the unsanitary conditions in migrant camps and, among other things, funded migrant camp living quarters with running water and sanitation.[14] These facilities were composed of largely canvas tents, with community centers and shared facilities.



15

Negatives, LIBRARY OF CONGRESS (1939), https://cdn.loc.gov/service/pnp/fsa/8b15000/8b15500/8b15572_150px.jpg.

14. Christy Gavin & Garth Milam, *A "Flat Tired People": The Health of California's Okies During the 1930s*, *in* CALIFORNIA ODYSSEY: DUST BOWL MIGRATION ARCHIVES 9, https://www.csub.edu/library/_files/DB_files/OkieHealth.pdf (last visited Sept. 24, 2021).

15. Dorothea Lange, Photograph of Farm Security Administration camp for migrant workers at Shafter, California, *in Farm Security Administration / Office of War Information*

16

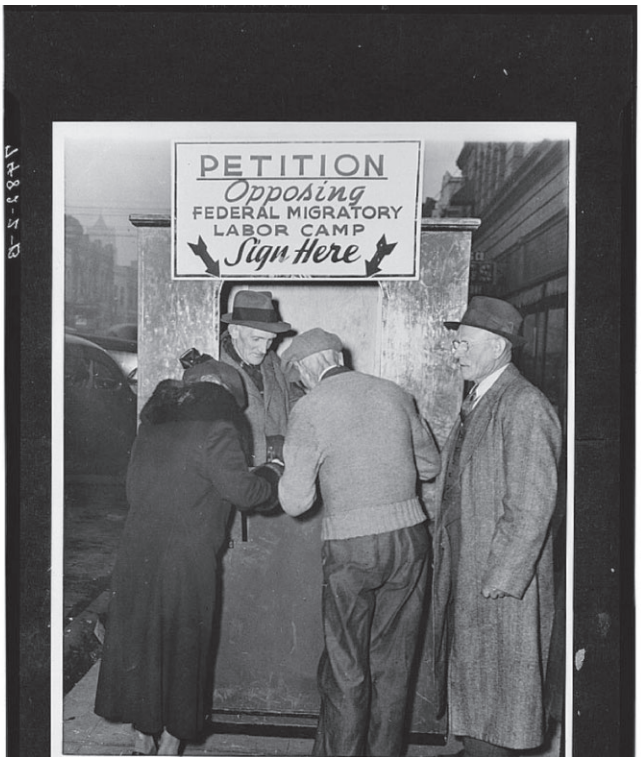
The federal government also constructed three brick and mortar "Greenbelt Towns" that were "complete communities" designed for "570 to 885 families" and had their own "stores, post office, community center, schools, parks, and playgrounds." These towns were "encircled" by the "green belt" from which the projects took their names, were "a girdle of farm and woodland" that served as "protection against undesirable building encroachment in the future."[17] The "greenbelt"

Black-and-White Negatives, LIBRARY OF CONGRESS (1938), https://www.loc.gov/pictures/collection/fsa/item/2017770545/.

16. Dorothea Lange, Photograph of Farm Security Administration camp for migrant workers at Shafter, California, *in Farm Security Administration / Office of War Information Black-and-White Negatives*, LIBRARY OF CONGRESS (1938), https://www.loc.gov/pictures/collection/fsa/item/2017771021/.

17. 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 154 (1935); *and see* Exec. Order No. 7027 (1935) (creating the "Resettlement Administration" which was responsible to establish "Greenbelt Towns" and other programs to resettle "destitute or low income families from rural or urban areas, including the establishment, maintenance, operation, in such connection of communities in rural or suburban areas.").

also to provided "garden tracts for those who wish[ed] to augment their income by raising some of their food."[18] Then, as now, neighbors did not like the idea of migrant labor camps, but the federal government established them anyway to respond to the large crisis.



19

Another important federal project of the time was the "Works Project Administration," The Final Report on the Works Project Administration Program 1935–43 (Report)[20] explains that while by the turn of the century, state and local governments had largely managed

18. 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 17, at 154.

19. Photograph of men signing a petition in opposition to federal migratory labor camps, *in Opposition to government migratory labor camps: Portland, Oregon: intermediary roll film*, LIBRARY OF CONGRESS (1939), https://www.loc.gov/resource/fsa.8e04024/.

20. GEORGE H. FIELD, FINAL REPORT ON THE WPA PROGRAM (1946) (*available at* http://lcweb2.loc.gov/service/gdc/scd0001/2008/20080212001fi/20080212001fi.pdf).

to shame relatives into caring for their destitute relatives and, as necessary, to house the "feeble minded," the "insane," orphans and "infirm" in "poorhouses" or other institutions, state and local governments were ill-prepared to deal with the mass displacement and unemployment of the Great Depression. Before the Social Security Act of 1935, "the number of persons receiving aid was small and the relief given inadequate[,]" but even so, the "relief given was permissive; localities could adopt it or not as they chose."

The Report observes that in the period leading to 1929, while "substantial improvements" had been made to provide relief to "unemployables," "little had been done toward developing any system of relief" that could deal with "the destitution arising from unemployment." The report explains that when some seven million people were unemployed and homeless or at significant risk of homelessness by the end of 1930, "it became necessary to institute new relief methods." While the federal government initially relied upon bolstering state and local programs, the federal government under the leadership of FDR, led the country out of its misery by establishing dozens of federal "New Deal" programs to scaffold, and then all but end, the nation's serious homelessness problem. Many of those programs persist today, but none establish "migrant camps" with running water and sanitation, and none provide a place for people living with serious mental illness or drug addiction to live and get help while there.

In solving the problem of homelessness for people capable of work, the WPA built or improved "651,000 miles of roads," "125,110 buildings of all kinds," "16,100 miles of water mains and distribution lines" and "24,300 miles of sewerage facilities," many airports and airport facilities, as well as put otherwise homeless people to work in "service projects," including "serving of hot school lunches," working to maintain "child-health centers," "operating recreation centers and literacy classes" and providing "many needed and valued community services."[21] The New Deal programs were not always politically popular, but the federal government was then, and is now, in the best position to weather local firestorms of opposition and provide meaningful relief for all.

---

21. FIELD, *supra* note 20, at III.

Today's homeless problem is vastly smaller in scale than that of the Depression, and its antecedents are no more complicated than the homelessness the federal government ended in the 1930s and early 40s. Today's problem is different in the sense that many, and perhaps most, of the people who make up the nation's chronic homeless people are not relatable "down on their luck people," looking for hard work, eager to return to American society, like many of the people whom the photographic history characterizes as the homeless population of the 1930s. Today's homeless population includes some number (no one really knows the exact proportions) of people who are severely mentally ill, drug addicted, or otherwise profoundly disconnected from American society, making them in the main less sympathetic characters, with fewer champions than the seven million unemployed people in the 1930s and early 40s. But the current situation is intolerable, and to solve it we must agree to a federalized program that charts a plausible exit from homelessness.

Homelessness today finds itself in a more shameful public policy framework than existed in the 1930s and 40s. Then, there were institutions for people called "unemployables" to be cared for—people too sick or disabled to work. While surely those institutions were not acceptable models of civil rights protection that anyone would model today, the fact is society made some effort then to appropriately house otherwise homeless people and today we spend a lot of money but do nothing meaningful to solve for the varied populations who live on the streets today. Perhaps most shocking is that today, American policy largely abandons severely mentally ill and disabled people to the streets.[22] Accordingly, our homelessness problem is worsened by the lack of any serious, coordinated national effort to ensure there is a place for citizens who cannot care for themselves to live and get better if they can; for addicts to get clean and sober; for the chronically or newly unemployed to get meaningful job training, or really any meaningful roadmap out of poverty or homelessness.

But while a desperate and serious problem for the homeless and housed alike, today's homelessness problem is one the federal government has solved before and can solve again. The only obvious impediment is strong federal leadership committed to a solution.

---

22. E. FULLER TORREY, NOWHERE TO GO: THE TRAGIC ODYSSEY OF THE HOMELESS MENTALLY ILL (1988).

II. Formula for Success: Diverse and Powerful Stakeholders Are Motivated to Solve Homelessness

While there are no universal champions for homeless people, there is universal agreement among powerful constituencies that we must solve the problem of homelessness. State, regional, and local governments, property owners, homeowner associations and neighborhood groups, medical personnel, hospitals (especially emergency rooms), first responders, educators, advocates for particular populations like veterans groups, AARP (American Association of People with Disabilities), youth groups, foster parents, law enforcement, and so forth, all want to see an end to the crisis. There is no one who thinks that it makes any sense for our primary facilities providing services to the severely mentally ill to be emergency rooms and jails; or that homeless people with drug-resistant TB should be released from emergency rooms with last resort drugs they have no way to store or take; or that kids age out of foster care with nowhere to go but the street; or that a victim of domestic abuse and her children have no place of escape but their car or worse; or that retirees with inadequate savings live in cars, tents, or RVs. That means there is a politically powerful group of people that includes many and perhaps most Americans who are motivated to solve the problem. That is a formula to get Congress' attention.

III. A Coherent Coordinated Policy Framework Is Needed: Local Sweep-and-Tow Programs Solve Nothing

Today, the governmental response to homelessness includes a dizzying uncoordinated patchwork of largely ineffective state and local programs funded by equally ineffective and uncoordinated federal programs; and ultimately local sweep-and-tow programs that evict homeless people from wherever they squat when the housed citizenry is fed up with the bounty of said ineffective responses.

From a policy perspective, sweep-and-tow programs are by their nature Sisyphean; a homeless person evicted from one sidewalk or park, simply moves to another such place. They are people, not vapor, and it restates the obvious that they will situate somewhere.

From a legal perspective, sweep-and-tow programs can expose municipalities to federal civil rights liability. Jailing or criminally citing a person for being homeless, or sweep-and-tow programs that criminalize homelessness or confiscate the property of homeless people, have been held to violate federal civil rights laws. Sweep-and-tow programs that take a homeless person's property can violate the U.S. Constitution Fourteenth Amendment Due Process Clause, as the federal court held in *Lavan v. City of Los Angeles*.[23]

The Ninth Circuit has also held that universally criminalizing sleeping on public property violates the Eighth Amendment's Cruel and Unusual Punishment clause. Thus, in *Martin v. City of Boise*,[24] the court decided that "as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter."

The "work arounds" to keep sweep-and-tow programs seem hardly worth the effort, although it is possible to avoid *Martin* liability, if that is a municipality's goal. Local ordinances that criminalize camping on public property in particular but not all city locations, have passed legal muster.[25] *Martin* itself "does not cover individuals who *do* have access to adequate temporary shelter, . . . but who choose not to use it."[26] This passage, repeated numerous times, justifies shelter programs that do not and cannot solve the problem.[27]

While FDR declared in his third term inauguration speech of 1944, an "economic truth" that "we have accepted as self-evident" in a "second Bill of Rights" that there is a "right of every family to have

---

23. 693 F.3d 1022 (9th Cir. 2012) ("[t]he government may not take property like a thief in the night . . . .").

24. 920 F.3d 584 (9th Cir. 2019)*, cert. denied*, 140 S. Ct. 674 (2019),

25. Frank v. City of St. Louis, 458 F. Supp.3d 1090 (2020).

26. *Martin*, 920 F3d at 617 n.8.

27. *See* Ari Shapiro, *Why Some Homeless Choose The Streets Over Shelters*, NPR (Dec. 6, 2012), https://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters; Rick Paulas, *This Is Why Homeless People Don't Go to Shelters*, VICE (Feb. 24, 2020), https://www.vice.com/en/article/v74y3j/this-is-why-homeless-people-don't-go-to-shelters; Shane Dixon Kavanaugh*, Portland Mayor Ted Wheeler's urgent mandate to move homeless campers into humane shelters isn't working*, THE OREGONIAN (Jan. 23, 2021), https://www.oregonlive.com/news/2021/01/portland-mayor-ted-wheelers-urgent-mandate-to-move-homeless-campers-into-humane-shelters-isnt-working.html.

a decent home,"[28] it was a policy pronouncement, not a legal one. As a result, in the absence of willing leaders, that "self-evident" right has not materialized. For its part, the United States Supreme Court has held that there is no "fundamental right to housing" in the Federal Constitution. Thus, the United States Supreme Court explained in *Lindsey v. Normet* that in the context of an Oregon eviction law, "[w]e are unable to perceive" that the U.S. Constitution has "any constitutional guarantee of access to dwellings of *a particular quality*, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement."[29] The Court resolved any uncertainty about who was responsible to solve the plight of the unhoused when it wrote "the assurance of adequate housing and the definition of landlord-tenant relationships are *legislative, not judicial, functions*."[30] While some commentators observe that the case extends only to housing of a particular quality and does not say there is no right to be "housed," that misses the point that the solution to the problem of homelessness lies with the legislature.[31]

Another example of the wisdom of the Supreme Court's observation that solving homelessness is the province of the legislature is a class action suit brought by homeless men in New York that resulted in a consent decree in which New York City committed itself to provide shelters to its homeless citizens.[32] The so-called "Callahan Consent Decree" (1981) did not solve the city's homeless problem; rather it caused the city to assume merely providing shelters was enough, resulting in shelters that were little worse than living on the street.[33]

---

28. *FDR and Housing Legislation: 75th Anniversary of the Wagner-Steagall Housing Act of 1937*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBRARY AND MUSEUM, https://www.fdrlibrary.org/housing (last visited Sept. 24, 2021); Franklin D. Roosevelt, President of the United States, State of the Union Address (Jan. 11, 1944).

29. 405 U.S. 56, 74 (1972) (emphasis added).

30. *Id.* (emphasis added).

31. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING RIGHTS FOR ALL: PROMOTING AND DEFENDING HOUSING RIGHTS IN THE UNITED STATES 118 (5th ed. 2011).

32. Callahan v. Carey, No. 79-42582 (Sup. Ct. N.Y. County, Cot. 18, 1979) (consent decree *available at* https://www.coalitionforthehomeless.org/wp-content/uploads/2014/06/CallahanConsentDecree.pdf).

33. *S*ee INDEPENDENT DEMOCRATIC CONFERENCE, HORRORS IN HOMELESS HOUSING: NEW YORK'S UNCLEAN, UNSAFE, DANGEROUS TEMPORARY SHELTER SYSTEM AND HOW TO FINALLY

The idea of some state and local governments to put the problem of "affordable housing" on the backs of private developers who did not create the problem and who are ill-equipped to solve it is similarly a non-starter. Developers can only build housing that pencils, or they cannot build anything. No lender will loan on a housing project for which there is an inadequate predicted return on investment. Further, all housing projects have built-in development costs, such as high land costs; high government fees, and the cost of paying construction workers market wages, etc. that do not allow developers to lose money to futilely attempt to solve public problems.[34] Moreover, the lack of "affordable housing" is but one problem contributing to homelessness in many communities and is a problem that local land use programs are largely responsible for creating.[35]

Regardless, homeless people include many different and difficult populations who are not served by private "affordable housing" in any event. In many ways, homelessness is a people problem. Many of the problem people cannot manage any housing that is not institutional in nature even if it is free to them: they cannot follow rules and are more likely than not to be evicted for any number of reasons. As for private housing, the problems are the same except that otherwise homeless people largely lack incomes, or if they have incomes, they are unlikely to be enough to afford any type of non-public housing.

TACKLE THE HOMELESSNESS EPIDEMIC (Jan. 2017) (*available at* https://www.nysenate.gov/sites/default/files/horrors_in_homeless_housing_-_full_report.pdf).

34. *See The cost of affordable housing: Does it pencil out?*, URBAN INSTITUTE, https://apps.urban.org/features/cost-of-affordable-housing/ (last visited Sept. 24, 2021); Daniel Herriges, *"Why Are Developers Only Building Luxury Housing?"*, STRONG TOWNS (July 25, 2018), https://www.strongtowns.org/journal/2018/7/25/why-are-developers-only-building-luxury-housing; Brenda Richardson, *Affordable Housing Is Doable For Builders And Buyers, But Here's The Problem*, FORBES (June 2, 2019, 8:37 AM), https://www.forbes.com/sites/brendarichardson/2019/06/02/housing-affordability-report-outlines-challenges-solutions-for-turning-renters-into-homeowners/?sh=5314456b3397.

35. Jacob Passy, *These cities have the toughest laws for home builders—and the highest property prices*, MARKET WATCH (Dec. 28, 2019, 11:22 AM), https://www.marketwatch.com/story/these-cities-have-the-strictest-regulations-for-building-new-homes-and-the-highest-property-prices-2019-12-24; Gillian B. White, *How Zoning Laws Exacerbate Inequality: Such laws aren't just a headache for developers, economists believe. They're bad for (nearly) everyone*, THE ATLANTIC (Nov. 23, 2015), https://www.theatlantic.com/business/archive/2015/11/zoning-laws-and-the-rise-of-economic-inequality/417360/; Sanford Ikeda & Emily Hamilton, *How Land-Use Regulation Undermines Affordable Housing* (Mercatus Center at George Mason University, Research Paper, 2015) *(available at* https://www.mercatus.org/publications/regulation/how-land-use-regulation-undermines-affordable-housing).

The net result is that public or private "affordable housing" will not solve the problem.

IV. Land Use and Building Code Constraints Prevent Solutions

Ending homelessness requires providing places for the entire spectrum of otherwise homeless people to be. Society has been unwilling to reinvest in institutions and has been unable to build enough multifamily or other stick-built housing to house all homeless people who could adopt to such living arrangements. Moreover, zoning and building codes foreclose alternative living modalities like Quonset huts, RVs, tents, tipis and tiny houses, that would enable society to shelter and serve many of its homeless citizens. So, homeless people wait on the street for years, and sometimes their entire lives, for a place to call home to open up.

Zoning and building codes must be modified to enable immediate available housing options, so policy makers can put an end to years of long waiting lists, and shelter people of all types. It must be possible to tow a homeless person's RV to a designated place, or relocate his or her tent, or to move him or her to a community of tiny houses, tipis, Quonset huts or canvas tents (like the federal government provided during the Depression), with needed services to care for the population. It must be possible to establish immediately available situations that if necessary, rely upon portable toilets, mobile handwashing, shower trucks, food trucks, common refrigeration, and the like.

Instead of city officials ordering the towing of an RV from a public street to a lot for destruction, it must be possible to tow it to a place where it and its occupants can be. This recognizes that someone lives in that RV and has nowhere else to go; and until we have something else for them, it is cruel in the extreme not to tow their home to a designated, suitable, safe place. Imagine being a homeless woman who lives in an RV. A door that locks in a derelict RV is far superior to the street, where there is no keeping out predators. Depriving her of her RV serves no purpose other than condemning her to serious risks of personal harm.

Or consider people who are evicted from public housing for rule violations stemming from serious mental illness or drug addiction.

They are evicted to the streets. It is impossible to find private housing for homeless people with a history of eviction and extremely difficult to find public housing for persons having that profile. Moreover, if an otherwise homeless person finds public housing but goes to jail for any period, they lose their apartment and has nowhere to go when eventually released. Consider the example of "Todd," a man in his late 40s or early 50s, afflicted with serious mental illness ("SMI") that came to light in his late teens. His SMI causes him to devolve into uncontrollable rages and experience extreme paranoia. While homeless for most of his adult life, after many years, a social service agency finally finds him a single-room occupancy hotel, and he weeps with joy. A few months later, he has a significant SMI episode, resulting in his arrest and jail. In his absence, he loses his apartment for good. When he is released, he again has nowhere to go.[36]

Removing land use and building codes barriers to immediate solutions to the homeless crisis is essential. Without these barriers society can provide a place for jails and emergency rooms to release troubled populations other than the street.

V. GETTING HOMELESS PEOPLE INTO SAFE AND ADEQUATE SITUATIONS, FROM THE LENS OF HOMELESS PEOPLE AND EXPERTS. RECOGNIZE THAT THERE ARE PEOPLE WHO UNDERSTAND WHAT WORKS; THAT THERE ARE VERY DIFFERENT POPULATIONS TO BE SERVED, AND THAT NO ONE SOLUTION WILL SOLVE THE PROBLEM

The housed often have particular ideas about what homeless people want or need and appoint non-expert, well-meaning people to offer to find solutions. But to solve this problem, the housed must solicit input from the homeless populations to be served, from social services, medical, and law enforcement experts, about what works. This provides the greatest chance of success. Most of the housed do not understand the complicated puzzle that is homelessness. Unless a person has been exposed to the problem, or studies it, they cannot possibly understand or untangle it.

---

36. *See* BEDLAM: AN INTIMATE JOURNEY INTO AMERICA'S MENTAL HEALTH CRISIS (International Documentary Association 2019).

Contrary to what many people think, it is a fallacy to assume that needy populations must be near the services they require. In fact, society's demand that homeless people figure out, identify, connect with, and somehow get to services, wait in line for them, do an "intake" and be told to come back to repeat the process, diminishes the possibility of successful services ever happening. This tragic situation repeats itself regardless of how physically proximate the homeless person is to said services. To be successful, services can and should come to the needy population to be served and not the converse. Service providers must be willing and able to travel. To be reasonably efficient and effective, establishing services where otherwise homeless people will live is important. This has two benefits. It enables services to be provided when they are needed to serve the target population, but it also benefits service providers because they know where to go, who to serve, and can do so in safety. It is unfair to ask a social worker to enter an unsanctioned encampment when she has no idea who is there or whom she will meet and has no meaningful security to protect her.

Traditional shelters often touted as a community's solution, are not the answer. Shelters where homeless people go, by appointment or if they manage to get a bed after waiting in long lines to stay only for the night, solve little. Homeless people will tell this to anyone who will listen. There are many reasons that homeless people avoid shelters. Some shelters are simply unsafe.[37] It is a fact that outside of some shelters, bad actors "enjoy" hanging out to beat up, harass and steal from homeless people for sport.[38] Many homeless people do not like the religious proselytizing that pervades some facilities or being required to sit through religious services.[39] Some homeless

37. *See* MYRON MAGNET, THE DREAM AND THE NIGHTMARE: THE SIXTIES LEGACY TO THE UNDERCLASS 118 (2000); Jeremy Jojola & Katie Wilcox, *We asked 100 homeless people if they'd rather sleep outside or in a shelter, A vast majority of the people experiencing homelessness who spoke to 9Wants to Know said they'd rather sleep outside in the cold than a shelter. Their reasons varied*, WUSA 9, http://www.wusa9.com/article/news/investigations/we-asked-100-homeless-people-if-theyd-rather-sleep-outside-or-in-a-shelter/493638711 (last visited Sept. 24, 2021).

38. Kylyssa Shay, *Why Don't Homeless People Use Shelters*?, SOAPBOXIE (Jan. 11, 2021), https://soapboxie.com/social-issues/why_homeless_people_avoid_shelters.

39. *See id.*; *Shelters are for Someone Else, Part 1*, GUIDE 2 HOMELESSNESS BLOG (Oct. 25, 2004), http://guide2homelessness.blogspot.com/2004/10/shelters-are-for-someone-else-part-1.html.

people are banned from shelters for misbehavior or are unable or unwilling to comply with shelter rules and are ultimately thrown out. Other homeless people refuse shelters due to legitimate fear of disease and parasitic infections or an unwillingness to comply with rules that require they be separated from family, significant others, or pets. "No pets" prohibitions are particularly cited as a reason homeless people refuse to go to shelters.[40]

A segment of the homeless population is too sick to get in or stay in most of the housing options available today, including shelters.[41] There is a significant segment of homeless people who suffer from untreated, severe mentally illness for whom private housing and nonspecialized public housing, is unsuited. They require specialized facilities that, in fact, no longer exist. A bit of history is in order. America demolished most of its mental institutions in the 1960s and 70s with no replacement, in favor of "community-based programs" focused on "prevention" that never did or could serve the population living in institutions already afflicted with mental disease.[42] The states that had formerly been responsible for the care of the mentally ill and that had established mental hospitals were relieved of that duty by the federal government.[43] President Kennedy is primarily responsible for relieving the states of the obligation to care for the mentally ill. He had a personal dislike of mental institutions, likely because his sister had been sent to such a facility after a lobotomy, exposing the fact that her case and many others, were horrific.[44] In 1962, Ken Kesey wrote *One Flew Over the Cuckoo's Nest*, which turned public opinion against mental institutions. President Kennedy successfully established federal laws to fund turnover of the care of the mentally ill to "community-based" mental illness "prevention" programs.[45] However, Kennedy's program made no meaningful provision for severely mentally ill people who required institutionalized treatment and who could not benefit from the particular version of community-based care that the new laws established.

40. Shay, *supra* note 38.
41. *Id.*
42. TORREY, *supra* note 22, at 118.
43. TORREY, *supra* note 22, at 96, 151–55.
44. TORREY, *supra* note 22, at 103–06.
45. TORREY, *supra* note 22, at ch. 5.

The tragedy-in-making was set to happen. State mental hospitals closed, and their patients were simply tossed into the street, where they live and die to this day.[46] President Reagan (wrongly credited for the problem), decided that the federal government should not be funding the program of community care, rather that communities should be returned that responsibility, and so he largely cut off federal funding that Kennedy had established.[47] But the states never took the mental institution program back, and instead, inadequately took on community-based treatment. And, so, we have what we see today—people with severe mental illness on the streets with nowhere to go but emergency rooms and jails.

Further, any solution must consider that a significant segment of the homeless population is addicted to narcotics. This means that they, like the severely mentally ill, are unsuited for traditional housing options and require options with significant treatment and other support.

These are but a few examples of how the problem is inordinately complex and why simply building "affordable housing" will not solve the problem and why we need to consult with experts. We must keep in sharp focus that it is critical that there be immediately available suitable shelter options for all homeless people, regardless of their sobriety or history. In the absence of this, they will continue to wander the streets to their detriment and ours.

VI. FISCAL CONSTRAINTS

It is not possible to provide stick-built housing for all homeless people; if it were, we would have done it decades ago. The reality is that publicly subsidized stick-built housing is exceedingly expensive and takes years to establish in too few numbers, to solve the problem. A policy problem is that its advocates more often than not, demand expensive architectural features and so-called "Leadership in Energy and Environmental Design" or "LEED" certification compliance, which

46. TORREY, *supra* note 22, at 155 ("What federal and state officials thought was going to happen to the hordes of discharged patients is one of the abiding mysteries of our time."); *and see* Chapter 10.

47. TORREY, *supra* note 22, at 196–98.

adds to the cost and delay for this housing type. Stick housing is an important part of the toolbox to solve homelessness, but it cannot and should not be the only tool. The fallacy that stick-built housing is the only tool is why we find ourselves with an intractable and unacceptable homeless problem.

VII. FISCAL OPPORTUNITY

In the uncoordinated homeless services ecosystem, there is money, a lot of it—money otherwise spent Band-Aiding the fiscal arterial bleeding that characterizes homelessness. It is undeniable that homeless people cost enormous amounts of public and private money and impose significant drains on jails and hospital emergency rooms, with little palpable return on that investment. These "hard costs" are costs apart from the less considered social costs in terms of lost participation in society, lost children, children who age out of foster care and feed the cycle, and crime and victimization of both homeless people and others.

No one knows, and no study has been done, that attempts to figure out all public and private costs of homelessness. It may be impossible to do so. But what would happen if the federal government redirected the money it spends on piecemeal programs designed to solve the problem, but that do not do so? It is easy to say it is too expensive to solve this problem, but looking at the numbers, it is also easy to see that doing nothing costs enormous amounts of money—money we should be able to better spend on long-term solutions. And what if permanently solving homelessness costs more than we spend now? The electors have shown a willingness to spend enormous amounts of money to solve the problem. Surely, it is worth a try to actually achieve that goal.

Consider that in 2017, HUD estimated each homeless person costs $40,448 per year in 2002 dollars in a study that did not evaluate all of the costs.[48] Another study opined that for a single homeless person "in four Canadian cities, institutional responses (jails, hospitals,

48. UNITED STATES INTERAGENCY COUNCIL ON HOMELESSNESS, ENDING CHRONIC HOMELESSNESS IN 2017 (2017) (*available at* https://www.usich.gov/resources/uploads/asset_library/Ending_Chronic_Homelessness_in_2017.pdf).

etc.) cost $66,000–$120,000 annually, [and] emergency shelters cost $13,000–$42,000 annually . . . ."[49]

Santa Clara County, California alone estimates the cost of homelessness to that community between the years of 2007 and 2012 was "$520 million per year."[50] A recent study commissioned by the Mental Health Treatment Research Institute LLC concludes that those who have health insurance who are "high" medical service users, cost on average $41,631 per year in health care costs.[51] That study explains:

> People struggling with homelessness are often frequent users of emergency departments. On average, they visit the emergency room five times per year. The highest users of emergency departments visit weekly. Each visit costs $3,700; that is $18,500 spent per year for the average person and $44,400 spent per year for the highest users of emergency departments.

Another study explains that "80% of emergency room visits made by people struggling with homelessness is for an illness that could have been treated with preventative care."[52]

There are costs to society of homelessness that these studies may not factor that are worth considering. They include:

- Law enforcement costs—crime, crises, public health and safety.
- Public works costs for refuse collection and cleaning streets and parks of human waste.
- Transit district funds to clean stations, buses, and trains of human urine/feces/trash.
- Lost transit ridership and fees because it is too filthy and dangerous for business or family riders to use.
- Federal, state, and local department of social services case management and response.

---

49. *Cost Analysis of Homelessness*, HOMELESS HUB, https://www.homelesshub.ca/about-homelessness/homelessness-101/cost-analysis-homelessness (last visited Sept. 24, 2021).

50. *Home Not Found: The Cost of Homelessness in Silicon Valley*, DESTINATION HOME, https://destinationhomesv.org/wp-content/uploads/2015/05/FactSheetDestinationHome.pdf (last visited Sept. 24, 2021).

51. SHODDARD DAVENPORT, TRAVIS J. GRAY, & STEPHEN P. MELEK, HOW DO INDIVIDUALS WITH BEHAVIORAL HEALTH CONDITIONS CONTRIBUTE TO PHYSICAL AND TOTAL HEALTHCARE SPENDING? 1 (2020) (*available at* https://www.milliman.com/en/insight/How-do-individuals-with-behavioral-health-conditions-contribute-to-physical).

52. *The Cost of Homelessness Fact*, GREEN DOORS, https://greendoors.org/facts/cost.php (last visited Sept. 24, 2021).

- Non-profit money spent on homelessness whether through government grant or private donors.
- School programs for homeless school children.
- Enforcing sit-lie ordinances.
- Tow contracts to remove the vehicles and RVs of homeless people, costs of sweeps to remove encampments, etc.
- Veteran homeless programs.
- Drug treatment programs.

The point is that there are huge sums of money poured into solving the homelessness problem in a way that is an uncoordinated patchwork of approaches that has solved little. There are rational reasons to decide instead to dedicate resources to developing an effective, comprehensive solution.

VIII. Basic and Necessary Premises of a Comprehensive Solution

There are several premises that policy makers must share to solve the problem of homelessness.

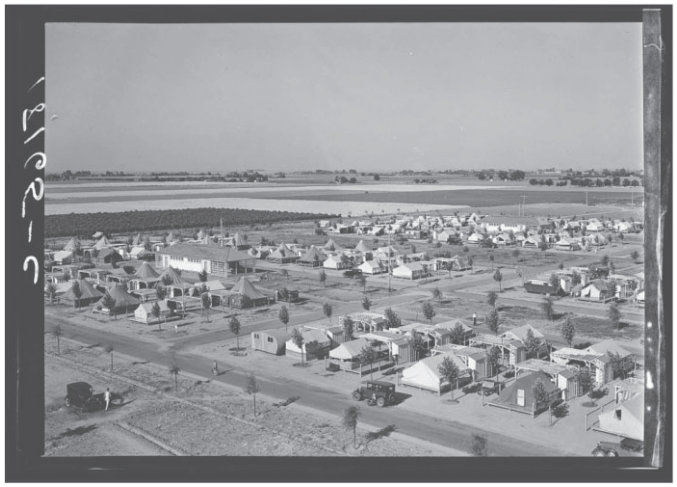
First, it is necessary to commit to solve homelessness and understand that any solution will have two segments: immediate and long term. We have to decide that in the immediate term, it is acceptable that otherwise homeless people will live in government-sanctioned places like tents, tipis, RVs, tiny houses, and Quonset huts, with sanitation provided minimally—by portable toilets with handwashing, shower trucks, laundry trucks, food trucks, garbage service, centralized refrigeration and electricity, frequented by social service representatives who target, and are responsible to figure out and maintain, needed services. And the duration of stays in such facilities could morph into a long-term solution, for some people.

When the federal government established such places during the Depression, their appearance was clean, their facilities adequate and not so different than places that even rich people now choose to live. Consider below, a community in Las Vegas where former Zappos CEO Tony Hsieh lived[53]:

53. Diana Budds, *Building community in Las Vegas with Airstreams: Tiny homes are helping the city's downtown turnaround*, CURBED (Mar. 29, 2018, 10:00 AM), https://www.curbed.com/2018/3/29/17163698/tiny-house-las-vegas-zappos-downtown-project.

54

Non-traditional immediate solutions are not inhumane. Rather, it is inhumane to demand that homeless people remain in danger and squalor on the streets until the housed get around to building them a stick-built home of the sort that the housed will approve. Compare how rich folks choose to live in Las Vegas in the above image with a canvas tent migrant camp run by the federal government during the Depression[55]:



54. Photograph of Llamalopolis, *in Llamalopolis, as Urban Tiny Living Oasis*, TINY HOUSE BLOG, https://tinyhouseblog.com/tiny-house/llamalopolis-an-urban-tiny-living-oasis/ (last visited Sept. 24, 2021).

55. Lange, *supra* note 15 (Photograph of Farm Security Administration camp for migrant workers at Shafter, California).

It cannot be seriously disputed that the above image is far superior to the living conditions of today's homeless. We must accept that not all homeless people want or need stick-built housing. In fact, not all wealthy people want that either.

Second, we must recognize that local land use and other regulatory programs that forbid non-traditional housing solutions must be changed to enable America to solve its homelessness problem. All housing types and non-traditional situations (portable toilets, shower trucks, etc.) must be allowed. Relatedly, the regulatory framework for housing development can no longer be controlled by the "costs of growth" and anti-"growth" advocates. States should carefully evaluate administrative agency leadership to ensure that the persons who manage "growth" are willing participants in solutions to allow growth and the change that comes with it, to happen.

Third, it is critical to recognize that there are differing populations of homeless people with differing needs. It is important that housing situations be tailored to the distinct populations of America's homeless people and to the societal objectives for their care. Relatedly, it is important to accept that not all populations of homeless people are sympathetic.[56] We have to be willing to provide minimally adequate shelter for people viewed as freeloaders.

Fourth, it is essential to reject that homeless people do not deserve the same level of safety and law enforcement response as anyone else. "Self-governing" encampments should be a non-starter. No one should be expected to resign to live under a "self-governing" despot or despotic committee, apart from the rules of civilized society that the rest of "us" are expected to adhere to and benefit from. We are one people and we all should benefit from and be burdened by the same laws. Society legitimately wants and expects otherwise homeless people to live in a way that is safe for all of us.

Finally, it is critical to recognize that there are no political villains to blame—the problem of homelessness has worsened under both Democratic and Republican administrations. We are in this political moment, together.

---

56. *See* VICE, *Inside Slab City, the Lawless City in the Desert*, YOUTUBE (May 15, 2012), https://www.youtube.com/watch?v=0vVCSUafFVI&list=PLh0vqAIo2BuDfU1ULMac0w__vj-xl0Gm_&index=11&t=0s; *I was hunted at Slab City*, REDDIT (Dec. 4, 2015, 3:19 PM), https://www.reddit.com/r/solotravel/comments/3ve70i/i_was_hunted_at_slab_city.

IX. TWO GUIDING STARS TO THE SOLUTION: (1) PAY ATTENTION TO HUMAN BIOLOGY BY KEEPING HOUSING GROUPS SMALL, AND (2) DO NOT CONCENTRATE FACILITIES

There are two guiding stars we must follow in establishing any housing solutions for homeless people. The first is to limit the size of communities we establish for otherwise homeless people, and the second is a variant of environmental justice, to avoid concentrating facilities in particular areas.

First, the maximum size of any community for the otherwise homeless cannot be composed of more than 150 people. Oxford Professor Robin Dunbar has established that 150 people is the cognitive number of people who can live together and maintain stable social relationships.

> According to the theory, the tightest circle has just five people—loved ones. That's followed by successive layers of 15 (good friends), 50 (friends), 150 (meaningful contacts), 500 (acquaintances) and 1500 (people you can recognize). People migrate in and out of these layers, but the idea is that space has to be carved out for any new entrants.[57]

As we establish communities where we expect otherwise homeless people to live, we should observe "Dunbar's Number" and ensure that homeless communities do not exceed it. No one wants a repeat of the "projects."

Second, the places where homeless housing is established must be distributed and not concentrated. Concentrating communities of otherwise homeless people in particular areas risks blight, which ultimately solves nothing. Worse, it results in the further social disconnection of the politically ignored housed. Relatedly, there are good policy reasons why communities of otherwise homeless families with children should be situated in the best school districts to ensure that formerly homeless children have the best chance at life success and societal integration. More on this follows.

---

57. Christine Ro, *The theory of Dunbar's number holds that we can only really maintain about 150 connections at once. But is the rule true in today's world of social media?*, BBC (Oct. 9, 2019), https://www.bbc.com/future/article/20191001-dunbars-number-why-we-can-only-maintain-150-relationships.

X. A Proposal for a Federal "Homelessness New Deal"

Congress should adopt a mandate that every city (big and small) in America must have a proportional national share of housing for people who are otherwise homeless, on particular time frames, and to maintain that housing. The law would provide minimum standards and for regular audits. The need for new facilities in each community would be reassessed annually. As homelessness is reduced, so is the need for more such places. Everyone is incentivized to solve the problem. The mandate comes with federal money otherwise spent by the federal government on homelessness and its trappings. State and local governments are expected to distribute state money otherwise spent on the problem, on solving this problem. They can choose otherwise, but their federal funding will dry up if they choose to do so. In other words, all levels of government would be expected to commit to the program and its success.

Each and every city and other unit of government (counties, villages) would be given a certain period of time with achievement milestones to figure out where housing for their state proportion of otherwise homeless people will be established within its boundaries, what that housing will look like, and then to establish it.

Such programs may entail condemning and buying nearby homes or commercial establishments to create a "buffer" around them for political acceptability. Such purchased properties can be either resold with a covenant that the owner understands who/what their neighbor is and/or that the property may be used for other palatable public objectives.

However, if local communities fail to meet their timeline milestones, the federal government is empowered to step in and do whatever is left to be done, for them. In which case, the federal government will begin where the local actors failed—they will designate the places and the housing types for the local government's proportional share of homeless people if that has not been done. The federal government will develop the housing if that has not been done or will perform maintenance, all using federal funding the locality would otherwise have received to do so.

Once communities establish (and maintain) housing for their proportion of homeless people, then state and local laws against camping in unsanctioned public places are expected to be enforced.

All such housing establishments would be required to have particular minimum characteristics developed by experts must have at the least:

1. Housing of some type (i.e.): tents, Quonset huts, tipis, RVs, single room occupancy rooms, tiny houses *and* the following: sanitation, a way to get and stay warm in winter, refrigeration, storage, electricity, laundry and shower services on site or on weekly laundry and shower trucks, food services—on site or trucks, services to meet the population, including adequate funding for law enforcement and social services which come to the facility; each establishment is limited to no more than 150 residents. And these facilities cannot be concentrated in particular areas of town.
2. Facilities for families of school-aged children must come with excellent childcare, parenting training, drug rehab, intensive supports, including "Individualized Educational Plan" ("IEP") or "Section 504" and related educational support for the children. Navigating the IEP and 504 maze is beyond the ken of most housed parents. It is daunting in the extreme for homeless parents.
3. There will need to be a formula for distributing particularly difficult groups, whom smaller communities cannot manage (severely mentally ill people, pedophiles released from jail, people who simply refuse to follow any rules, etc.). Along the lines of other social programs, these more difficult populations would have to come with higher federal/state subsidies and a detailed management program, developed by experts.

Within these basic requirements, state and local governments would be authorized to make public-policy-driven housing choices and to make targeted investments. Thus, a community might choose among the following:

1. Prioritize public subsidized stick-built housing for families with school-age children. Federal incentives might also provide for larger metro areas to establish this type of housing in cities with the highest rated school districts.

   a. Intensive parenting education, support, interventions, high quality day care, high quality before/after school care—both linked to children's and science museums, outdoor programs,[58] etc.; with skilled navigators to ensure IEP/504 and related educational services happen, to cut through the inevitable red tape and bureaucracy.
   b. There might be extra, targeted funding for public schools serving these housing developments.
2. Prioritize SROs[59] for veterans without school-age children with whom they live.
   a. Shared experiences may contribute to sense of community and improve chances of success.
   b. Provide targeted veterans' services.
3. Establish a youth-hostel model for homeless youth aging out of foster care with no social skills and little to no connection with society.
   a. Provide intensive targeted services.
   b. Promote GED and college programs, with educational supports to provide youth with the best chance of success and integration into society.
4. Establish a youth hostel model or SROs for elderly retiring with inadequate savings to afford private housing.
   a. Fund basic activities akin to "elder hostel" adventures available at low or no cost.
   b. Connect to appropriate volunteer opportunities.
   c. Provide geriatric medical services, onsite.
5. Establish RV/tent/tiny house communities for other populations with drug rehab/job counseling/social services where *the services come to them*—and it is the social service provider who has the *responsibility for managing* those contacts. These communities will likely serve the majority of homeless people.
   a. These places could have progressive levels of security to address segments of the population who refuse or are unable to follow society's rules. That population who cannot

58. *Featured Programs*, TRACKERS PORTLAND, https://trackerspdx.com/ (last visited Sept. 24, 2021).

59. SROs are single room occupancy residences with individual bathrooms, but shared eating and communing facilities.

follow rules due to mental illness should be place in facilities where they can be treated. People who simply refuse to follow rules must either find a private arrangement on their own or accept the adequate, but modest, living situation the public provides, which would be tailored to this population.

b. Some housing should be tailored to persons with serious mental illness who can safely live outside of an institutionalized setting, but need help with medication management.

Federal laws would restore funding for institutionalized care for persons with serious mental illness that cannot be safely managed in less secure environments. And then each state would be expected to use that money to establish an adequate number of federally funded mental institutions, where the seriously mentally ill can be treated and, if untreatable, where they humanely stay until unsupervised treatment is possible. Organizations with specialty in the unique problems suffered by the severely mentally ill would establish, manage, and oversee the protocols.

Federal law should adjust the "danger to oneself or others standard" so it is actually possible to commit seriously mentally ill people to treatment who need it, for so long as they need it. Now it is said that to be committed, a person either has to be actually actively trying to kill her doctor or actively trying to kill herself in front of her doctor to meet the standard. And almost no one meets it. As a consequence, the seriously mentally ill are doomed to roam the streets where they are abused, killed, and sometimes, commit crimes.

The federal government would also introduce something like the Works Project Administration to put people to work in reasonable paying jobs to fix ailing infrastructure, construct new housing (whatever that might look like), and retrain people whose jobs have been lost or will be lost to automation. The people who would be put to work should include otherwise homeless people, with the goal being to (1) teach them job skills, (2) enable them to get experience and references, to be able to succeed, and (3) reconnect with American society and see themselves as important contributors to it.

XI. THE ULTIMATE GOAL OF A 2021 FEDERAL NEW DEAL WOULD BE STABILIZING AMERICAN SOCIETY AND BENEFITTING ALL AMERICANS

Homelessness is a critical social problem that divides us. Solving it allows us to return to being a nation of people invested in the future of our great country. In his inauguration speech for his third term, FDR made poignant observations about the expected results of his "second bill of rights" which included the right to decent housing. They are repeated in closing here:

> All of these rights spell security. And . . . we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.
>
> America's own rightful place in the world depends in large part upon how fully these and similar rights have been carried into practice for our citizens. For unless there is security here at home there cannot be lasting peace in the world.
>
> . . . .
>
> I ask the Congress to explore the means for implementing this economic bill of rights—for it is definitely the responsibility of the Congress so to do. . . .[60]

Committing to solving our homelessness crisis would go a long way toward re-establishing a United States in which all citizens see themselves as vital parts. But it seems certain that it will take an act of Congress to achieve that.

---

60. Franklin D. Roosevelt, President of the United States, State of the Union Address (Jan. 11, 1944) (*available at* https://www.fdrlibrary.org/address-text).

HURDLES TO JUST COMPENSATION

JEREMY P. HOPKINS*

* Jeremy Hopkins is an attorney and partner with Cranfill Sumner LLP in Raleigh, North Carolina. His practice is dedicated exclusively to representing property owners in eminent domain, inverse condemnation, and other constitutional property rights matters. He has represented numerous property owners against a variety of condemning authorities in state and federal courts at both the trial and appellate levels.

INTRODUCTION

Some of the worst atrocities in world history have come when the masses, or at least a controlling faction, are blinded by what they perceive to be the greater good. "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent."[1] Far too often, the pursuit of the perceived collective good stamps out the fundamental rights of the individuals standing in its path.[2] The rights of the individual become disposable. This phenomenon is all too real for property owners in the path of eminent domain.[3]

While the Constitution memorializes the fundamental right to private property, and specifically just compensation, the collective pursuit of public projects has trampled the rights of individual property owners. It is for this reason alone that Americans now live under a Constitution that guarantees just compensation but laws that guarantee otherwise.

The laws have developed to protect the takers, not the individuals targeted by one of the most invasive powers of government. In the end,

---

1. Olmstead v. United States, 277 U.S. 438, 479, 48 S. Ct. 564 (1928) (Brandeis, J., dissenting).

2. The U.S. Supreme Court recently declared: "The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom." Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021). It then noted that "protection of property rights is 'necessary to preserve freedom' and 'empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.'" *Id.*

3. State Highway Dep't v. Branch, 152 S.E.2d 372, 374 (Ga. 1966) (recognizing that "[t]oo often . . . the desire of the average citizen to secure the blessings of a good thing . . . blinds them to a consideration of the property owner's right to be saved from harm by even the government").

the thirst for public projects and the zeal to attain them has left the individual property owner—the prey in the property rights contest—in the most precarious position.

For those on the outside looking in or who have never had their property targeted by eminent domain, these claims may seem surreal. To those who wield the powerful stick of eminent domain, these claims may seem overstated. To individuals on the opposite end of that stick, these claims are real; they are truth.[4]

While practitioners and academics alike can argue over theory or what the law should be, the law is what it is. This Article sheds light on the actual state of eminent domain law and the burdens courts have imposed on owners in America's eminent domain courts today.

Imagine being told that you have to sell part of your property to your neighbor. You do not have a choice. The neighbor can put the burden of proving the value of the property on you, and, if you do not meet that burden, the neighbor gets to name the price. In setting the price, you cannot consider actual damages that will be inflicted to the property that you will be left with after the sale. You have to live with these damages forever and without compensation.

Property owners forced to sell their property under eminent domain do not have to imagine this scenario. They live it. The only difference is that the neighbor in the hypothetical is the government.

Owners seeking just compensation must overcome many hurdles, some of which are insurmountable. This Article does not cover all the burdens these owners shoulder, only some of the most glaring ones. The hope is that the reader will gain better understanding into what owners face each day in courts throughout America.

---

4. Part of the problem facing property owners today may be much deeper rooted, stemming from the denial of absolute truth and the abandonment of fixed, enduring principles. This departure presents a discussion far beyond the pages of this Article, but, suffice it to say, denial of the existence of certain fixed principles is also a denial of gravity. As the late Ravi Zacharias pointed out when touring the Wexner Center for the Performing Arts at Ohio State University, "America's first deconstructionist building," the architect did not use the same principles in constructing the foundation that he did in building the truth-defying parts of the building. RAVI ZACHARIAS, CAN MAN LIVE WITHOUT GOD 21 (1st ed. 1994). So, too, a legal system cannot stand on any foundation other than those fixed, enduring truths our Founders etched into our constitutional form of government. Recognition of the individual's inalienable rights—fixed, enduring rights that come from God, not government—is an individual's only defense against the masses, those in power, or the collective desire to achieve the prevailing "greater good" of the moment.

I. A Review of the Common Owner's Experience Reveals the Owner's Plight

The following scenario illuminates the owner's plight in eminent domain cases. A city land agent sends you a letter, stating he would like to speak with you about a sewage project that will affect your home. You call the number on the letter and schedule a meeting with the land agent.

During the meeting, the land agent tells you the city is going to build a sewage treatment plant about 150 feet from your front door. He also says the city cannot build the sewage plant without taking some of your front yard. The land agent then pulls out a map to show you a drawing of the project. The map shows that, after the project, your home will face the sewage pond. The pond will be located on the neighbor's property just on the other side of your property line. It also shows that the service road for the sewage pond will run through your front yard.

Before this project, you had a home on one acre with a front yard covered in mature trees and landscaping. The trees provided privacy, peace, and tranquility. After the project, this buffer will be gone. You will have a view of the sewage pond and will have to endure its attendant odors.

You ask, "What happens if I do not want to sell part of my front yard?" The agent responds, "Then we will have to take it." After he is finished explaining the project, the agent says he will come back later with an offer. He gives you a copy of the map and leaves.

Several weeks pass, and the land agent calls to schedule another meeting. During this meeting, the agent informs you the city is offering only $15,000 for the quarter acre of your yard that is needed for the project. When you ask about the depreciation in the value of your home after the taking (i.e., damages), he says the city cannot pay you for that because only the service road will be located on the quarter acre the city is taking from you. He explains that no part of the sewage pond will be on your property.

The agent is very sympathetic and tells you he is sorry. He acknowledges your property will not be nearly as desirable or valuable after the project. However, he explains that he has to follow the law. He says the city has to be able to explain any purchase to its taxpayers

and its auditors so the city must be careful not to pay any more than it is legally required to pay.

He informs you that in your jurisdiction, the government, unlike a private developer or a private party building a similar project, does not have to pay for certain damages it causes when it takes property by eminent domain. He explains that because only the service road, as opposed to the sewage pond itself, is on the quarter acre the city is taking from you, the city cannot compensate you for the loss in value of your home caused by being next to a sewage pond.

You ask, "I cannot get paid for the loss in value caused by your project for which you are taking my front yard?" The agent seems very sympathetic but again explains the city cannot pay for any depreciation in value that it is not legally required to pay. Unfortunately, according to the agent, you cannot get compensated for the depreciation in your home, even if you would get compensated for this reduction in value if you voluntarily sold your property to a developer or private party that was doing a similar project.

You are shocked, but the worst is yet to come. You cannot believe the government gets a condemnation discount and that you have to bear that loss. You then say, "Well, even if I cannot be reimbursed for the damage caused by the sewage pond, the quarter acre you are taking is worth $30,000, not $15,000." The agent then says the most he can offer is $20,000. He explains that other owners have settled with the city and that you will have to hire an attorney and go to court if you do not accept the city's offer. He explains, albeit sympathetically, that you will not be compensated for those expenses.

The agent leaves, and you immediately call an attorney. The attorney proceeds to inform you that, yes, you can go to court. However, the burden of proving the value of your property is on you. Moreover, even if you prove the city is wrong—i.e., that the land taken from you is worth $30,000, not just $15,000 or $20,000—you will have to pay attorneys, appraisers, and any other necessary experts. The city does not have to reimburse you for these costs, even if you prove the city is wrong or unreasonable. Thus, there is no way you can end up with the value of your property even it is truly worth $30,000.

The attorney informs you that he disagrees with the agent's statement that the depreciation in the value of your property after the taking is not compensable. He then says, however, that some courts

have ruled otherwise. He explains that some courts do not allow owners to consider many facts that ordinary buyers and sellers would consider—facts appraisers would also consider in ordinary appraisals.

Worse yet, the attorney explains that the city can take your property now, build its sewage plant, and pay you later. Unlike a normal sale, you may not get paid until months after your property is taken. It may take twelve to twenty-four months or longer for you to receive the full value of your property. The only saving grace for you is that, unlike some of your neighbors, your home is not being taken. Thus, you do not have to vacate your home before the government pays you the full value.

This scenario would not leave most owners feeling good about their government or their courts. The fundamental unfairness is obvious. Yet, this scenario is exactly the one courts have sanctioned for years.[5] It is precisely what property owners face in some jurisdictions.

II. The Law Places the Burden of Proof on the Individual Whose Property Is Taken, Not on the Taker

Owners are different from all other defendants under the law. Not only have they done nothing wrong, but they are not even alleged to have committed any wrongdoing. As one judge stated:

> Every other justiciable controversy of a civil nature arises out of some prior relationship or contact between the parties. . . . But in the condemnation proceeding the condemnee (who is actually the defendant although in this state forced to assume plaintiff's burdens) has admittedly done no wrong, broken no promises and committed no negligence. He has only exercised his constitutional right to possess property—which in the condemnation situation, unfortunately, is property coveted by another.[6]

Eminent domain is a forced sale imposed upon the owner. Yet, the law in many jurisdictions puts the burden of proof on the owner whose property is taken. The Wyoming Supreme Court recently observed:

---

5. This scenario continues to shed the legal profession in a negative light. To the average person, it is an indictment on the attorneys that perpetuate such a system and on the courts that allow it to continue. To those outside the system, it reveals an utter lack of common sense and defies any notion of justice.

6. Peel v. Burk, 197 N.W.2d 617, 621–22 (Iowa 1972) (Reynoldson, J., dissenting).

> The landowner has the burden at trial to establish the amount of just compensation. The landowners in eminent domain cases have the burden of proving the just compensation to which they are entitled. This is the general rule. This is not an idle statement of a rule meant to be disregarded. This is true in both inverse condemnation actions, such as this case, and in formal eminent domain proceedings, which this case was not.[7]

Although the condemnee is the one who has his property taken against his will, "the burden as to value is on the condemnee."[8] "The burden of proving the value of the land taken is on the landowner."[9] If the owner cannot overcome the legal burden, he has to surrender his property at the government's price. Leave it to politicians and lawyers to think such a system is fair!

In all other legal disputes, plaintiffs bear the burden of proof. The government likewise bears the burden in other cases in which it exerts its power over the citizen. That is not the situation in eminent domain cases in many jurisdictions.

Placing the burden on the owner may seem benign. It is not. For example, in many cases, the government does not even attempt to value the entire disputed property. It just summarily states there is no impact to certain portions of the property and refuses to make the owner an offer that includes the impact to the entire property.[10] Owners in such situations have no choice but to fight. The only way

---

7. Byrnes v. Johnson Cnty. Commissioners, 2020 WY 6, ¶ 26, 455 P.3d 693, 700 (Wyo. 2020). Many condemnors attempt to place an even heightened or more exacting burden of proof on the owner. *See* Utah Dep't of Transp. v. LEJ Investments LLC, 2018 UT App 213, ¶ 22, 437 P.3d 569, 574 (stating that while "[t]he burden of showing the damages which the owner will suffer rests on him[,]" the owner "need only do so with reasonable certainty rather than with absolute precision").

8. Religious of Sacred Heart of Texas v. City of Houston, 836 S.W.2d 606, 613 (Tex. 1992); Stephens Prod. Co. v. Larsen, 2017 OK 36, ¶ 13, 394 P.3d 1262, 1267 ("Once the condemnor proves the validity of the taking, the burden shifts to the landowner to prove the fair market value of the property."). Some courts have held that neither party bears the burden of proving the value of the property that is taken, the owner bears the burden of proving the value of the damage to the property remaining after the taking, and the condemnor bears the burden of proving enhancement. Hamer v. Sch. Bd. of Chesapeake, 240 Va. 66, 72, 393 S.E.2d 623, 627 (1990).

9. United States v. 69.1 Acres of Land, 942 F.2d 290, 292 (4th Cir. 1991) (citing United States *ex rel.* TVA v. Powelson, 319 U.S. 266, 274, 63 S. Ct. 1047, 1052 (1943)); *but see* Dep't of Pub. Works & Buildings v. Bloomer, 28 Ill. 2d 267, 270, 191 N.E.2d 245, 248 (1963) ("While the condemnor bears the burden of proving the value of the land actually taken, the owner bears the burden of proof in seeking to recover for damage to the remainder.").

10. *See* Comm'r of Highways v. Karverly, Inc., 295 Va. 380, 813 S.E.2d 322 (2018).

the impact to the entire property will be assessed in such cases is if the owner hires his own attorney and appraiser.

Even an owner with the resources to obtain legal counsel and valuation experts still does not enter the courtroom as an equal. They enter with a burden. This burden is especially onerous because "no private purse can compete with the public treasury in the hiring of counsel and expert witnesses."[11] Owners who do not (or cannot) hire counsel enter the courtroom alone, forced to overcome the burden themselves.

In jurisdictions like Virginia, the law saddles the owner with all the disadvantages of plaintiffs and all the disadvantages of defendants, not just the burden of proof.[12] No other litigant in the law bears the burdens of both plaintiff and defendant. The law singles out owners in eminent domain cases for this dubious distinction.

Owners in such circumstances occupy the most disadvantaged position any litigant can face. The owner has the burden of proof, but he or she does not get the first and last word at trial like other litigants who carry the burden. In other legal cases, the plaintiff bears certain burdens (e.g., burden of proof—substantive burden) while the defendant bears others (e.g., does not get to speak first or last at trial—procedural burden).

No principled basis exists for putting owners on a lesser footing than the taker when it comes to proving the value of the taking. As the government is forcibly taking the owner's property against his will, one might think that the owner would get the benefit of a base runner in baseball where a tie goes to the runner. At the very least, the owner should enter the courtroom as an equal when the government forces him into court. Anything less falls short of basic fundamental fairness.[13]

---

11. Comm'rs of Lincoln Park v. Schmidt, 386 Ill. 550, 564, 54 N.E.2d 525, 531 (1944).

12. *See* Commonwealth Transp. Comm'r v. Glass, 270 Va. 138, 149, 613 S.E.2d 411, 417 (2005) ("In a condemnation proceeding, the burden of proof rests upon a landowner to prove the value of the land taken and the resulting damages."); *Hamer*, 240 Va. at 74, 393 S.E.2d at 628 (stating "it has been the traditional practice in this State for the condemner [sic] to open and close the argument" and "[r]egardless of the burden of proof . . . the condemner [sic] has . . . the right to open and close").

13. Condemnors such as the government and large utility corporations almost always have more resources than the individual owner. These entities often have trade organizations and other groups, such as a league of municipalities and the Interstate Natural Gas Association of America. These entities pool resources to fund lobbying efforts, to conduct market and appraisal studies they can use against owners, and to engage in other activities the typical owner cannot afford. In fact, condemnors often argue that an owner should not be able

III. THE LAW DENIES THE PROPERTY OWNER A RIGHT TO A JURY

Despite the Seventh Amendment's provision guaranteeing the right to a jury, many courts have denied owners the right to a jury. The Seventh Amendment to the United States Constitution states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[14] Yet, the U.S. Supreme Court has stated "there is no constitutional right to a jury in eminent domain."[15]

The law has preserved the right to trial by jury since the Magna Carta, which included a right to trial by jury when the King took property.[16] The U.S. Supreme Court has recognized that "[t]he colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property."[17] Yet, the same courts have rejected the provisions providing a trial by jury when the King took property.

Federal courts have unilaterally denied landowners a right to a jury. The Federal Rules of Civil Procedure are court-created rules.

---

to present evidence of damages unless the owner has a market study like the ones these organizations have paid tens of thousands of dollars to obtain.

14. U.S. CONST. amend. VII. The U.S. Supreme Court long ago stated that suits at common law

> meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit.

Parsons v. Bedford, Breedlove & Robeson, 28 U.S. 433, 447 (1830) (emphasis in original).

15. United States v. Reynolds, 397 U.S. 14, 18, 90 S. Ct. 803, 806 (1970); Bauman v. Ross, 167 U.S. 548, 593, 17 S. Ct. 966, 983, 42 L. Ed. 270 (1897) ("By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be entrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury."); Welch v. Tenn. Valley Auth., 108 F.2d 95, 99 (6th Cir. 1939) (explaining owners have no right to a jury because eminent domain proceedings are statutory proceedings and not suits at common law); City of Perris v. Stamper, 1 Cal. 5th 576, 593, 376 P.3d 1221, 1229 (2016) ("The Seventh Amendment to the United States Constitution does not guarantee landowners a jury trial in eminent domain proceedings.").

16. *See* MAGNA CARTA (1215) §§ 39, 52; *see also* Horne v. Dep't of Agric., 576 U.S. 350, 358, 135 S. Ct. 2419, 2426, 192 L. Ed. 2d 388 (2015) ("The colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property."); Baron de Bode's Case, 8 Q.B. Rep. 208 (1845) (involving a "petition of right," an English common law action akin to inverse condemnation, for which there was a right to a jury); Bayard v. Singleton, 1 N.C. 5, 1787 WL 6 (1787).

17. *Horne*, 576 U.S. at 358, 135 S. Ct. at 2426.

Rule 71.1 of the Federal Rules of Civil Procedure expressly denies owners the right to a jury. It gives federal judges the power to reject an owner's request for a jury and instead appoint three commissioners to determine just compensation.[18]

Even in cases where a court empanels a jury, the court may nevertheless deny the owner a right to a jury through its rulings. When judges substitute their appraisal opinion for that of the independent appraisal expert, they invade the province of the jury.[19] Different appraisers rarely, if ever, come to the same conclusion of value even when asked to appraise the same property on the same day.[20] This result holds true among different appraisers hired by the same party, such as when the condemnor hires multiple appraisers to value the same property.

The appraisers also frequently employ different appraisal methodologies, techniques and approaches. One appraiser may use the sales and cost approaches to measure value. Another appraiser may use the sales and income approaches. Even when different appraisers each use the sales approach, they often use different sales. These differences confirm what many courts have come to acknowledge: appraising is not a science but an art.[21] Just because two appraisers use different valuation approaches, different methodologies or techniques, or different sales does not mean one appraiser did something inappropriate or that one appraisal is contrary to approved and accepted

18. *See* FED. R. CIV. P. 71.1(h)(2)(A) ("[I]f a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation.").

19. Miss. State Highway Comm'n v. Terry, 288 So. 2d 465, 466–67 (Miss. 1974) (explaining that, although appraisals vary widely, the court cannot "substitute [its] judgment for that of the jury" and that "resolution of fact issues is left to a jury of laymen" even if the court disagrees with their opinion).

20. *Terry*, 288 So. 2d at 466 ("An opinion of a real estate appraiser as to land values is not a matter so apodictically exact as not to be susceptible, in all honesty, to wide variation from that of his fellows.").

21. United States v. 1,378.65 Acres of Land, 794 F.2d 1313, 1318–19 (8th Cir. 1986) ("Appraising real estate is more an art than a science; it is incapable of mathematical precision and implicates methods of judgment."); *see also* United States v. 5.65 Acres of Land, No. 7:08-CV-00202, 2020 WL 5105206, *9 (S.D. Tex. Aug. 31, 2020); Ohio Dep't of Nat. Res. v. Thomas, 2016-Ohio-8406, ¶ 118, 79 N.E.3d 28, 52 (stating that "both parties stressed [that appraising] was more "art than science" and explaining that "specific tests or procedures" used for scientific experts "would not seem to coincide precisely with an appraisal opinion"); Powell v. Kelly, 223 So. 2d 305, 309 (Fla. 1969) ("The appraisal of real estate is an art, not a science."); Trustees of Wade Baptist Church v. Miss. State Highway Comm'n, 411 So. 2d 761, 763 (Miss. 1982) ("[V]aluation of real estate may be an art, but it is not an exact science.").

appraisal methodology. Similarly, just because two appraisers arrived at widely differing opinions of value does not mean one appraiser violated approved and accepted appraisal methodology.[22]

In *United States v. 5.65 Acres of Land*, rather than attacking the owner's appraisal opinion through cross-examination, the United States sought to summarily exclude it so that the jury could not hear it. The court denied the government's attempt, stating:

> The United States appears to be attacking [the appraiser's] assessment of $25,000 per acre as arbitrary when $14,000 per acre could also have been selected within the bracket, but this attack amounts to a complaint that appraisals are not capable of mathematical precision. "[T]here are no infallible means for determining with absolute conviction what a willing buyer would have paid a willing seller for the condemnee's property at the time of taking." Appraisals are "more an art than a science; it is incapable of mathematical precision and implicates methods of judgment." [The appraiser's] judgment rests on comparable sales; it is not invented out of whole cloth. Accordingly, the United States' attack goes to Defendant's expert's factual credibility, not admissibility. [The appraiser's] valuation would inevitably rest on his judgment in any case. That [the appraiser] ultimately chose a number does not signify that his expert opinion is inadmissible.[23]

Courts have almost universally recognized that the determination of market value amounts to an educated guess.[24] "Appraising real estate is more an art than a science; it is incapable of mathematical precision and implicates methods of judgment."[25] It "involves, at best, a guess by informed persons."[26]

---

22. *See* United States v. 0.376 Acres of Land, 838 F.2d 819, 827 (6th Cir. 1988) (explaining that different appraisers can arrive at differing values even when they each use accepted appraisal methodology and approaches). "[T]he accepted valuation approaches do not result in absolute property values and thus provide a margin of latitude within which the conclusion of different qualified appraisers acting in good faith could vary." *Id.*

23. *5.65 Acres of Land*, 2020 WL 5105206, at *9 (footnotes omitted).

24. Kimball Laundry Co. v. United States, 338 U.S. 1, 6, 69 S. Ct. 1434, 1438 (1949) ("[S]ince a transfer brought about by eminent domain is not a voluntary exchange, this amount can be determined only by a guess, as well informed as possible, as to what the equivalent would probably have been had a voluntary exchange taken place.").

25. *1,378.65 Acres of Land*, 794 F.2d at 1318–19; *0.376 Acres of Land*, 838 F.2d at 825 ("It is true generally, however, that "[a]ppraising real estate is more an art than a science; it is incapable of mathematical precision and implicates methods of judgment.").

26. United States v. Miller, 317 U.S. 369, 375, 63 S. Ct. 276, 280 (1943).

The market may ultimately prove one appraiser's opinion right (or closer to right), but it does not mean the other appraiser did something wrong. Varying opinions between appraisers is no different than what occurs in the marketplace where market participants exercise differences of opinions each day. Indeed, the one thing that separates the most successful developers or investors from others is the ability to see value or potential where others do not (or to identify risk where others do not see it).

Cases involving scientific expert opinions stand in stark contrast to contests between varying appraisal or valuation opinions.[27] Some courts have recognized that imposing scientific standards on appraisal opinions invades the province of the jury by substituting the judge's opinion for that of the valuation expert.

> The value of property taken by the Government, which is no longer on the market, is largely a matter of opinion. Since there are no infallible means for determining with absolute conviction what a willing buyer would have paid a willing seller for the condemnee's property at the time of taking, eminent domain proceedings commonly pit the Government's valuation experts against those of the landowner. Thus, the exclusion of one or all of either party's proposed experts can influence substantially the amount of compensation set by the factfinder. Not only does the landowner have a strong interest in receiving just compensation for property, the public as well has vested interests in insuring that the Government does not pay more than what the owner justly requires. Recognizing the critical role of expert witnesses in these cases and the strong interest on both sides that compensation be just, trial courts should proceed cautiously before removing from the jury's consideration expert assessments of value which may prove helpful.[28]

Denying the owner a trial by jury, whether by general rule or individual ruling, denies the owner his constitutional right to just

27. Buchanan Energy (N), LLC v. Lake Bluff Holdings, LLC, No. 15 CV 3851, 2017 WL 1232973, *5 (N.D. Ill. Apr. 4, 2017) (stating "real estate appraisal is not a branch of social science," and therefore, "the court need not apply the same standards of methodological rigor required of social scientific inquiry."). It can be difficult for courts to recognize the differences between expert appraisal opinions and the opinions of scientific experts. Most jurisdictions, New York being the exception, task their judges with handling all types of legal matters, ranging from criminal, domestic relations, personal injury, medical malpractice, contracts, business disputes, and other general types of law to eminent domain and other specialized matters.

28. United States v. 14.38 Acres of Land, 80 F.3d 1074, 1077–78 (5th Cir. 1996).

compensation. If a person has a dispute involving a voluntary sale, he gets a jury in most jurisdictions. It follows that he should not be denied a jury when he is forced to sell.

> [I]n most condemnation cases, the amount of what the award should be varie[s] widely from witness to witness. . . . [U]nless the testimony of an expert witness is irrelevant as to the real subject at hand, which is the true loss of the landowner, it should not be excluded merely because a witness has arrived at his conclusion under a theory of compensation not adopted by the other side or by the district court. . . . And the fact that the other side may not agree with that theory does not mean that the jury should not consider the evidence.[29]

Courts should carefully guard the owner's constitutional right to a jury. If one party does not like the other side's appraisal, the remedy is vigorous cross-examination. "[T]he trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system: Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[30]

IV. THE LAW DOES NOT REQUIRE THE TAKER TO PROVIDE FULL DISCLOSURE TO THE OWNER—AND REQUIRES THE OWNER TO PAY FOR SUCH DISCLOSURE WHEN IT IS PERMITTED

Some jurisdictions do not require the takers to disclose the appraisals or other statements of value. At least one state does not even require the condemnor to make the owner an offer before it takes the property.[31]

Federal law requires condemnors to obtain an appraisal and to provide a copy to the owner.[32] However, the same Act that establishes this requirement expressly states that it creates no rights.[33] As courts have noted, "the statute [requiring disclosure of appraisals],

29. United States v. 97.19 Acres of Land, 582 F.2d 878, 883 (4th Cir. 1978) (holding that the testimony and opinion of each side's s appraiser "should have gone to the jury and the jury then should have made its award").

30. *14.38 Acres of Land*, 80 F.3d at 1078.

31. *See* N.C.G.S. § 40A-4 (entitled "No Prior Purchase Offer Necessary").

32. 42 U.S.C. § 4651.

33. 42 U.S.C. § 4602(a).

42 U.S.C. § 4651, does not create any substantive rights and . . . [t]herefore, the federal statute provides no basis for relief."[34]

Even in jurisdictions that require disclosure, either under condemnation statutes or open records statutes, condemnors have attempted to withhold documents related to valuation.[35] The fact that the right to disclosure has long been a contested issue reveals that condemnors do not typically provide full disclosure unless forced to do so.[36]

Condemnors have used a multitude of creative arguments in their attempt to withhold valuation information, but each argument places the interests of the public collectively over the interests of the individual forced to surrender his or her property. For example, in *State by Commissioner of Transportation v. Hancock*, the state argued:

> There is a need to strike a balance in these cases between protecting the public fisc and providing a prospective condemnee with enough information to make a determination whether the State has made an acceptable offer of compensation. Requiring the State to furnish its appraisal during pre-litigation negotiations gives the prospective condemnee the opportunity to structure a reactive appraisal and thereby to possibly prolong litigation by seeking an excessive award.[37]

---

34. Portland Nat. Gas Transmission Sys. v. 4.83 Acres of Land, 26 F. Supp. 2d 332, 336 (D.N.H. 1998); Clear Sky Car Wash LLC v. City of Chesapeake, 743 F.3d 438, 444 (4th Cir. 2014) (stating "§§ 4651 and 4655 create[] no individually enforceable rights . . . [and provides no] basis for a private action to remedy violations of those sections"); *but see* Bergano v. City of Virginia Beach, 241 F. Supp. 3d 690 (E.D. Va. 2017) (finding the owner had a remedy under the constitutional protections of due process and equal protection even when the Uniform Relocation Assistance and Real Property Acquisition Act provided no relief).

If the Act creates no right or enforceable benefits, the owner is left with a hearing before the very agency that violated his rights. Bergano v. City of Virginia Beach, No. 2:15CV520, 2016 WL 4435330 (E.D. Va. 2016) (explaining the process under the Administrative Procedures Act). The agency is effectively judge and jury in its own case with limited oversight or judicial review.

35. *See, e.g.*, State v. D'Onofrio, 235 N.J. Super. 348, 355, 562 A.2d 267, 270 (Law Div. 1989) ("[T]he court holds that the reasonable disclosure aspect of bona fide negotiations requires the condemnor to provide the prospective condemnee with all appraisals in its possession which have been obtained for the purposes of making its condemnation offer."); *but see* State v. Town of Morristown, 129 N.J. 279, 289, 609 A.2d 409, 414 (1992) (stating "DOT need not disclose neighboring appraisals during the pre-complaint phase of the condemnation process"); Dep't of Transp. *ex rel.* People v. Hunziker, 342 Ill. App. 3d 588, 796 N.E.2d 122 (2003), *as supplemented on denial of reh'g* (Sept. 10, 2003).

36. *See* S.C. State Highway Dep't v. Booker, 260 S.C. 245, 195 S.E.2d 615 (1973) (discussing disclosure requirements and citing cases where disputes arose over disclosure); Pinkham v. Dep't of Transp., 2016 ME 74, ¶ 5, 139 A.3d 904.

37. 208 N.J. Super. 737, 741, 506 A.2d 855, 858 (Law. Div. 1985), *aff'd sub nom*, 210 N.J. Super. 568, 510 A.2d 278 (App. Div. 1985).

Similarly, in *Cartwright v. Commonwealth Transportation Commissioner of Virginia*,[38] the condemnor argued that owners lose their rights under the Freedom of Information Act the moment the government takes their property. According to the state in *Cartwright,* these owners had to pay attorneys to obtain documents through discovery even when the owners' neighbors (whose property was not taken) could get the same documents for free under the Freedom of Information Act.[39] Without disclosure requirements or the ability for owners to readily obtain valuation documents, owners are forced to hire attorneys and to engage in costly litigation just to see the government's documents related to the value of the owners' property.[40]

Common sense and fundamental fairness seem to weigh in favor of disclosure. If the government takes an owner's property against his will, is it not fair to at least require the government to show the owner the documents related to the value of his property? After all, the owner's tax money was used, at least in part, to pay for these documents. Moreover, the Constitution requires the government to make the owner whole so one would think disclosure is consistent with this aim. The lack of disclosure and transparency is yet another hurdle owners face—one that leaves an especially bad taste in the mouths of those forced to surrender their property.

V. THE LAW PLACES UNDUE BURDENS ON OWNERS

A. The Law Allows the Government to Freeze an Owner's Property Under a Cloud of Condemnation

The sheer nature of eminent domain works certain hardships that are seemingly ignored by nearly everyone except the owner and potential buyers or renters of the owner's property. One such hardship is the impact from project influence.[41] When a condemnor announces

38. 270 Va. 58, 613 S.E.2d 449 (2005).

39. *Id.*

40. *See Hancock*, 208 N.J. Super. at 738, 506 A.2d at 856, *aff d sub nom*, *Hancock*, 210 N.J. Super. 568, 510 A.2d 278. The fact that an owner's tax money is used to create documents about the value of his own property makes the prospect of being denied access to these documents even more difficult to accept.

41. *See* Reichs Ford Rd. Joint Venture v. State Roads Comm'n of the State Highway Admin., 388 Md. 500, 511, 880 A.2d 307, 313 (2005) (stating "there are many hidden costs involved in the acquisition of property by the government for public projects that have not been determined

a project, it often freezes the properties in the path of the project. Tenants do not want to rent and buyers do not want to buy properties that are going to be taken. Owners in these situations are left with properties they cannot rent or sell—and certainly not at market value. Yet, these owners must continue to pay their mortgages, their taxes, and other holding costs. If they are unable to do so, they lose their property through default.

This cloud of condemnation that hangs over the property is suffocating to many owners. Consequently, some owners have lost their property or been forced to sell at extreme discounts while others suffer immense losses before the condemnation ever occurs.[42]

In some jurisdictions, the government often sends tenants notices to vacate before the government ever takes the property. The government even pays the tenants to leave the property before the government takes it. This scenario leaves the owner with a mortgage and vacant buildings that he or she cannot rent. Owners with rental property not only lose their property but also their income, which in some cases is the owner's sole source of livelihood.

A recent case in North Carolina represents these very real hardships.[43] A family owned a multi-unit shopping center. This shopping center was their sole source of livelihood. They rented several units and operated their restaurant in another unit. The condemnor sent the tenants notices to vacate many months before it took the property. The condemnor then paid the tenants to leave the property. The condemnor subsequently sent a letter to the owners, stating they could remain in the property for 90 days but were not guaranteed any more time. Again, the condemnor had not taken the property when it sent these notices.

In response to the condemnor's actions, the owners shut down their restaurant, auctioned off what items they could (for salvage value),

---

to be compensable as a matter of common law"); *but see* Klopping v. City of Whittier, 8 Cal. 3d 39, 54, 500 P.2d 1345, 1357 (1972) (recognizing "the cloud of condemnation over property" targeted for acquisition and acknowledging the loss in use and value of such property).

42. There are legislative means of addressing this problem, although few have sought to tackle this issue. For example, a condemnor could be required to take properties in the path of the project within a certain time after the announcement of the project. They could also mandate a reduction in taxes during the time the property is targeted for acquisition. While not perfect solutions, such protections would at least ease some of the hardships faced by those targeted for acquisition.

43. *See* Dep't of Transp. v. Hilbert Crossing Plaza, LLC et al., Case No. 20 CVS 00754 (Craven Co. Sup. Court 2020).

and vacated the property. Two weeks later, the project was suspended. The owners were left with an empty building, no tenants, no restaurant, no livelihood, no income stream, and a huge mortgage. The owners also faced the threat of being penalized by the locality if they did not maintain their now vacant property, and they likewise risked losing their insurance on the property because insurers often refuse to insure vacant buildings.[44]

With the exception of premature notices to vacate, the cloud of condemnation is a natural, unavoidable consequence of eminent domain, but this fact does not mean it should continue to go unaddressed. Most owners are unable to obtain relief from the debilitating effects of the cloud of condemnation. "It is well settled that any harm arising from the mere announcement or pendency of a project is not compensable. Even the announcement of a projected public improvement together with the preparation of plans and maps showing the property in question within the limits of the project, without interference with the landowner's use, does not constitute a present taking."[45]

As harm stemming from the "pendency of a project is not compensable," in most jurisdictions, the owner must wait until the condemnor eventually takes the property before the owner can obtain compensation. It is true that the compensation the owner ultimately receives will be based on an amount that does not include the depreciating effects of the project, but owners can recover this amount only if they are able to hold their property until the condemnor finally files suit and the case is resolved.

Some states have attempted to address these harms.[46] However, these statutes frequently fail to offer real relief to owners because the owner must typically prove unreasonable delay or some form of bad faith, and they typically force owners into protracted litigation.[47] When owners are forced to resort to inverse condemnation

---

44. To its credit, the condemnor in this case voluntarily took measures to rectify the situation before the owners had to resort to litigation.

45. State v. Westgate, Ltd., 798 S.W.2d 903, 907 (Tex. App. 1990), *writ granted* (June 5, 1991), *aff'd and remanded*, 843 S.W.2d 448 (Tex. 1992); *see also* Atchison etc. Ry. Co. v. S. Pac. Co., 13 Cal. App. 2d 505, 518, 57 P.2d 575, 581 (1936) *disapproved of by Klopping*, 8 Cal. 3d 39, 500 P.2d 1345.

46. *See Reichs Ford Rd. Joint Venture,* 388 Md. at 519, 880 A.2d at 318 (stating "[i]n an attempt to remedy these problems, the [Maryland] Legislature enacted § 12-105(b)").

47. *See* W. Va. Dep't of Transportation v. Pifer, 242 W. Va. 431, 443, 836 S.E.2d 398, 410

actions for relief, they are not typically well received by the courts.[48] The case of *Kiriakides v. School District of Greenville County*,[49] is indicative of the judicial reception many owners receive when seeking relief through inverse condemnation. There the court stated, "Construction of public-works projects would be severely impeded if the government could incur inverse condemnation liability merely by announcing plans to condemn property in the future."[50] It added that "changes in value [caused by a public project] are incidents of ownership."[51] If government were liable, it "would have a devastating impact on government and its citizens."[52] The court rejected the owner's argument that the "threat of a condemnation suit stigmatized his property and that the [condemnor's] alleged delay in bringing th[e] action entitled him to damages for an inverse condemnation."[53]

As it stands now, owners suffering under the cloud of condemnation must try to hold on to their property until the condemnor eventually files its suit and the case is resolved. As explained below, however,

---

(2019) ("Because some delays relating to public projects are natural and unavoidable, before a landowner may recover damages for condemnation blight, he or she must establish that there has been an unreasonable delay in instituting the condemnation proceeding following its official announcement."); Pearsall v. Richmond Redevelopment & Hous. Auth., 218 Va. 892, 242 S.E.2d 228 (1978); *see also Reichs Ford Rd. Joint Venture*, 388 Md. at 523, 880 A.2d at 320 (noting that "[i]f lost rental value and other related damages are not recoverable, it might encourage a condemning authority simply to extend, without justification, the encumbering period prior to condemnation.").

48. *See* Sproul Homes of Nevada v. State, 96 Nev. 441, 443–44, 611 P.2d 620, 621–22 (1980) (stating that "[i]t is well-established that the mere planning of a project is insufficient to constitute a taking for which an inverse condemnation action will lie [and that] not every decrease in market value as a result of precondemnation activity is compensable."); Potomac Dev. Corp. v. D.C., 28 A.3d 531, 548 (D.C. 2011) (dismissing the owner's inverse condemnation action stemming from the cloud of condemnation despite acknowledging that, at least as alleged, the pending taking hung over the owner's property like the "Sword of Damocles" and reduced the income-generating potential of the property "to a small fraction of what it would otherwise have been"); *but see* Stone v. City of Los Angeles, 51 Cal. App. 3d 987, 124 Cal. Rptr. 822 (Ct. App. 1975).

49. 382 S.C. 8, 16–17, 675 S.E.2d 439, 443–44 (2009).

50. *Id.*

51. *Id.*

52. *Id.* As this case demonstrates, many modern courts are seemingly more concerned about the perceived "devastating impact" to the public than what is often an actual "devastating impact" to the individual owner. This utilitarian approach does not bode well for individual owners despite the Just Compensation Clause that was supposed to ensure that any owner forced to surrender his or her property is made whole for such sacrifice.

53. *Id.* (noting that "impairment of the market value of real property" alone does not give rise to a cause of action. *Id.* (citing Kirby Forest Indus. v. United States, 467 U.S. 1, 15, 104 S. Ct. 2187 (1984)).

even those owners must eventually part with their property at a condemnation discount.

B. The Law Allows the Condemnor to Take the Owner's Property and Pay for It Later—Often Months or Years Later

Unbeknownst to the average citizen, the law allows condemnors to take property and pay for it long after it is taken.[54] This process is called the quick take power. The condemnor files a document in court and deposits into court what it claims to be the value of the property taken. The condemnor gets title and possession of the owner's property the moment it files these documents.

The quick take power is especially burdensome when the government's deposit is less than the owner's mortgage. The mortgage company gets the money, leaving the owner with the remaining balance on the mortgage, no property (whether it is a home or business), and the need to find a new place to go. Owners in this predicament are saddled with (1) two mortgages—the one on the property taken and the one on the new property to which they relocate—if they can get financing under these circumstances or (2) a mortgage and a lease—the mortgage on the property taken and a lease on the new property to which they relocate.[55] Needless to say, this scenario puts inordinate pressure on owners hoping to hang on long enough to obtain just compensation.

As courts have long upheld the use of quick take power that allows government to take property long before it pays the owner just compensation, condemnors routinely exercise this well-entrenched power.[56] Who would not take property now and pay for it later if they

---

54. United States v. Miller, 317 U.S. 369, 381, 63 S. Ct. 276, 283–84 (1943) (explaining the process and purpose of the quick take power); *see also Kirby Forest*, 467 U.S. 1, 104 S. Ct. 2187 (discussing the process for the exercise of the quick take power).

55. Some condemnors may argue that the relocation statutes help offset some of these burdens on owners, but, as explained earlier, courts have held that the relocation statutes are a matter of legislative grace and that these statutes create no rights and are unenforceable. *See Clear Sky*, 743 F.3d at 444.

56. *See, e.g.*, Sweet v. Rechel, 159 U.S. 380, 399, 16 S. Ct. 43, 48 (1895) (holding it is permissible for a condemnor to take property before just compensation is ultimately paid to the owner); *see also* State Highway Dep't v. Mitchell's Heirs, 142 Tenn. 58, 216 S.W. 336 (1919); City of Richmond v. Dervishian, 190 Va. 398, 411 (1950) (citing Bailey v. Anderson, 326 U.S. 203 (1945); Bragg v. Weaver, 251 U.S. 57 (1919)) ("That the requirements of due process do not inhibit the sovereign from taking physical possession of private property for public use in a

had the power to do so? Even when the legislature has not authorized certain condemnors to exercise the extraordinary quick take power, courts have judicially granted this power.[57]

Courts have largely ignored or discounted the hardships the quick take power imposes upon owners. For example, the condemnor may abandon the project after it takes the owner's property but before it pays the owner. This situation recently occurred when Dominion Energy and Duke Energy abandoned their multistate pipeline project—the Atlantic Coast Pipeline.[58] It is little solace to owners that they may recover damages if a condemnor, such as Dominion, has already razed buildings or cut through their land.[59]

Such abandonment is not mere speculation; Enron proved no company is too big to fail, and the Atlantic Coast Pipeline project proved the same for individual projects. Additionally, in the wake of COVID-19, condemnors have suspended or abandoned several projects. Moreover, a condemnor could become insolvent. This fact is especially concerning with private condemnors, as they are not backed by the public treasury.

Finally, and as explained above, in situations when the condemnor deposits less money than the owner's mortgage (i.e., times of economic downturns or depressed real estate markets), the owner has to relocate and has to carry the remainder of the mortgage on the old property. No reasonable owner would sell his or her property in times of economic downturn unless he or she absolutely had to sell. Instead, the owner would hold his or her property until the market recovered. Owners are not given this choice when the power of eminent domain is exerted upon them, forcing them to sell when the market is low.[60]

---

condemnation proceeding prior to notice to the owner and in advance of a judicial determination of the validity of such taking has been settled by the decisions of the Supreme Court and the rulings of this court.").

57. *See, e.g.*, E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808 (4th Cir. 2004) (stating that the court-created rules of civil procedure authorized courts to empower private condemnors to exercise the quick take power even in the absence of legislative authorization); Transcon. Gas Pipe Line Co., LLC v. 6.04 Acres, 910 F.3d 1130 (11th Cir. 2018); Nexus Gas Transmission, LLC v. City of Green, 757 F. App'x 489 (6th Cir. 2018).

58. *See Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline*, DOMINION ENERGY (July 5, 2020), https://news.dominionenergy.com/2020-07-05-Dominion-Energy-and-Duke-Energy-Cancel-the-Atlantic-Coast-Pipeline (announcing cancellation of the project).

59. *Sage*, 361 F.3d at 826 (stating "the company would be liable to the landowner for . . . any damages" if it abandoned its project after taking the property).

60. Imagine if the government could seize investment accounts when the market is low.

In at least one state, the law did not require condemnors to give owners notice when it took their property by quick take. Until 2017, Virginia law did not require the government to tell the owner when it took the owner's property.[61] Unless the government benevolently sent a copy of the certificate it filed when it took the property, owners would not know the government had taken their property until the bulldozers arrived. Before the Virginia General Assembly enacted laws requiring notice, the government vehemently defended its right to take property without notice.[62]

The Virginia Commissioner of Highways asserted that owners could check the courthouse records or call the highway department if they wanted to know if the Commissioner had taken their property.[63] The Commissioner's position is indicative of the attitude some condemnors have toward owners.

First, the Virginia Commissioner of Highways argued that the Constitution does not require condemnors to give owners notice when it takes their property by quick take.[64] The Commissioner went so far as to argue that it does not have to give owners notice of the taking even after it takes the property. It stated: "The only question before the Court is whether *post-recordation* notice that a certificate has been recorded is constitutionally required. The answer to that question is clear—it is not."[65] In its subsequently filed Reply brief, the Commissioner added, "While other forms of notice are obviously preferred, commencement of construction activity provides yet another form of notice that a certificate has been recorded"—i.e., the owner will know when the bulldozers arrive.[66]

Public outcry would almost certainly ensue. The result is no different when the government takes homes and business properties when the real estate market is low.

61. *See* VA. CODE ANN. §§ 25.1-306, 33.2-1020 (requiring condemnors to provide notice to the owner).

62. The Commissioner's strenuous opposition to a legal notice requirement was even more telling given the fact that notice would cost the Commissioner only the price of a postage stamp. The Commissioner argued that he gave owners notice as a matter of policy, which several owners contested, but the Commissioner apparently did not want to be legally bound to do so.

63. Comm'r of Highways Memo. in Support of his Demurrer and Plea in Bar at 7, Pahlavani et al. v. Comm'n of Highways, Case No. 96850 (Loudoun Co. Cir. Court 2016) [hereinafter Comm'r of Highways Memo] (contending "the Landowners could easily determine whether a certificate has been recorded—by checking the land records or simply asking VDOT").

64. *Id.* at 12–14.

65. *Id.* at 5 (emphasis added).

66. Comm'r of Highways Reply Memo. at 11 n.14, Pahlavani et al. v. Comm'n of Highways, Case No. 96850 (Loudoun Co. Cir. Court 2016).

Second, the Commissioner was so resolute in his position that owners are not entitled to notice that he asserted the owner's suit demanding such notice was unnecessary and a waste of judicial resources.[67] The Commissioner stated: "The Commissioner hopes the Court will press the Landowners to explain why they even filed their lawsuit. It seems unnecessary . . . and both the Court and the Commissioner could better devote resources elsewhere."[68] In other words, how dare a landowner demand to receive notice when the Commissioner takes his property!

Third, the Commissioner contended that courts should not give strict scrutiny to statutes infringing on property rights even though the Commissioner admitted that Virginians amended their constitution in 2012 to expressly affirm that private property is a "fundamental right."[69] According to the Commissioner, other fundamental rights should get strict scrutiny, but not property rights.

While the court in *Pahlavani* did not agree with the Commissioner's arguments, at least one Virginia court found no problem with the lack of notice in Virginia's statutes.[70] Apparently, the arrival of the bulldozers was good enough. Thankfully for Virginians, as multiple lawsuits challenging the lack of notice were making their way through the legal system, the Virginia General Assembly decided to correct this obvious problem.[71]

The quick take power may allow the government or other condemnors to acquire property more quickly. It may also allow the government to build its project more quickly. However, the quick take power sacrifices the rights and concerns of the owner on the altar of expediency. Once again, individual owners suffer uncompensated losses for the alleged public good, even when that good is the profit of a private company.[72]

---

67. Comm'r of Highways Memo, *supra* note 63, at 6.

68. Comm'r of Highways Memo, *supra* note 63, at 6.

69. Comm'r of Highways Memo, *supra* note 63, at 17–18 (stating "the Court should not use the 'strict scrutiny' test" even though "Article I, Section 11 [of the Virginia Constitution as amended in 2012] now characterizes the right to private property as being a fundamental right").

70. Order, Gottlieb v. City of Suffolk, Case No. CL16-208 (City of Suffolk Cir. Ct. Dec. 20, 2016) (sustaining the city's Plea in Bar asserting that notice is not legally required).

71. VA. CODE ANN. § 25.1-306 (2021); VA. CODE ANN. § 33.2-1020 (2021).

72. Gas companies asking courts for the quick take power often argue that having to take property through the normal eminent domain process would result in increased costs for their projects. These companies contend that they need the owners' properties immediately—before the companies pay the amount determined to be just compensation. Rather than require these

VI. THE LAW ALLOWS THE GOVERNMENT TO ENGAGE IN COERCIVE TACTICS DESIGNED TO LITIGATE OWNERS INTO SUBMISSION

While some hardships imposed upon owners stem from the unavoidable nature of eminent domain, others are the direct and deliberate result of the government's actions. The lack of disclosure is not the sole way that some condemnors play "fast and loose" with owners. For years, some condemning authorities have engaged in a litigation tactic that owners and their counsel have affectionately dubbed "the leg sweep" or "the bait and switch."[73]

Here is how this tactic works. The condemnor obtains an appraisal and makes the owner an offer. If the owner rejects the offer, the condemnor deposits its appraised value into court and immediately takes title and possession of the owner's property. The owner has to leave the property. After the owner vacates the property but before trial, the condemnor obtains a lower appraisal, often from a select group of appraisal firms.

The condemnor then tells the owner that he must accept the first appraised amount or have to pay money back to the condemnor—if the court awards the property for an amount less than the amount the condemnor previously said the property was worth. Moreover, the condemnor asks the court to exclude any evidence of the original appraisal the condemnor used when it evicted the owner. The condemnor does not want the jury to hear about its original opinion of value or the amount it previously stated was just compensation and paid into court.

This practice is extremely coercive, as the owner faces the prospect of having to pay back the money he was paid when he had to leave his property. Oftentimes, the owner has already used this money to buy his replacement home or business property or to pay toward the mortgage on the property that was taken. Sometimes the owner is

---

companies to engage in better planning, courts shoulder individual owners with the burden of the gas companies' poor planning and failure to appropriately schedule their projects.

73. *See* Ramsey v. Comm'r of Highways, 770 S.E.2d 487 (Va. 2015); Coleman v. Miss. Transp. Comm'n, 159 So. 3d 546, 551 (Miss. 2015); Redding v. Miss. Transp. Comm'n, 169 So. 3d 958 (Miss. Ct. App. 2014); Dept. of Transp. v. Frankenlust Lutheran Congregation, 711 N.W.2d 453, 460 (Mich. App. 2006); Ark. State Highway Comm'n v. Johnson, 780 S.W.2d 326, 330 (Ark. 1989); Thomas v. State, 410 So.2d 3, 5 (Ala. 1981); United States v. 320.0 Acres of Land, 605 F.2d 762, 825 (5th Cir. 1979); *see also* NICHOLS ON EMINENT DOMAIN, Ch. 18 § 18.12[1] (Matthew Bender, 3d ed., 2013).

stuck paying two mortgages (i.e., if the amount originally paid was less than the mortgage)[74] until he or she receives full compensation via a trial or settlement. Under this tactic, the law allows the condemnor to pay the owner for his property and then renege on the price only after the condemnor has taken possession and forced the owner to vacate. This tactic is neither novel nor new. Condemnors have employed it for years.[75]

As if the bait and switch alone was not bad enough, some lower courts have not allowed the owner to tell the jury about the condemnor's original appraisal and statement of value. The only appraisal the jury heard in such instances was the condemnor's latter, lower appraisal.[76] Fortunately for owners, appellate courts that have addressed this tactic have seen through it.[77] While not forbidding the tactic, these courts have held that the owner is entitled to tell the jury about the condemnor's initial appraisals and statements of value.[78] Thus, the owner is at least entitled to a fair fight in which the jury is permitted to hear all the evidence, not just the evidence the condemnor wants it to hear.

While some may argue that this tactic is designed to force owners to be reasonable, such rationale does not justify the action. No reasonable person permitted to sell his property voluntarily would sell at the lower end of the price spectrum. He would sell at the highest price he can get. Since the condemnor's duty is to make the owner whole and to place the owner in the same position he would occupy if the taking had not occurred, the condemnor should not seek to get the owner to part with his property for the lowest price possible.

Condemnors should not seek to "win" at the owner's expense. "Just as the Government's interest 'in a criminal prosecution is not that

74. During economic downturns, it is not uncommon for payments to be less than the mortgage. Eminent domain forces the owner to sell his property during this time, and the owner is not permitted to hold his property until the real estate market recovers—as he would without the use of eminent domain to force the sale of his property.

75. *See, e.g.*, *320.0 Acres*, 605 F.2d 762.

76. Denying the jury the right to hear evidence about the condemnor's previous statement of value effectively perpetrates a fraud on the jury as the jury is asked to make a decision based on only half the story. Some jurors are none too happy to learn, only after making a decision, that they were not allowed to hear all the evidence.

77. *320.0 Acres*, 605 F.2d at 825 (stating "the Government is not completely free to play fast and loose with landowners telling them one thing in the office and something else in the courtroom.").

78. *See, e.g.*, *Ramsey*, 770 S.E.2d 487.

it shall win a case, but that justice shall be done,' so its interest as a taker in eminent domain is to pay 'the full and perfect equivalent in money of the property taken,' neither more nor less—not to use an incident of its sovereign power as a weapon with which to extort a sacrifice of the very rights the Amendment gives."[79] The bait-and-switch tactic imposes yet another hardship on owners in eminent domain cases, one designed solely to litigate owners into submission.[80]

VII. THE LAW GUARANTEES THAT OWNERS CANNOT RECOVER THE MARKET VALUE OF THEIR PROPERTY

The Constitution requires just compensation, yet the law (as applied by the courts) guarantees owners cannot recover the market value of their property. If the government does not offer to pay market value, owners cannot recover it! The courts treat "Just Compensation" as if it were "just" compensation.

Courts often give flowery rhetoric to the requirements of just compensation. The U.S. Supreme Court has repeatedly stated that "'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken."[81] It has also declared that just compensation "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[82]

---

79. United States v. Certain Property Located in Borough of Manhattan, 306 F.2d 439, 452–53 (2d Cir. 1962) (citations omitted).

80. The owners did not argue the practice was unlawful but rather that the jury should be permitted to hear the evidence.

81. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473–74, 93 S. Ct. 791, 794 (1973); United States v. Miller, 317 U.S. 369, 373, 63 S. Ct. 276, 279–80 (1943) ("The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."); Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 304, 43 S. Ct. 354, 356 (1923) ("The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken.").

82. Armstrong v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569 (1960); United States v. Willow River Power Co., 324 U.S. 499, 502, 65 S. Ct. 761, 764 (1945) (stating "just compensation . . . undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project."). "'The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity.'" United States v. Va. Elec. & Power Co., 365 U.S. 624, 631, 81 S. Ct. 784, 789 (1961).

Despite this judicial rhetoric, these same courts have expressed a willingness to tolerate undercompensation. The U.S. Court of Appeals for the Seventh Circuit declared that takings are not unlawful simply because they fail to fully compensate the owner. The court noted: "The fact that 'just compensation' tends systematically to undercompensate the owners of property taken by eminent domain underscores the fact that such a taking is not a wrongful act."[83] The U.S. Supreme Court announced that it is willing to "tolerate" undercompensation.[84] It "acknowledged that, in some cases, th[e] standard [applied by the courts] fails fully to indemnify the owner for his loss" but then added that it is "willing to tolerate such occasional inequity . . . because of the need for a clear, easily administrable rule governing the measure of 'just compensation.'"[85]

Thus, the owner's ability to recover just compensation is dependent upon the benevolence of the taker. Unless a condemnor makes an owner a fair market value offer (or, in partial taking cases, an offer that includes the depreciation in the value of the property remaining after the taking), the owner cannot recover the fair market value of the property taken from him or her. This statement is not hyperbole; it is a fact! Owners cannot be said to receive "just compensation" if they cannot recover (1) the fair market value of the property taken from them or (2) in partial taking cases, the depreciation in the value of the property they are left with after the taking (i.e., the difference in the market value of such property before and after the taking). The court-created non-compensable damages doctrine and the lack of reimbursement for litigation expenses are the major reasons owners cannot receive just compensation despite the constitutional mandate.

A. The Court-Created Non-compensable Damages Doctrine Denies Owners the Ability to Obtain Just Compensation

The reason owners cannot recover just compensation is because courts have created rules that substitute fictional value for market value. These rules prohibit jurors from considering facts and circumstances that buyers and sellers would consider in a voluntary sale.

---

83. United States v. Norwood, 602 F.3d 830, 834 (7th Cir. 2010).

84. Kirby Forest Indus. v. United States, 467 U.S. 1, 10, 104 S. Ct. 2187, 2194 (1984) (acknowledging that the law as applied by the courts "does not make the owner whole").

85. *Id.*

Consequently, owners suffer uncompensated damages and depreciation in the value of their property that they would not suffer in a voluntary sale, i.e., a condemnation discount.

Courts do not deny these damages exist. Rather, they have labeled them as "non-compensable damages."[86] Condemnors have long seized on these court-created rules that reduce what condemnors must pay and that simultaneously shortchange owners.[87] Rather than seeking to fully compensate owners, many condemnors have acquisition manuals with entire chapters dedicated to the damages they can inflict on owners without compensation, i.e., "non-compensable damages."[88]

Courts employing the non-compensable damages doctrine may claim to use market value as the standard of just compensation, but they do not. These courts require the parties to substitute fiction for fact. They require the jury to value the property according to this fiction.[89] They reject ordinary appraisals used in the marketplace and replace them with eminent domain appraisals that fail to include the facts and circumstances considered in the marketplace.

Although courts have rejected fair market value in practice, they have universally professed to adopt fair market value as the standard for determining just compensation for forced eminent domain sales.[90] The U.S. Supreme Court has stated that "fair market value constitutes just compensation."[91]

---

86. The principle of just compensation and the notion of non-compensable damages are mutually exclusive.

87. *See, e.g.*, Utah Dep't of Transportation v. Target Corp., 2020 UT 10, 459 P.3d 1017 (involving a condemnor arguing for the imposition of non-compensable damages); State by Humphrey v. Strom, 493 N.W.2d 554, 560 (Minn. 1992); Ryan v Davis, 201 Va. 79, 82, 109 S.E.2d 409, 412 (1959). "Experience has shown all too well the abuses which could thus be made of the privilege of condemnation." Comm'rs of Lincoln Park v. Schmidt, 386 Ill. 550, 564, 54 N.E.2d 525. 531 (Ill. 1944).

88. *See, e.g.*, OREGON DEP'T OF TRANSPORTATION RIGHT OF WAY MANUAL, § 5.450 (entitled "Non-Compensable Damages"); TEXAS ROW APPRAISAL AND REVIEW MANUAL, Chapter 3, § 3 (entitled "Non-compensable Items").

89. Worse yet for jurors is the fact that they make a decision without even knowing they were denied the right to hear all the relevant and meaningful evidence.

90. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2432 (2015); United States v. Miller, 317 U.S. 369, 373–75, 63 S. Ct. 276, 280 (1943).

91. United States v. 50 Acres of Land, 469 U.S. 24, 33, 105 S. Ct. 451, 457 (1984); United States v. 564.54 Acres, 441 U.S. 506, 510–13, 99 S. Ct. 1854, 1857–58 (1979) (stating the court has adopted "fair market value to determine the condemnee's loss"); Ne. Ct. Econ. Alliance, Inc. v. ATC P'ship, 256 Conn. 813, 833, 776 A.2d 1068, 1080 (2001) ("just compensation is ordinarily calculated by determining the fair market value of the property").

> There are at least two methods by which just compensation in partial taking cases can be ascertained. The first is the before-and-after method of valuation, which computes damages to be the difference in the value of the entire parent tract before the taking and the value of the portion remaining after the taking. The second method computes damages as the value of the actual land taken plus the diminution in the value of the remaining land in the parent tract. Both methods take into consideration the loss of the part taken and severance damages to the remainder of the property left after the taking.[92]

In such cases, "[d]amages . . . are to be measured by the difference in market value of the respondents' land before and after the interference or partial taking."[93]

> Just compensation in cases involving a partial taking is generally the fair market value of the property taken plus all the damages which the residue suffers, including the diminution of the fair market value of the remainder. . . . if a condemnor acquires an easement by eminent domain, just compensation can be no less

---

92. United States v. 5.65 Acres of Land, No. 7:08-CV-00202, 2020 WL 5105206, at *8 (S.D. Tex. Aug. 31, 2020).

93. Dugan v. Rank, 372 U.S. 609, 624–25, 83 S. Ct. 999, 1009 (1963); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 332, n.27, 122 S. Ct. 1465, 1484 (2002) (stating the "underlying purpose of the guarantee that private property shall not be taken for a public use without just compensation applies to partial takings as well as total takings"); State *ex rel*. Miller v. Filler, 168 Ariz. 147, 149, 812 P.2d 620, 622 (1991) ("In determining just compensation in a partial taking case, Arizona courts consider (1) the market value of the property actually taken by the condemnation and (2) the diminution in the remaining property's market value caused by the taking."); *see also* State by Comm'r of Transp. v. Weiswasser, 149 N.J. 320, 329, 693 A.2d 864, 868 (1997) ("One of two formulas may be used to calculate just compensation in a partial-taking case. The first measures damages as the market value of the land taken plus the difference before and after the taking in market value of the remainder area. The second set measures damages as the difference between the value of the entire tract before the taking and the value of the remainder area after the taking."); W. Va. Dep't of Highways v. Bartlett, 156 W. Va. 431, 440, 194 S.E.2d 383, 389 (1973) ("[T]he measure of damages in an eminent domain proceeding where parts of the land are taken is the fair market value for the land at the time it was taken, plus the difference in the fair market value of the property claimed to be damaged immediately before and immediately after the taking, less all benefits which may accrue to the residue from the construction of the improvement for which the land was taken."); Kendry v. Div. of Admin., State Dep't of Transp., 366 So. 2d 391, 393 (Fla. 1978) (stating that, in a partial taking case, "damages to the remainder . . . are measured by the reduction in value of the remaining property"); Greene v. D.C., 56 A.3d 1170, 1176 (D.C. 2012) (stating "when the government makes only a partial taking, just compensation requires consideration of any decrease or increase in market value to the land that is untaken").

> than the difference between the fair market value of the property before the easement is taken and its market value as burdened with the easement. . . . determination of just compensation must be based upon a determination of the fair market value of the property sought.[94]

Whether the case involves a full or partial taking or a fee taking versus an easement taking, courts have adopted the fair market value standard in their attempt to replicate the marketplace. This standard aims at determining the price a willing buyer and willing seller would agree upon in a voluntary sale. As market value is the standard, neither the condemnor nor the owner should stand on any better or worse footing than an ordinary buyer or seller would occupy in a voluntary sale.

A simple analogy reveals that court-created rules create a fiction that does not replicate the marketplace, but instead puts the parties on much different footing than they would occupy in a voluntary sale. Suppose a developer sought to purchase part of an owner's front yard for a sewage plant project to serve the developer's new residential community. The developer needed the owner's property to build a service road to the sewage plant. Suppose further that, while the service road will be on the owner's property, the actual sewage pond will not be on the owner's property. The pond will sit about 100 feet from the owner's front door but will be physically located on his neighbor's property.

In determining the sales price for the land, the owner would certainly consider the fact that his home will sit next to a sewage pond after the sale to the developer. The developer could not prohibit the seller from considering this fact. Moreover, the developer must either pay a price that contemplates this change or build his service road elsewhere.

If the developer moves the service road onto one of the owner's neighbor's parcel, that neighbor will likewise consider the sewage plant in setting the sales price. No reasonable owner would sell his property without considering the fact that his house will sit next to a sewage plant after the sale. The developer could not force any of the owners to sell their property without contemplation of the impact from the project.

---

94. Unger v. Ind. & Mich. Elec. Co., 420 N.E.2d 1250, 1259–60 (Ind. Ct. App. 1981).

This result should not be different when it is the government taking the property by force rather than the developer purchasing it voluntarily. Yet, courts that apply the non-compensable damages doctrine force owners to sell their property based on a fiction that the project will not exist and will not impact the property. This approach is not only contrary to the facts and conditions that actually exist, but it is also contrary to the way buyers and sellers would value the property in a voluntary sale as demonstrated in the developer analogy above.

The end result of these court-created rules is that the government gets a condemnation discount. The government's discount is the owner's loss. The owner is not made whole under such a scenario as he or she suffers losses he or she would not endure in a market sale. Courts applying fictional value place the government on better footing than the developer and place the owner on lesser footing than an owner in a market sale.

For example, if it were the government taking the owner's property to build a service road to a public sewage plant, some courts applying the fictional value standard would not allow the parties to consider the sewage pond. They would not allow the parties to consider the sewage pond because it is not on the owner's property. It would not matter that the government used the owner's property for its sewage project just like the developer in the example above used the owner's property for his or her sewage project. This analogy reveals that courts are using a fictional value standard rather than market value.[95]

The absurdity of the non-compensable damages doctrine was recently borne out in *Utah Department of Transportation v. Target Corp*.[96] In that case, the condemnor built an interchange with a bridge, and part of the bridge was on the owner's property. The condemnor argued that the court should parse out the different pieces of the bridge and that the jurors should be able to consider those pieces of the bridge that were on the owner's property but not those pieces that were not.[97]

---

95. The fictional value imposed by courts is also unfair to the juror exercising his or her civic duty who believes he or she has determined market value only to learn after trial that the jurors were not told the actual facts and conditions of the property as it existed after the taking.

96. 2020 UT 10, 459 P.3d 1017.

97. *Id.* ¶ 2, 459 P.3d at 1019 (stating the condemnor argued that the owners "had failed to establish that their severance damages stemmed from the portion of the interchange situated on the claimants' property condemned by UDOT").

No buyer of the owner's property after the taking would break the bridge into parts and only consider those parts that are on the owner's property. The arguments in *Target* stand in stark contrast to the logical approach illustrated in the developer analogy above. Again, the developer analogy, unlike the approach urged by the condemnor in *Target*, is the approach buyers and sellers use in the marketplace.

Courts have relied upon faulty reasoning to support the non-compensable damages doctrine that results in a fictional value. These courts have argued that, when only part of an owner's property is taken, the owner should not receive compensation for damages resulting from the use of his neighbor's property because the owner cannot control what the neighbor does on his property.[98] These courts also argue that the owner whose property is taken should not receive compensation because the neighbors (whose property is not taken) do not recover such damages.[99]

The developer analogy above bears out the fallacy in this rationale. The arguments in support of the non-compensable damages doctrine are contrary to what happens in the marketplace. Again, if a developer needed part of an owner's property to build a project, the owner would not sell his property without considering what the developer would be doing—regardless whether the project would be entirely, or only partially, on the owner's property. Similarly, the developer would have to pay the person whose property it needed but would not have to pay the neighbors unless it needed their property, too. None of the rationale used by the courts support any different result or approach when the government takes an owner's property by force.

---

98. Campbell v. United States, 266 U.S. 368, 45 S. Ct. 115 (1924); DuBois v. State, 54 A.D.2d 782, 782, 387 N.Y.S.2d 753, 755 (1976) (stating "damages are plainly limited to those which arise by reason of the use to which the State puts the property taken and do not encompass those which result from the taking of neighbors' land"); *but see* Lee Cnty. v. Exch. Nat. Bank of Tampa, 417 So. 2d 268, 269 (Fla. Dist. Ct. App. 1982) (noting the many exceptions to the rule); State *ex rel.* Missouri Highway & Transp. Comm'n v. Horine, 776 S.W.2d 6, 11–12 (Mo. 1989) ("Considering these rules, we believe the better policy is to permit persons whose land is taken as part of a single public improvement project and who are part of a condemnation action to recover their consequential damages even though it is not the taking of their land that is the direct cause of their damage.").

99. *See* Foster v. City of Augusta, 165 Kan. 684, 690–91, 199 P.2d 779, 784 (1948) ("When it takes only a part of the owner's property it pays the full price for the part taken and such damages as result to the owner's property by reason of the fact that a part of it is taken. Owners of other property nearby or adjoining that which is taken are not entitled to receive any compensation, though in fact they may sustain some loss or injury, such being regarded as consequential and damnum absque injuria.").

Ironically, courts have been willing to tolerate inequity among neighbors when it resulted in lower compensation to the owner but have rejected supposed inequity when it resulted in higher compensation to the owner.[100] In *Miller*, the Court stated that an owner is not entitled to recover any increase in value caused by the project even though his neighbors whose property is not taken get to enjoy the increase in value. The Court added that the neighbors, unlike the owner, would be entitled to recover the increased value caused by the project if their property was later taken by the government.[101]

Courts have readily acknowledged that, while it may be unequal to allow consideration of appreciation caused by a public project (i.e., enhancement or benefits), it is not unjust. For example, an owner whose property is taken may suffer $100,000 in damages caused by the project but those damages are offset by $100,000 in appreciation also caused by the project. It is a net zero gain or loss for such owner. Meanwhile, the owner's neighbor, whose property is not taken, enjoys the full measure of the $100,000 in appreciation caused by the project because the neighbor did not lose any of his or her property. Courts have recognized this result is unequal but not unjust.

As the Virginia Supreme Court explained:

> It is true the law may operate unequally as most human laws do. One class of persons may receive equal benefits with another, and may contribute less or lose nothing. But so long as the other class receives a fair equivalent for losses, how can it be said that the property of those who belong to this class is taken without consideration, and that in violation of the Constitution? The simple fact is, that they get the worth of their property, while others, who lose no land, share the benefit. This is inequality, but not injustice. It is the case of the laborers in the vineyard, who bore the burden and heat of the day, but received only the penny which was given to the eleventh hour man.[102]

Just as it may be unequal but not unjust to allow consideration of the project when the project increases an owner's property value, it is not unjust to allow consideration of the project when it decreases

---

100. United States v. Miller, 317 U.S. 369, 376, 63 S. Ct. 276, 281 (1943).

101. *Id.* at 376, 63 S. Ct. at 281 ("Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity.").

102. Town of Galax v. Waugh, 143 Va. 213, 237, 129 S.E. 504, 511 (1925); *see also* Dep't of Transp. v. Rowe, 353 N.C. 671, 680, 549 S.E.2d 203, 210 (2001).

the owner's property value.[103] Indeed, that is precisely what happens in the marketplace. If a developer needs part of a person's property to build a project, the developer must pay the owner for any impact the project will have on the owner's property. The developer does not have to pay the neighbors whose property it does not need for the project.

The rationale of courts attempting to justify undercompensation merely underscores the owner's plight as many courts seemingly view themselves as a defender of the public purse rather than a constitutional check or balance on the power of the other branches of government.[104] In *Symons*, the California Supreme Court explained: "The courts have assumed the burden and responsibility of seeing to it that the cost of public improvements involving the taking and damaging of private property for public use be not unduly enhanced."[105] The court denied the owner recovery of damages caused by the project because it "would impose a severe burden on the public treasury and, in effect, place an embargo upon the creation of new and desirable roads."[106] If it saved the government money, the court was willing to saddle the individual owner with the entire cost of the damages rather than requiring the public to bear its proportionate share.

"Just and adequate compensation should be a two-way street. The public should not expect to finance its improvements by the expropriation of private property. Nor should any citizen expect to be *enriched* (as opposed to *compensated*) from the public treasury."[107] It follows

---

103. Any argument that the neighbor in this scenario ends up with a net loss in the value of his or her property merely begs the following question: Why should any individual bear losses caused by a public project rather than the public sharing equally in such costs? Moreover, unlike a person whose property is needed for a public project, the neighbor whose property is not needed does not have to surrender part of his or her property.

104. *See, e.g.*, People *ex rel.* Dep't of Pub. Works v. Symons, 54 Cal. 2d 855, 860–62, 357 P.2d 451, 454–55 (1960) (superseded by statute); *see also* United States v. Merchants Matrix Cut Syndicate, 219 F.2d 90, 98–99 (7th Cir. 1955) (stating "condemnation juries . . . commence deliberations in a positive awarding-state-of-mind[,]" that many "envision the public treasury as fair game in [condemnation] proceedings[,]" and that "[a]ll too frequently, profit seeking motives creep into condemnation cases"); W. Va. Dep't of Highways v. Berwind Land Co., 167 W. Va. 726, 737, 280 S.E.2d 609, 616 (1981) (explaining that courts have applied certain rules, such as the unit rule, to "reduce the likelihood of . . . exorbitant awards of compensation by juries"); Richmond v. City of Hinton, 117 W. Va. 223, 185 S.E. 411, 412 (1936) ("If damages could be recovered in such circumstances, crushing burdens would be imposed on the public treasury.").

105. 54 Cal. 2d at 861, 357 P.2d at 455.

106. *Symons*, 54 Cal. 2d at 862, 357 P.2d at 455.

107. Metro. Atlanta Rapid Transit Auth. v. Funk, 263 Ga. 385, 388, 435 S.E.2d 196, 200 (1993).

that neither the owner nor the condemnor should be on any greater or lesser footing than a buyer and seller in a voluntary sale.

Nevertheless, courts have been more apt to look at the owner with a skeptical eye than at the party taking the property, resulting in rules that foster systemic undercompensation.[108] Courts are seemingly less concerned about undercompensation than they are about overcompensation. The U.S. Court of Appeals for the Fourth Circuit explained:

> "Just compensation" is that amount of money necessary to put a landowner in as good a pecuniary position, but no better, as if his property had not been taken. Eminent domain is an indispensable means of constructing public improvements. No citizen has a right to thwart the public use through obstinance, or to reap a windfall from the public treasury because his land must be taken. Overcompensation is as unjust to the public as undercompensation is to the property owner.[109]

Courts with an eye toward protecting the public purse rather than applying the plain meaning and spirit of "just compensation" often fall prey to applying a double standard. For example, courts routinely apply a "fictional" value when it reduces the amount owed to the owner. Yet, courts have been quick to dismiss a "fictional" value when it increases the amount owed to the owner.[110]

In *ATC Partnership*, the court stated that certain facts related to contamination should be considered over the owner's objection because "to conclude otherwise could result in a fictional fair market value of the condemned property."[111] Just as "[i]t blinks at reality to say that a willing buyer would simply ignore the fact of contamination," it likewise blinks at reality to say a willing buyer would blink at the project that will exist after the taking.[112] The former (i.e., contamination) decreases the amount the government must pay the owner

108. United States v. Norwood, 602 F.3d 830, 834 (7th Cir. 2010) (acknowledging that the judicial application of just compensation "systematically . . . undercompensate[s]" property owners).

109. United States v. 69.1 Acres of Land, 942 F.2d 290. 292 (4th Cir. 1991).

110. Ne. Ct. Econ. Alliance, Inc. v. ATC P'ship, 256 Conn. 813, 843, 776 A.2d 1068, 1085–86 (2001) (stating that certain facts related to contamination should be considered over the owner's objection because "[t]o conclude otherwise could result in a fictional fair market value of the condemned property.").

111. *ATC P'ship*, 256 Conn. at 843, 776 A.2d at 1085–86.

112. *ATC P'ship*, 256 Conn. at 833–34, 776 A.2d at 1080.

whereas the latter (i.e., the project) increases the amount the government must pay.

Similarly, some courts have gone so far as to hold that certain facts (i.e., the project) can be considered if it decreases just compensation but not if it increases just compensation. In other words, the project can be considered for enhancement but not for damages.[113] These courts allow jurors to consider the impact a public project has on the value of the property remaining after the taking only when the project enhances the value of the property but not when the project damages the owner's property. Rather than basing just compensation on the fixed principle of indemnity, or even the difference in the actual market value of the property before and after the taking, these courts base just compensation on how much the government has to pay.

Some courts and legislators have, at least partly, begun to see through the fallacy of the court-created non-compensable damages doctrine.[114] Some states, such as Utah and Virginia, recently enacted statutes that did nothing more than state that the parties can consider everything a buyer and seller would consider in a voluntary sale.[115] The fact that such statutes had to be enacted is a seeming indictment on lawyers and the courts. After all, what reasonable person asked to determine market value would not consider things a buyer and seller would consider? Can you imagine telling the average person that he or she must determine market value, but then telling them that they cannot consider things market participants would consider? Yet, that is precisely what courts routinely tell jurors in many eminent domain courts.

The notion of non-compensable damages is inconsistent with the principle of "just compensation." It is also contrary to "the basic equitable principles of fairness" embedded in the constitutional

---

113. *Compare* Long v. Shirley, 177 Va. 401, 14 S.E.2d 375 (1941) (allowing consideration of general enhancement or damages from the project) with State Highway & Transp. Comm'r v. Lanier Farm, Inc., 233 Va. 506, 357 S.E.2d 531 (1987) (disallowing consideration of damages from the project).

114. *See, e.g.*, S.C. Dep't of Transp. v. Powell, 424 S.C. 206, 818 S.E.2d 433 (2018), *reh'g denied* (Sept. 28, 2018); Utah Dep't of Transp. v. Admiral Beverage Corp., 2011 UT 62, 275 P.3d 208 (2011); Los Angeles County Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809, 820–21 (Cal. 1997) (stating that damages "can be based on any factor, resulting from the project, that causes a decline in the fair market value of the property" and that "the landowner . . . need only prove the value of his or her property has been impaired, not that other members of the public are not similarly affected").

115. *See* Utah Code Ann. § 78B-6-511; VA. CODE ANN. §§ 25.1–230.

requirement of just compensation.[116] As the U.S. Court of Appeals for the Fourth Circuit reasoned, jurors should be permitted to consider

> such matters [as] would be considered by any business man in selling, buying or valuing the property; and when the court adopts the standards of the market place in making valuations there is no reason why it should close its eyes to how the market place arrives at and applies the standards. . . . It is difficult to perceive why testimony, which experience has taught is generally found to be safely relied upon by men in their important business affairs outside, should be rejected inside the courthouse.[117]

If just compensation is truly "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," owners must be permitted to consider everything a buyer and seller would consider in setting a price in a voluntary sale.[118] If "the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking," owners must be permitted to consider the facts and circumstances that buyers and sellers would consider.[119] Anything less is a fictional value that requires the owner to part with his property at a condemnation discount.

B. Litigation Expenses Deny Owners the Ability to Obtain Just Compensation

Another reason owners cannot obtain just compensation is that the law in many jurisdictions does not allow the owner to obtain reimbursement for appraisal and attorney fees and other costs—even if the owner proves the condemnor's offer was grossly below market value and thus constitutionally insufficient.[120] Like the non-compensable

---

116. United States v. Fuller, 409 U.S. 488, 490, 93 S. Ct. 801, 803 (1973) ("The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.").

117. Cade v. United States, 213 F.2d 138, 140–41 (4th Cir. 1954).

118. Armstrong v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569 (1960).

119. Kirby Forest Indus. v. United States, 467 U.S. 1, 10, 104 S. Ct. 2187, 2194 (1984).

120. *See, e.g.*, Utah Dep't of Transp. v. Boggess-Draper Co., LLC, 2020 UT 35, ¶ 43, 467 P.3d 840, 849 (holding "just compensation under . . . the Utah Constitution . . . does not . . . cover costs incurred in defending a condemnation action"); *see also* United States v. Bodcaw Co., 440 U.S. 202, 203–04 (1979) (stating "[a]ttorneys' fees and expenses are not embraced

damages doctrine, the failure to reimburse owners for their litigation expenses guarantees that owners cannot receive just compensation unless the government benevolently makes a fair offer that approximates market value. If the government does not make such an offer, the owner has a choice: either (1) take the government's offer and accept less than market value or (2) be sued by the government and forfeit a portion of market value to litigation expenses.[121]

Neither choice gives the owner an opportunity to recover just compensation or market value.[122] The owner's conundrum is exacerbated in cases where the condemnor engages in protracted litigation that is costly to both parties. The owner is not reimbursed for litigation expenses regardless of the condemnor's actions, and some condemnors seize on this fact.

Suppose an owner's home is worth $200,000, and the condemnor's best offer is $160,000. When the owner rejects the offer, the condemnor sues him to take his property. The owner has to hire an attorney and an appraiser. The court determines the value of the home is $200,000, but the owner has to forfeit $25,000 to litigation expenses.[123] The owner receives $175,000 for a $200,000 home he

---

within just compensation"); Ryan v Davis, 109 S.E.2d 409, 414 (1959); Ellis v. Ark. State Highway Comm'n, 2010 WL 1720610 (Ark. 2010) (declining to reconsider the rule that just compensation does not require reimbursement for litigation expenses); Comm'rs of Lincoln Park v. Schmidt, 386 Ill. at 563–64, 54 N.E.2d at 531–32 (explaining that, absent reimbursement for expenses in at least some circumstances, condemnors have the power to litigate owners into submission). Courts have denied reimbursement for litigation expenses on the grounds that "just compensation is for the property, and not to the owner." *Bodcaw*, 440 U.S. at 203. This assertion ignores the nature of the Bill of Rights, which protects persons, not things. Just compensation is a personal right belonging to the owner, not the property. *See* Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195, 30 S. Ct. 459, 460 (1910) (acknowledging that just compensation is a personal right of the owner and that "the question [in such cases] is, What has the owner lost?").

121. State v. Johnson, 282 N.C. 1, 22, 191 S.E.2d 641, 655 (1972) (stating that "in order to avoid the expense . . . of the condemnation proceeding . . . the [owner] may accept less" than fair market value).

122. Any argument that the Constitution merely requires the government to pay market value, as opposed to the owner receiving market value, ignores several key points. First, unlike other rights, just compensation is a constitutional right to money. It guarantees the owner a right to a certain amount of money. Second, the government can deprive the owner of this monetary right through its own actions, i.e., making a constitutionally insufficient offer and then forcing the owner into costly litigation when he does not accept it. Third, the right to just compensation, like other rights in the Bill of Rights, is an individual right for the benefit and protection of the owner, not the government.

123. Litigation expenses include attorney and expert witness fees, appraisal fees, exhibit costs, court reporter fees, and other expenses associated with trial.

did not want to sell.[124] Has the owner received market value? Has the law put the owner in as good a position as he would have occupied absent the taking?

It is difficult to perceive why one who is forced into court through no fault of his own should not be reimbursed for litigation expenses when (1) he proves the government was wrong and (2) he cannot receive the constitutionally guaranteed amount of money (i.e., just compensation or market value) absent reimbursement for expenses caused solely by the government.

Fortunately, at least some courts and judges have recognized that just compensation cannot be achieved without reimbursement for litigation expenses. The Florida Supreme Court declared:

> Since the owner of private property sought to be condemned is forced into court by one to whom he owes no obligation, it cannot be said that he has received "just compensation" for his property if he is compelled to pay out of his own pocket the expenses of establishing the fair value of the property, which expenses in some cases could conceivably exceed such value. The plight of the land owner in this situation is well stated . . . as follows: He does not want to sell. The property is taken from him through the exertion of the high powers of the statute, and the spirit of the Constitution clearly requires that he shall not be thus compelled to part with what belongs to him without the payment, not alone of the abstract value of the property, but of all the necessary expenses incurred in fixing that value. This would seem to be dictated by sound morals, as well as by the spirit of the Constitution; and it will not be presumed that the Legislature has intended to deprive the owner of the property of the full protection which belongs to him as a matter of right.[125]

As Justice Reynoldson of the Iowa Supreme Court aptly stated:

> It is illogical to contend . . . that costs in a condemnation proceeding should be treated as costs in any other action. This is no ordinary lawsuit. We are here breathing life into a constitutional right—the right to possess and protect property. We are further

124. Even if one assumes the owner would incur 6% realtor fees if he sold his home voluntarily, the owner of a $200,000 home would recover $188,000, far more than the amount he would recover in the condemnation scenario.

125. Dade Cnty. v. Brigham, 47 So. 2d 602, 604–05 (Fla. 1950) (citations omitted).

> charged with enforcing a constitutional mandate that such property shall not be taken without payment of just compensation. [I]n the condemnation proceeding the condemnee . . . has admittedly done no wrong, broken no promises and committed no negligence. He has only exercised his constitutional right to possess property—which in the condemnation situation, unfortunately, is property coveted by another. . . . [I]t cannot be said that he has received 'just compensation' for his property if he is compelled to pay out of his own pocket the expenses of establishing the fair value of the property.[126]

Other courts have refused to address the undeniable injustice caused by the lack of reimbursement.[127] In *Bodcaw,* the U.S. Supreme Court stated: "Perhaps it would be fair or efficient to compensate a landowner for all the costs he incurs as a result of a condemnation action. . . . But such compensation is a matter of legislative grace rather than constitutional command."[128] The Utah Supreme Court's recent decision in *Boggess-Draper* illustrates the reluctance of courts to address unjust decisions once established. Courts are not always quick to admit past mistakes. While the Utah Supreme Court did so in the context of eminent domain less than a decade ago,[129] that same court refused to revisit its prior decisions on litigation expenses, thereby perpetuating the injustice of undercompensation.[130]

Leaving the issue of reimbursement to the legislature in the face of the constitutional requirement of just compensation is like leaving the keys to the chicken coop with the fox. By punting on the issue or, worse yet, embracing undeniably unjust past case law, courts have left the issue of reimbursement for takings in the hands of the party with the power to take—the legislature.

The power of eminent domain has as much ability to destroy as the taxing power.[131] Courts should not interpret the Just Compensation Clause in a manner that allows the power to take to become the power to destroy. The lack of reimbursement for litigation expenses

---

126. Peel v. Burk, 197 N.W.2d 617, 621–22 (Reynoldson, J., dissenting) (citing *Brigham*, 47 So. 2d at 604–05)).

127. *See Boggess-Draper*, 2020 UT at ¶¶ 39–48, 467 P.3d at 848–50.

128. United States v. Bodcaw Co., 440 U.S. 202, 204 (1979).

129. *See* Utah Dep't of Transp. v. Admiral Beverage Corp., 2011 UT 62, 275 P.3d 208 (2011).

130. *But see id.*; Cnty. of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004).

131. McCulloch v. Maryland, 17 U.S. 316, 431 (1819) (stating "the power to tax involves the power to destroy").

empowers the government to destroy the owner's right to just compensation. In small takings, the litigation expenses can exceed the entire amount of just compensation.[132]

At least one court has implicitly recognized that litigation expenses can destroy an owner's right to just compensation. In *State by Commissioner of Transportation v. Hancock*,[133] the court held that the condemnor must fully disclose its valuation information because that was the only way to ensure the owner would not be subject to litigation expenses that would erase the compensation for the modest taking. The court explained:

> This matter does not involve substantial money. The State's offer of compensation totals $9550. The fact that the amount is modest highlights the significance of the principle involved. The statutory requirements of bona fide negotiations and reasonable disclosure are particularly important when minor property interests are being acquired by an exercise of the power of eminent domain. Condemnees subject to these takings can ill afford to hire attorneys and appraisers whose fees are not recoverable in a condemnation proceeding (except in circumstances not relevant here). They must be given every assurance that their government, spending, in part, their money, is treating them with absolute candor and fairness. Such assurance can be provided only if the government, when undertaking negotiations, fully discloses all of the information upon which it relies in making its offer. How else can its negotiations be bona fide?[134]

The U.S. Supreme Court has acknowledged: "The fundamental right guaranteed by the Fourteenth Amendment is that the owner shall not be deprived of the market value of his property under a rule of law which makes it impossible for him to obtain just compensation."[135] If this statement amounts to more than mere rhetoric, courts must (1) reject the court-created non-compensable damages doctrine and (2) require reimbursement to owners for litigation expenses when the condemnor fails to make a constitutionally sufficient

---

132. Owners in these situations have little choice but to accept whatever amount the condemnor offers.

133. 208 N.J. Super. 737, 738, 506 A.2d 855, 856 (Law. Div. 1985), *aff'd sub nom*, *Hancock*, 210 N.J. Super. 568, 510 A.2d 278 (App. Div. 1985).

134. *Id.* at 738, 506 A.2d at 856.

135. McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 365, 38 S. Ct. 504, 507 (1918).

offer that approximates market value.[136] Anything less "makes it impossible for [the owner] to obtain just compensation."[137]

VIII. THE FACT THAT THE LAWS ARE SKEWED AGAINST OWNERS SHOULD NOT BE A SURPRISE

A. The Burdens the Law Places on Owners Today—and the Imbalance Between Government Power and Individual Protections—Is the Result of Good Intentions

The current state of eminent domain law largely stems from what can be best described as the tyranny of good intentions. The owner's plight is not the result of ill-intentioned politicians or evil-minded bureaucrats. Just the opposite!

The sincere desire to use eminent domain for good, and to protect the public purse while doing so, has plagued the decision-making of legislators and other public officials alike, leading to a skewed system. Meanwhile, those exercising the power of eminent domain seek to save the taxpayers money when carrying out public projects. The problem is that they tend to forget that the property owner is a taxpayer, too. He or she should not be forced to bear a disproportionate share of the cost of the project even if it would result in savings for the rest of the taxpayers.

In their zeal to promote public projects and limit costs, public officials and their counsel can succumb to the danger of acting like they are ordinary buyers, attempting to obtain the property as

136. Denying an owner reimbursement for litigation expenses in effect penalizes the owner for exercising his constitutional right. As the High Court has recognized in other contexts, "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'" Perry v. Sindermann, 408 U.S. 593, 597 (1972). The Court added that "[s]uch interference with constitutional rights is impermissible." *Id.* Just as "retention of a public position does not require, and cannot be conditioned upon requiring, an employee to completely forego the exercise of his rights to freedom of speech and association," *see* Perez v. Cucci, 725 F. Supp. 209, 232 (D.N.J. 1989), an owner's right to just compensation (i.e., to receiving the value of the property taken from him) cannot be conditioned upon the owner's willingness to forego this right by accepting a condemnor's constitutionally insufficient offer.

137. *McCoy*, 274 U.S. at 354.

cheaply as possible. Lost in this zeal is the individual owner and the constitutional duty to make each owner whole.[138] While their intentions may be good, the result is not.

B. The Powers of Eminent Domain Have Increased with the Growth of Government

As the size and scope of government has grown, so too have government projects and the use of eminent domain power. There have been periods of rapid expanse of eminent domain powers, such as the golden era for railroads near the turn of the twentieth century. For the most part, however, legislatures have gradually expanded powers of eminent domain, in turn chipping away at the protections for owners. Unfortunately for owners, courts have not heeded the warning in *Monongahela Navigation Co. v. United States*, where the court explained:

> Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[139]

Contrary to this declaration, courts have "liberally construed" government power while narrowly construing individual constitutional protections.[140] Meanwhile, legislatures have delegated vast powers of eminent domain to an array of public and private entities.[141]

---

138. *See* Certain Property Located in Borough of Manhattan, 306 F.2d 439. 452–53 (2d Cir. 1962).

139. 148 U.S. 312, 325, 13 S. Ct. 622, 626 (1893).

140. *See* Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655 (2005) (broadly construing public use and the government's power of eminent domain); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 238, 104 S. Ct. 2321, 2328, 81 L. Ed. 2d 186 (1984).

141. *See* JEREMY HOPKINS, THE REAL STORY OF EMINENT DOMAIN IN VIRGINIA, A VIRGINIA

Today, a multitude of entities, some accountable to the people and others not, wield vast powers of eminent domain over the citizens and their private property. Even entities such as the mosquito control commission in Virginia have wielded this immense power.[142]

Each new delegation of eminent domain power creates another condemnor interested in preserving its power through the legislative process. Federal and state governments and their many agencies or departments, local governments and their various subdivisions and associations,[143] common carriers such as railroads, and utility companies routinely wield the eminent domain power. These entities have cohesive, powerful, well-funded, and politically connected lobbying organizations, trade organizations, and other groups that routinely participate in the legislative process. Meanwhile, the individual owner, who may face eminent domain once or twice in his lifetime, is busy working to provide for his family and to pay his taxes—taxes that are sometimes used to pay the very lobbyists seeking to limit his property rights.[144]

In some jurisdictions, public employees and tax-funded lobbyists participate in the legislative process to determine eminent domain laws.[145] Taxpayers in these jurisdictions fund the demise of their own property rights. Given this state of affairs, it is no wonder that eminent domain laws have become skewed in favor of power and against protections.

The fact that the intentions of those using or promoting the power of eminent domain may be good does not lessen the burdens imposed upon individuals facing this power. Indeed, "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[146]

INSTITUTE FOR PUBLIC POLICY REPORT (2006) [hereinafter THE REAL STORY OF EMINENT DOMAIN IN VIRGINIA].

142. *Id.*

143. Cities and counties have active lobbying arms through their associations like the municipal leagues and associations of counties.

144. *See* THE REAL STORY OF EMINENT DOMAIN IN VIRGINIA, *supra* note 141. This author once heard it said that "Democrats do not believe in property rights, and Republicans do not want to pay for them." While this statement is too sweeping, there is much truth to the fact that owners have not traditionally been represented in the political process surrounding the making of eminent domain laws. With that said, there has been a recent movement in states like Virginia to change this situation.

145. *Id.*

146. Olmstead v. United States, 277 U.S. 438, 479, 48 S. Ct. 564, 572–73 (1928).

C. As Courts Have Broadly Construed Powers of Eminent Domain and Narrowly Construed Individual Protections, It Has Further Skewed the Balance Between Powers and Protections

Courts are not immune from the same dangers that plague legislators and other public officials. These courts tend to view their role as a check on the individual's constitutional rights as opposed to a check on the government's power.[147] Although courts once exercised judicial review as a check and balance on the other branches of government,[148] some of today's eminent domain courts view themselves as a check on the owner and a protector of the other branches.[149] Imagine how an owner must feel in a court where one branch of government is taking his property, and the other branch of government presiding over the trial is there to protect the taker, not the constitutional rights of the owner!

This judicial phenomenon reminds this author of a debate between a prominent judge and a leading constitutional scholar. At one point, the judge declared, "I find it difficult to find rights that are not in the Constitution." The opponent responded, "I find that difficult to believe, judge, because you do not have any problem finding powers that are not in the Constitution."

This statement rings true with regard to private property rights where judicial construction has led to further imbalance between powers and protections. The Constitution once provided a sea of liberty with mere islands of government power, but the Constitution as construed by the courts today consists of a sea of government power with only islands of liberty.[150] Thomas Jefferson's warning that "[t]he natural progress of things is for the government to gain ground and

147. *See, e.g.*, People *ex rel.* Dep't of Pub. Works v. Symons, 54 Cal. 2d 855, 861, 357 P.2d 451 (1960) (stating "courts have assumed the burden and responsibility of seeing to it that the cost of public improvements involving the taking and damaging of private property for public use be not unduly enhanced").

148. *See* Marbury v. Madison, 5 U.S. 137 (1803).

149. *See, e.g.*, *Symons*, 54 Cal. 2d 855, 357 P.2d 451.

150. Georgetown law professor Randy E. Barnett, coined the phrase and discussed the topic of islands of power in a sea of liberty (and vice versa) in his book, *Restoring the Lost Constitution*. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (1st ed. 2004). As Profession Barnett stated, "The Constitution that was actually enacted and formally amended creates islands of government powers in a sea of liberty. The judicially redacted constitution creates islands of liberty rights in a sea of governmental powers." *Id.* at 1.

for liberty to yield" has proven prophetic, especially with regard to property rights.[151]

The infamous *Kelo* case illustrates the expansion of power and contraction of protections. In *Calder v. Bull*,[152] the Court noted that "a law that takes property from A. and gives it to B. . . . is against all reason and justice." In 2005, the Court declared that government can take one person's property (Susette Kelo's home) and give it to another (Pfizer Inc.).[153] The Court reasoned that such government action was legal because it created more jobs and increased tax revenue.[154] Once again, the Court eradicated the protections for the individual because it felt it was better for the public at large.

Eminent domain powers that are unquestioned today would have been unthinkable in years past.[155] Even the quick take power, which is universally accepted today and used almost exclusively by some condemnors, was once questionable.[156]

Anyone that doubts the courts' narrow construction of property rights protections need only spend a day or two in the trial courts. One trial court's construction of a seemingly clear constitutional restriction is indicative of the courts' approach. The question presented to the court was: "Whether Article I, Section 11 of the Constitution of Virginia limits the Commissioner to taking only the property necessary to achieve the public use?"[157] The court acknowledged: "The voters amended Article I, Section 11 of the Constitution of Virginia in 2012 by adding, '[n]o more private property may be taken than necessary to achieve the stated public use.'"[158] It then concluded:

---

151. Letter from Thomas Jefferson to Edward Carrington, May 27, 1788, *in* THE PAPERS OF THOMAS JEFFERSON, 13:208–09.

152. 3 U.S. 386, 388 (1798).

153. Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655 (2005).

154. *Id.*

155. *See, e.g.*, Yarborough v. N.C. Park Comm'n, 196 N.C. 284, 145 S.E. 563, 569 (1928) (stating "a proposition to take private property . . . for a public park would formerly have been regarded as a novel exercise of legislative power, but now the validity of legislative acts erecting such parks and providing for their cost is uniformly upheld") (citing Shoemaker v. United States, 147 U. S. 282, 297, 13 S. Ct. 361 (1893)). The court noted that "the old doctrine [limiting the government's eminent domain power] is now little more than a theory or a canon of construction." *Yarborough*, 196 N.C. at 292, 145 S.E. at 569.

156. *See* Sweet v. Rechel, 159 U.S. 380, 399, 16 S. Ct. 43, 48 (1895) (determining the constitutionality of the quick take power).

157. Comm'r of Highways v. Sadler, No. CL14-292, 2016 WL 1390274, *1 (Va. Cir. Ct. Mar. 16, 2016).

158. *Id.* at *2. Amongst other provisions in the constitutional amendment, Virginians had to add a provision reaffirming that private property is a fundamental right because courts had

"This Court is not convinced by the respondent's argument that amendment of Article I, Section 11 limits the Commissioner to take no more property than that which is necessary to achieve the stated public use."[159]

It is difficult to perceive a more limited construction of the constitutional amendment than the one the court provided there. After all, the court concluded that "no more private property may be taken than necessary to achieve the stated public use" did not "limit[] the Commissioner to take no more property than that which is necessary to achieve the stated public use."[160]

Condemnors arguing against compensation frequently seize on the judiciary's tendency to view itself as the protector of the public purse. In *Arkansas Game & Fish Commission v. United States*, the Court explained: "Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest."[161] The Court further recognized that, despite these arguments, the "sky did not fall" as predicted by condemnors seeking to avoid payment of compensation.

Any argument that awarding just compensation for depreciation caused by the project would increase the costs of public projects merely admits that condemnors have been shortchanging owners. If compensating owners for depreciation to their property increases the cost of a project, it means only that individual owners have been shouldering this cost alone—as opposed to the public at large. The cost of public projects does not change. The only thing that changes is who pays for it.[162] Does the individual forced to surrender his property pay this entire cost alone or does the public, for whom the property is taken, share in this cost?

In *Tidewater Railway Co. v. Shartzer*,[163] the Virginia Supreme Court was faced with the argument that allowing damages from a

---

not given property rights the protections afforded other fundamental rights or the heightened judicial scrutiny given to infringements upon other fundamental rights. The courts had treated private property as something other than a fundamental right.

159. *Id.* at *3.

160. *Id.*

161. 568 U.S. 23, 36–37, 133 S. Ct. 511, 521 (2012).

162. *Id.* at *2. The damages caused by the project are part of the costs. The fact that some courts do not require the public to reimburse the owner for these costs does not change the fact that such costs exist.

163. 107 Va. 562, 573–74, 59 S.E. 407, 411 (1907).

railroad project would "give rise to an indefinite number of claims."[164] The court stated that "this contention . . . is without merit."[165] It then explained,

> If it is to be asked where the line is to be drawn, I answer, not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing place 10 miles away, if there was no other within 20 of the premises affected. The line is to be drawn by ascertaining whether the premises are actually or potentially affected, for present or other purposes or the man, whether it is only the person who happens to be using them. It is said this might give the right to make an immense number of claims. Suppose it did. Suppose there were 1,000 claims of £1,000 each. If they are well founded, £>>1,000,000 of property is destroyed, and why is not that part of the cost of the improvement; and, if taken into account as such, why should not the loser of it receive it?[166]

IX. THE QUESTION OF JUST COMPENSATION GOES FAR BEYOND MONEY

Some may say that just compensation is merely a question about money. Nothing could be further from the truth. Tell the farmer who lost the land that had been in his or her family for six generations, the mother or father that just lost their family's home, or the small business owner that just lost his or her shop that just compensation is only about money.

The right to just compensation extends far beyond mere dollars and cents. It impacts people and affects their lives forever. In too many instances, those individuals impacted by eminent domain cannot recover enough to restore what they lost. They are not, in the words of the court, put in the same monetary position they occupied before the taking.

The protections afforded to the right to just compensation, and property rights in general, are one of the most telling indications about the nature and character of a government and the freedoms

164. *Id.*
165. *Id.*
166. *Id.* at 573–74, 59 S.E. at 411.

of its people.[167] While courts once understood this fact, they have seemingly forgotten it. In *Monongahela Navigation Co. v. United States*, the United States Supreme Court declared:

> The question presented is not whether the United States has the power to condemn and appropriate this property of the Monongahela Company, for that is conceded, but how much it must pay as compensation therefor. Obviously this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance, for in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government. The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.[168]

Private property and the venerable right to just compensation is one of the last barriers the individual has against the masses and the prevailing political winds of the moment.[169] Without it, an

---

167. In *The Guardian of Every Other Right*, Professor Jim Ely highlights the history and importance of private property rights in the protection of liberty. He explains how private property rights undergird every other right. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT (2d ed. 1998). With the expanse of government and the rise of governmental projects that require a weakening of private property rights, the importance of private property has been lost on politicians, practitioners, and professors alike—many of whom later sit as judges in eminent domain cases.

168. 148 U.S. 312, 324, 13 S. Ct. 622, 625, 37 L. Ed. 463 (1893).

169. The rights to private property and just compensation protected in the Constitution illustrate one of the most important differences between a democracy and the constitutional republic our Founders created. As James Madison explained in Federalist 10, "democracies have ever been . . . found incompatible with . . . the rights of property." In a democracy, the only limit on government power is the will of the majority, and every person's home, farm, business, or place of worship is subject to the whim of such majority. As John Adams declared: "The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence." JOHN ADAMS, DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES (1787).

individual has no liberty.[170] The Supreme Court of Georgia summed it up well when it avowed:

> Private property is the antithesis of Socialism or Communism. Indeed, it is an insuperable barrier to the establishment of either collective system of government. Too often, as in this case, the desire of the average citizen to secure the blessings of a good thing like beautification of our highways, and their safety, blinds them to a consideration of the property owner's right to be saved from harm by even the government. The thoughtless, the irresponsible, and the misguided will likely say that this court has blocked the effort to beautify and render our highways safer. But the actual truth is that we have only protected constitutional rights by condemning the unconstitutional method to attain such desirable ends, and to emphasize that there is a perfect constitutional way which must be employed for that purpose. Those whose ox is not being gored by this Act might be impatient and complain of this decision, but if this court yielded to them and sanctioned this violation of the Constitution we would thereby set a precedent whereby tomorrow when the critics are having their own ox gored, we would be bound to refuse them any protection. Our decisions are not just good for today but they are equally valid tomorrow.[171]

Only time will tell if America's courts will wake up to the injustices they are perpetrating every day in eminent domain courts throughout the country. "Just compensation" will not fulfill the plain meaning of those two, simple words until such awakening occurs.[172] It is too late for Susette Kelo and for the many individuals who have been

---

170. *See* ELY, *supra* note 167.

171. State Highway Dep't v. Branch, 222 Ga. 770, 772, 152 S.E.2d 372, 374 (1966).

172. As illustrated by the earlier example of the Virginia trial court's construction of the constitutional amendment of 2012, even if the people act to restore their own property rights, those rights will not be secure absent a place the people can go for a remedy, i.e., the courts. As Chief Justice John Marshall declared:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed . . . .

Marbury v. Madison, 5 U.S. 137, 176, 2 L. Ed. 60 (1803).

shortchanged by their government, despite the principles of equity and indemnification embedded in the Just Compensation Clause. It is not too late for those whose ox may be gored tomorrow or for a government that is teetering on the edge of a slippery slope into a form of government this nation has never seen—one that has a complete disregard for the property rights of the citizen and the liberties these rights undergird.[173]

CONCLUSION

The owner's plight today reminds one of President Reagan's prescient words: "The nine most terrifying words in the English language are, 'I'm from the government, and I'm here to help.'"[174] Owners forced to surrender their property for the public good should not bear the burdens and injustices they suffer today. "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[175]

The time is long overdue to reconsider America's eminent domain laws and to restore individual protections. To paraphrase Thomas Paine in *Common Sense*, doing a wrong thing for a long time does not make it right.[176] Time may make more converts than reason,[177] but one can only hope that reason and justice will ultimately prevail.

---

173. James Madison wrote, "Government is instituted to protect property of every sort." *See* James Madison, *Property*, *in* PRIVATE PROPERTY AND POLITICAL CONTROL 30 (1992). Madison noted that every individual "has a property . . . in . . . his person" as much as in his possessions. *Id.* As Madison further explained, property (and, with it, liberty) are in jeopardy when there is an (1) "excess of power" (i.e., no protection against government encroachment) or (2) "excess of liberty" (i.e., anarchy or no protection against one's neighbors). In each instance, "the effect is the same." *Id.* The right to private property succumbs to the whim of the majority. The only difference is that the former is clothed in governmental authority.

174. This warning is especially prudent in today's "sloganeering culture" in which those seeking to agitate the masses or escape constitutional restrictions have "cleverly redefin[ed] words and prostitute[ed] ideas." *See* ZACHARIAS, *supra* note 4, at 11. By saying these slogans loud enough and long enough, they have been able to escape reason and, all too often, the language of the Constitution. *Id.* In the context of property rights, one must point no further than Susette Kelo or the many urban homeowners who lost their family homes to "regentrification."

175. Penn. Coal Co. v. Mahon, 260 U.S. 393, 416, 43 S. Ct. 158, 160 (1922).

176. "[A] long habit of not thinking a thing *wrong*[] gives it a superficial appearance of being *right*." (emphasis in original). THOMAS PAINE, COMMON SENSE 1 (Dover Publications, Inc. 1997) (1976).

177. *See id.*

The balance between government power and individual protections for private property is far off-kilter. While the property owners should not get a windfall, they certainly should not bear burdens they would not have to suffer if they voluntarily sold their property. Until the process and method of providing "just compensation" fulfill the plain meaning of the Just Compensation Clause, this supposed constitutional right will be nothing more than a noble concept on a Constitution that provides little more than a lofty ambition.

IMPLIED PREEMPTION IN THE REGULATION OF LAND

DAVID L. CALLIES* & ELLEN R. ASHFORD**

INTRODUCTION

The subject of preemption by one unit of government over another is a fundamental issue precedent to the exercise of regulatory authority by state and local government. While preemption—in particular state and local preemption by the federal government—has been the subject of considerable discussion in the literature,[1] there has not been much recent discussion of preemption in the context of real property. The subject is treated more or less the same by most courts, whether the case involves federal preemption of state (and occasionally local) government law, or whether it involves state preemption of local government law.[2] The only critical difference—and it is critical—with respect to federal preemption is the need to carefully evaluate and analyze the federal government's authority to exercise the allegedly preemptive statutory or regulatory authority in the first place, since the federal government is one of enumerated powers with virtually no independent regulatory authority beyond that conveyed by an admittedly generous interpretation of the U.S. Constitution's Commerce Clause. The 11th Amendment also forbids the federal government from commanding states to regulate its citizens under the so-called anticommandeering doctrine. Both of these principles are fully and

* FAICP, ACREL, Benjamin A. Kudo Professor of Law, William S. Richardson School of Law, The University of Hawai'i at Mānoa. AB, DePauw University, JD, University of Michigan, LLM, Nottingham University (England), Life Member, Clare Hall, Cambridge University.

** Co-Editor-in-Chief, *University of Hawai'i Law Review*.

1. Michael T. Flannery, *Social Security, Divorce, and the Scope of Federal Preemption*, 66 BUFF. L. REV. 1 (2018); Amelia Raether, *Commandeering, Preemption, and Vehicle Emissions Regulation Post-*Murphy v. NCAA, 1014 NW. U.L. REV. 1015 (2020); Rachel Rothschild, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENV'T L.J. 412 (2019); *Federalism—Preemption—Massachusetts District Court Finds Portion of Local Drone Ordinance Preempted by FAA Regulation*—Singer v. City of Newton, No. CV 17-10071, 20017 WL 4176477 (D. Mass. Sept. 21, 2017), 131 HARV. L. REV. 2057 (2018); Jason A. Kurtyka, *Flying First Class: The Third Circuit Establishes a Methodology for Implied Preemption Analysis of Federal Premarket Approval Regulations in* Sikkelee v. Precision Airmotive Aircorp, 62 VILL. L. REV. 527 (2017).

2. NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 3 (2018).

clearly discussed and articulated in *Murphy v. National Collegiate Athletic Association*.[3] Since states have all the powers not granted to the federal government, reserved specifically to the states by the 10th Amendment, the only needful fundamental preliminary investigation with respect to state preemption of local government authority is the extent of limitations in the relevant state constitution, since state constitutions are limits, not grants, on otherwise plenary authority to regulate and govern.[4]

The standards—if not their application—are relatively straightforward and articulated in any number of recent cases. Virtually all commence with the fairly obvious statement that a superior level of government—subject to the limitations set out in the preceding paragraph—can always expressly preempt an inferior level, as the U.S. Supreme Court recently noted.[5] Absent such express preemption, the analysis and discussion generally passes on to the most difficult and arguably troublesome type: implied preemption. The elements of preemption are nicely set out by the Supreme Court in *Murphy*:

> Our cases have identified three different types of preemption . . . "conflict preemption". . . [where] state law imposed a duty that was inconsistent—*i.e.*, in conflict—with federal law . . . "[e]xpress preemption". . . illustrative [by the Airline Deregulation Act of 1978 which provided] that "no State or political subdivision thereof . . . shall enforce or enact any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any [covered] air carrier,". . . and "[f]ield preemption [which] occurs when federal law occupies a 'field' of regulation 'so comprehensively that it has left no room for supplementary state legislation.'"[6]

As the Court observed, express preemption is usually not difficult to apply. It is implied preemption that most often leads to litigation. A relatively recent magistrate order in Hawai'i[7] best illustrates the primary factors favoring such implied preemption in a property law context:

---

3. 138 S. Ct. 1461 (2018).

4. DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM (8th ed. 2014).

5. Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894 (2019).

6. *Murphy*, 138 S. Ct. at 1480.

7. Syngenta Seeds, Inc. v. Cnty. of Kauai, 2014 WL 4216022, at *1 (D. Haw. Aug. 25, 2014).

1. Does the superior government occupy the field?
2. Does the superior government evince a comprehensive plan or scheme?
3. Is there a need for statewide or federal uniformity?
4. Does the inferior government forbid what the superior government permits?
5. Does the inferior government permit what the superior government prohibits?

In *Syngenta Seeds v. County of Kauai*, the county passed an ordinance regulating the growing of genetically modified organisms ("GMO")[8] agricultural products. Concerned primarily with the spreading of pesticides, the ordinance:

1. Imposed various notification requirements on commercial agricultural entities, including mandatory disclosure of the use of certain restricted pesticides and the possession of GMO by commercial agricultural entities;
2. Created pesticide buffer zones;
3. Required the county to complete an Environmental and Public Health Impact Study to address environmental and public health questions related to large-scale commercial agricultural entities using pesticides and GMO; and
4. Placed a penalty provision providing that any firm or corporation violating the ordinance shall be assessed a civil fine of $10,000 to $25,000 per day, per violation and shall be guilty of a misdemeanor and upon conviction be punished by a fine of not more than $2,000 or imprisoned for not more than one year, or both, for each offense.[9]

Syngenta Seeds challenged the ordinance on a motion for summary judgement.[10]

While noting that Hawai'i's four counties have authority to enact laws pertaining to agriculture, both as a matter of state enabling statutes and broad state constitutional power, the court noted that

8. In this Article, GMO is used to describe any organism whose genetic material has been altered using genetic engineering techniques.

9. *Syngenta Seeds*, 2014 WL 4216022, at *1–2.

10. *Id.* at *1.

such power was not unlimited.[11] After dismissing plaintiffs' claims that the county ordinance prohibited certain disclosure requirements under a state statute governing disclosure and that a statutory right to farm law precludes the county from regulating nuisance—in other words, finding no direct conflict—the court then addressed implied conflict.[12]

It held that such a conflict existed and so the ordinance was impliedly preempted.[13] Finding that the ordinance legislated in an area already staked out by the legislature for exclusive use and statewide statutory treatment, the court found the ordinance impermissibly entered an area of such use and treatment because of the comprehensive nature of the state's statutory scheme.[14] First, the court held that the ordinance covered the same subject matter embraced by state law and regulation.[15] The ordinance imposed various pre- and post-application reporting requirements and established buffer zones in which no crops to which pesticides would be applied could be planted.[16] However, the state pesticide law already addressed pesticide use and granted extensive rulemaking authority to State of Hawai'i Department of Agriculture ("HDOA").[17] The court found these to be so extensive as to cover the same subject matter as the ordinance.[18] The court found the same to be true with respect to licensing, sales and enforcement.[19] Therefore, this "evidences the legislature's intent that the state law be both uniform and exclusive."[20] The court also found the same to be true with respect to annual GMO reporting requirements.[21] In sum, the court determined:

> [T]hat these statutory provisions, in the context of art. XI § 3, the comprehensive administrative system established under the HDOA, and the complete absence of reference to counties or local governments therein, evidence the legislature's intent that the

11. *Id.* at *3–4.
12. *Id.* at *5–7.
13. *Id.* at *9.
14. *Id.*
15. *Syngenta Seeds*, 2014 WL 4216022, at *8.
16. *Id.* at *7.
17. *Id.*
18. *Id.* at *8.
19. *Id.*
20. *Id.*
21. *Syngenta Seeds*, 2014 WL 4216022, at *8–9.

> state scheme for the regulation of specific potentially harmful plants be both uniform and exclusive preempting the imposition of local regulations on this specific issue.[22]

Accordingly, the court held the GMO notification provision of the ordinance was preempted by state law and barred from taking effect.[23] The court then turned to federal preemption.[24]

Plaintiffs also claimed that the Federal Insecticide Fungicide and Rodenticide Act ("FIFRA") preempted some of the informational requirements of the county ordinance and that a federal coordinated framework comprehensively regulated GMO, thereby impliedly preempting both state and county regulation.[25] Noting that Congress has the constitutional power to preempt state law either expressly or implicitly within the sphere of federal power and authority, the court further explained that in the absence of express preemptive language, preemption may be "inferred" (presumably the same as implied) first under either field preemption, "where federal law 'so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it' or 'where the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject'"; or second, where the state law actually conflicts with federal law such that "compliance with both . . . is a physical impossibility" or the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[26]

Turning first to the ordinance's reporting requirements, the court held there was neither express nor implied preemption by FIFRA.[27] According to the court, FIFRA imposes only informational restrictions on records maintained under FIFRA and the county ordinance imposed record-keeping requirements pursuant to a separate and independent state power, and so FIFRA's restrictions do not apply.[28] As to GMO regulations, since the county ordinance did not deal with movement in interstate commerce which would conflict with the

22. *Id.* at *9.
23. *Id.*
24. *Id.*
25. *Id.* at *10.
26. *Id.*
27. *Syngenta Seeds*, 2014 WL 4216022, at *11–12.
28. *Id.* at *12.

Federal Plant Protection Act ("PPA"), there was no preemption in the GMO notification provision of the county ordinance, nor do the county reporting requirements interfere with Animal and Plant Health Inspection Service regulations dealing with the conduct of field trials.[29] The federal district court's decision was affirmed by the Ninth Circuit on appeal on all accounts.[30]

What follows is a longer discussion of preemption in the area of GMO regulation and a summary of other property cases by subject matter which deal with implied preemption standards mostly as set out in *Syngenta Seeds*.

I. THE CASE LAW: A SURVEY BY SUBJECT

A. Transgenic Agriculture (GMO and GE)

Recently, Americans have become increasingly concerned about how food is grown and produced. With the trends in farm-to-table dining and organic farming, attention becomes focused on the seasonless American supermarket with year-round strawberries and tomatoes grown halfway around the world. Given the continuing debate on transgenic agriculture, which includes use of genetic engineering techniques ("GE") and GMO, there has been surprisingly little litigation of state-local preemption of transgenic agriculture regulation, even though regulation of land use and agriculture are traditionally areas of local concern.

GMO are achieved through a GE process in which a laboratory technician extracts genes from the DNA of one species and combines them with the genes of another.[31] According to the Federal Drug Administration ("FDA"), genetic modification uses a biotechnological method to manipulate an organism's genome.[32] Foreign genes are not necessarily extracted from like species and may originate in "bacteria, viruses, insects, animals, or even humans."[33] GE has been used

29. *Id.* at *12–14.

30. Syngenta Seeds, Inc. v. County of Kauai, 842 F.3d 669 (9th Cir. 2016).

31. *What is a GMO?*, INST. FOR RESPONSIBLE TECH., http://responsibletechnology.org/gmo-education (last visited June 21, 2021).

32. *Genetic Engineering, Agricultural Biotechnology Glossary*, U.S. DEP'T OF AGRIC., https://www.usda.gov/topics/biotechnology/biotechnology-glossary (last visited June 21, 2021).

33. INST. FOR RESPONSIBLE TECH., *supra* note 31.

to increase nutritional benefits or crop productivity,[34] disease resistance,[35] herbicide tolerance, and the ability of the plant to produce its own pesticide.[36] While selective breeding to achieve certain desirable traits has been practiced by farmers for centuries, modern technology permits giant strides in improved crop yields, enhanced nutritional value, and improved drought-resistance and tolerance to cold temperatures and insects.[37]

However, some critics claim that trait manipulation may cause unforeseen effects to the global ecosystem and ecological processes,[38] or that the prevalence of GMO will result in less biodiversity and increase the development of pesticide-resistant insects and weeds.[39] As a result, the federal government has enacted a comprehensive framework of regulation for transgenic agriculture. The U.S. Department of Agriculture's ("USDA") Animal and Plant Health Inspection Service ("APHIS") and Environmental Protection Agency ("EPA") consider potential environmental impacts of pest-resistant biotechnology on other species like honeybees and earthworms, through testing.[40] The EPA and FDA also test for potential toxicity and potential to cause an allergic response to regulate food safety of GMO.[41] Because GMO are heavily regulated by the federal government, it is unsurprising that most preemption claims relating to GMO are of the federal-state type. Nevertheless, a few recent cases evaluating claims of state-local preemption suggest that some local governments continue to regulate GMO.

---

34. *Biotechnology Frequently Asked Questions (FAQs)*, U.S. DEP'T OF AGRIC., https://www.usda.gov/topics/biotechnology/biotechnology-frequently-asked-questions-faqs (last visited June 21, 2021) ("Biotech crops may provide enhanced quality traits such as increased levels of beta-carotene in rice to aid in reducing vitamin A deficiencies and improved oil compositions in canola, soybean, and corn.").

35. *Id.*

36. INST. FOR RESPONSIBLE TECH., *supra* note 31.

37. *Genetically Modified Crops*, CASE STUDIES IN AGRICULTURAL SECURITY, https://fas.org/biosecurity/education/dualuse-agriculture/2.-agricultural-biotechnology/genetically-engineered-crops.html (last visited June 21, 2021).

38. Joel Achenbach, *Are GMO Crops Safe? Focus on the Plant, Not the Process, Scientists Say.*, WASH POST (May 17, 2016), https://www.washingtonpost.com/news/speaking-of-science/wp/2016/05/17/ge-crops/?utm_term=.b5f81185fce2.

39. Julie M. Muller, *Naturally Misleading: FDA's Unwillingness to Define "Natural" and the Quest for GMO Transparency Through State Mandatory Labeling Initiatives*, 48 SUFFOLK U. L. REV. 511, 516–17 (2015).

40. U.S. DEP'T OF AGRIC., *supra* note 34.

41. *Id.*

Hawai'i remains ground zero in the debate over local regulation of GMO.[42] Beyond the discussion of *Syngenta Seeds* in the Introduction above, it is therefore worth summarizing two other GMO cases from Hawai'i.

In an unreported case, a federal magistrate judge found a Hawai'i County ordinance restricting "the open air cultivation, propagation, development, or testing of genetically engineered crops or plants" preempted by state law and, in part, expressly preempted by federal law.[43] Though unreported, it has been relied on by federal courts in subsequent decisions.[44] The challengers argued that state law preempted the ordinance based on the state constitution vesting the state with exclusive authority over agriculture and the HDOA and Hawai'i Board of Agriculture ("HBOA") exercising such exclusive authority by establishing a comprehensive framework for regulating plants that present the same risk of environmental impacts the ordinance claimed to address.[45] The magistrate judge noted these were the same arguments for state preemption before the court in *Syngenta Seeds*.[46] Applying the "comprehensive statutory scheme test" from *Richardson v. City and County of Honolulu*, the magistrate noted the "critical determination . . . is whether the statutory scheme . . . indicates a legislative intention, express or implied, to be exclusive and uniform throughout the state."[47] Upon finding overlapping subject matter in the statutory scheme and municipal ordinance, the magistrate proceeded to analyze the uniformity and exclusivity of a statutory scheme.[48] Based on the HBOA receiving input on statewide agricultural problems from members who reside in each county and the HBOA chair's position on a state advisory committee with

42. David L. Callies, *GMO Regulation*, 38 No. 10 ZONING & PLANNING L. REPORT 1 (2015). There is a recent, unreported case of note where a federal district court in Oregon upholding a county ordinance approved by ballot measure, finding no preemption under Oregon's Right to Farm Act and additional, recent state law authorizing such ordinance. Schultz Family Farms LLC v. Jackson Cnty., 2015 WL 3448069, at *1 (D. Or. May 29, 2015).

43. Haw. Floriculture & Nursery Ass'n v. Cnty. of Haw., 2014 WL 6685817, at *1 (D. Haw. Nov. 26, 2014).

44. Robert Ito Farm, Inc. v. Cnty. of Maui, 111 F. Supp. 3d 1088, 1104, 1108, 1111–12 (D. Haw. 2015); Atay v. Cnty. of Maui, 842 F.3d 688, 704 n. 9 (9th Cir. 2016).

45. *Haw. Floriculture*, 2014 WL 6685817 at *3.

46. *Id.*

47. *Id.* at *4 (citing Richardson v. City & Cnty. of Honolulu, 868 P.2d 1193, 1208–09 (Haw. 1994)).

48. *Id.* at *6.

"extensive and broad responsibilities over agricultural problems spanning the various counties to form a coherent and comprehensive statewide agricultural policy," the magistrate concluded "legislative intent for a . . . comprehensive state statutory scheme . . . preempt[ed] the County's ban on genetically engineered organisms."[49] Accordingly, the ordinance was invalidated by virtue of implied preemption by state law.[50]

The magistrate also reviewed the different standards for federal implied preemption that applied.[51] For federal field preemption to apply, federal law must either "so thoroughly occup[y] a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it," or "the federal interest [must be] so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[52] For federal conflict preemption to apply, "compliance with both federal and state regulations [must be] a physical impossibility, or when the state law [must stand] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[53] Thus, the magistrate also found that the ordinance's ban on open air field testing of GE is expressly preempted under the PPA by parsing the statutory language to identify the domain expressly preempted.[54]

In its 2015 decision of *Robert Ito Farm, Inc. v. County of Maui* 2015, a federal court for the District of Hawai'i found a Maui County GMO ordinance preempted by state and federal law, thereby in excess of the county's ability to regulate.[55] The court found the Maui ordinance was expressly preempted by federal regulation of plant pests and noxious weeds.[56] The stated purpose of the Maui ordinance was to "protect against transgenic contamination caused by [genetically engineered] operations and practices . . . (including pesticide use and testing); to preserve the right of the County to reject [genetically

---

49. *Id.*

50. *Id.* (citing Richardson v. City & Cnty. of Honolulu, 868 P.2d 1193, 1207, 1209 (Haw. 1994)).

51. *Id.* at *9–10.

52. *Id.* at *9 (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) and Hawaiian Navigable Waters Pres. Soc'y v. State of Hawaii, 823 F. Supp 766. 771 (D. Haw. 1993)).

53. *Id.* (quoting Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985)).

54. Id. at *7–8.

55. Robert Ito Farm, Inc. v. Cnty. of Maui, 111 F. Supp. 3d 1088 (D. Haw. 2015).

56. *Id.* at 1104.

engineered] operations and practices based on health-related, moral, or other concerns, and to preserve Maui County's environment and public trust resources."[57]

The court examined the plain language of the ordinance to determine whether it was preempted by the PPA.[58] The PPA expressly preempts any "State or political subdivision of a State" from regulating plants pests and noxious weeds, among other plant types.[59] According to the findings and purpose of the Maui ordinance, which included preventing contamination of and damage to non-GE papaya and banana crops, the court found:

> The Ordinance inherently considers [genetically engineered] organisms to be 'noxious weeds' and/or 'plant pests' as defined in [the Plant Protection Act].
>
> According to the Ordinance, GE plants directly and indirectly injure or damage crops, agriculture interests, public health and the environment. The Ordinance therefore seeks to regulate what it sees as a 'noxious weed' as defined by federal law.[60]

In finding the Maui ordinance expressly preempted by federal law, the court rejected the argument by proponents of the ordinance that "because the Ordinance has an alleged purpose other than governing 'plant pests,'" preemption does not apply.[61]

The court did not stop there. The court continued to find the ordinance invalid by implied conflict preemption under federal law.[62] A purpose of the PPA is to set "a national standard governing the movement of plant pests and noxious weeds in interstate commerce based on sound science."[63] The Maui ordinance ban on GE organisms, including some plant pests, "causes the ordinance to run afoul" of the purpose of the PPA, thereby frustrating its purpose.[64]

The court then turned to the issue of preemption under state law, applying the test for "exclusive and statewide statutory treatment"

57. *Id.* at 1103 (citing the ordinance).
58. *Id.* at 1104.
59. *Id.* at 1102.
60. *Id.* at 1104.
61. *Robert Ito Farm, Inc.*, 111 F. Supp. 3d at 1105.
62. *Id.* at 1107.
63. *Id.* (internal citations omitted).
64. *Id.*

from *Syngenta Seeds*.[65] Following the two-step analysis, the court first "determine[d] whether an ordinance impermissibly legislates in an area of exclusive and statewide statutory treatment"—the "comprehensive statutory scheme" test—was applied.[66] The court found the "state statutes and regulations create a comprehensive scheme" that reflect the authority of the state over plants that may harm agriculture, the environment, or the public.[67] Thus, the ordinance attempted "to regulate the same subject matter that the [existing] state framework addresses."[68] The argument by a proponent of the ordinance that the state framework addressed a "statewide concern" while the ordinance "addresse[d] local health and safety concerns . . . within the County," failed because "preemption of a county ordinance by state law does not turn on whether the ordinance addresses local, rather than statewide, concerns."[69] The court stated that GE organisms may be "embraced within a comprehensive state statutory scheme" "absent explicit mention of GE organisms in a particular state law," and in this case, "the scope of [the state framework] reaches GE organisms" and the absence of explicit mention of "GE organisms in no way precludes preemption."[70]

Second, the court considered "whether the statutory scheme disclose[d] an express or implied intent to be exclusive and uniform throughout the state."[71] The court noted the network of state agencies created by the state legislature that have "extensive and broad responsibilities over agricultural problems spanning the various counties to form a coherent and comprehensive statewide agricultural policy" sufficient to "disclose[] an intent to be the exclusive and uniform [regulating bodies] throughout the state."[72]

---

65. *Id.* at 1109. "Any ordinance that 'conflict[s] with the intent of a state statute or legislate[s] in an area already staked out by the legislature for exclusive and statewide statutory treatment' is preempted by state law." *Id.* (citing Richardson v. City & Cnty. of Honolulu, 868 P.2d 1193, 1207 (Haw. 1994); and *Syngenta Seeds*, 2014 WL 4216022, at *1 (D. Haw. Aug. 25, 2014)).

66. *Robert Ito Farm, Inc.*, 111 F. Supp. 3d at 1109.

67. *Id.* at 1110.

68. *Id.*

69. *Id.* at 1110–11.

70. *Id.* at 1109, 1011.

71. *Id.* at 1109.

72. *Robert Ito Farm, Inc.*, 111 F. Supp. 3d at 1112 (quoting *Haw. Floriculture*, 2014 WL 6685817, at *1, *6 (D. Haw. Nov. 26, 2014)). The court took great care to note that its decision does not pass judgment on the merit, benefit, or harm posed by GMO.

The Ninth Circuit affirmed the decisions below, finding the Maui ordinance expressly preempted by federal law as applied to GE plants federally regulated as plant pests, but neither expressly nor impliedly preempted as applied to GE plants that have been deregulated.[73] The Ninth Circuit further found the ordinance impliedly preempted by state law in its application to federally deregulated, commercialized GE plants, thereby affirming the invalidation of the ordinance.[74] The court first identified three conditions in the express preemption provision in the PPA that "must be met for a local law to be preempted."[75] The court looked at the express design and purpose of the ordinance and the scope of the federal regulation to conclude that all three conditions for express preemption under the PPA were met to the extent the ordinance sought to regulate GE plants that are federally regulated as plant pests.[76]

The appellate court did, however, disagree with the finding of the court below that the ordinance was "impliedly preempted by the PPA in its application to deregulated, 'commercialized' GE crops."[77] The court began its "search for implied preemptive intent by [noting] the PPA's express preemption creates a 'reasonable inference' that Congress did not intend to preempt state and local laws that do not fall within [the scope of its preemption clause]."[78] While this inference can be overcome by proof that the ordinance creates an "actual conflict" with any federal statutory or regulatory provision, or more broadly that the ordinance impermissibly "frustrates any federal objective," the court found the opponents of the ordinance failed to do both.[79] Following the Supreme Court's "warn[ing] that obstacle preemption analysis does 'not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives[, because] such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law,'" the

73. Atay v. Cnty. of Maui, 842 F.3d 688, 710 (9th Cir. 2016). Note that the Ninth Circuit's unpublished decision of *Syngenta Seeds* was filed on the same day. 2014 WL 4216022, at *1 (D. Haw. Aug. 25, 2014).

74. *Id.*

75. *Id.* at 701.

76. *Id.* at 702–03.

77. *Id.* at 703–04 (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995)) (internal citations omitted).

78. *Atay*, 842 F.3d at 704.

79. *Id.*

Ninth Circuit maintained a high threshold for conflict preemption and found nothing in the PPA or its "implementing regulations suggest[] a local government could not choose to" ban commercialized, deregulated GE crops.[80] Regulation of commercialized crops that have been federally deregulated therefore remains within the authority of state and local governments.[81]

The Ninth Circuit, however, affirmed the finding of the court below that the ordinance's "remaining application to [deregulated,] commercialized GE plants" was preempted by state law.[82] The court used the three-part test from *Richardson*, evaluating each of the three "overlapping elements": "(1) [that] state and local laws address the same subject matter, (2) that state law comprehensively regulates that subject matter, and (3) that the legislature intended the state law to be uniform and exclusive."[83] The court found that "the pervasiveness of the . . . statutory scheme" as well as "[s]everal specific provisions of the . . . scheme . . . evidence[d]" the legislature's intent that "the State's regulatory oversight of potentially harmful plants . . . be uniform and exclusive of supplemental local rules," concluding that "the [o]rdinance impermissibly intrudes into this area of exclusive State regulation" and thereby impliedly preempted.[84]

B. Cannabis

The growing legalization of cannabis use at the state level has resulted in preemption challenges on the federal-state level, because the Federal Controlled Substances Act still plainly criminalizes all use of cannabis and related activities. However, as of November of 2020, thirty-six states and Washington, D.C. have legalized the use and cultivation of cannabis for medical and/or recreational use.[85] State authorization, however, does not prevent local attempts at regulation or exclusion of cannabis-related land use within a municipality. Most of the existing state statutes limit local authority to

80. *Id.* at 705.
81. *Id.*
82. *Id.* at 705–06.
83. *Id.* at 706.
84. *Atay*, 842 F.3d at 710.
85. Jeremy Berke, Shayanne Gal & Yeji Jesse Lee, *Marijuana legalization is sweeping the US. See every state where cannabis is legal.*, BUSINESS INSIDER (Apr. 14, 2021), https://www.businessinsider.com/legal-marijuana-states-2018-1.

regulate land use pertaining to cannabis within their jurisdictions.[86] The ability of local governments to regulate cannabis within its boundaries differs from state to state: some states expressly preempt local regulation of marijuana while others are silent on the subject, leaving open the issue of whether the statutory scheme impliedly preempts such regulation by imposing statewide regulation.[87]

1. Zoning

An obvious means of excluding cannabis cultivation and dispensaries from a municipality is through zoning. As the statutes legalizing certain cannabis activities vary from state to state, so do the local attempts to curtail such activities that are legalized at the state level. Generally, total bans achieved through local zoning have been upheld, though a recent appellate decision in Arizona discussed below offers a minority approach to the preemption issue of excluding legalized use of cannabis through zoning.

The Township of Byron, Michigan passed a zoning ordinance requiring medical marijuana caregivers to obtain a permit and "cultivate marijuana as a 'home occupation' at a full-time residence."[88] The ordinance was challenged by a licensed qualifying patient and registered primary caregiver who grew cannabis without a permit "on rented commercially zoned property" in an enclosed, locked facility.[89] The township sent the caregiver's landlord a cease and desist letter, which "asserted that violations of the zoning ordinance were a nuisance per se."[90] The caregiver challenged the permit requirement and locational restriction, claiming that the "zoning ordinance was preempted . . . and . . . therefore, unenforceable."[91] The trial court found the "ordinance impermissibly subjected . . . caregivers to penalties," which state law prohibits and that the "[t]ownship could not prohibit what [state law] explicitly authorized—the medical use of [cannabis]."[92] The court of appeals affirmed.[93]

86. Martha H. Chumbler, *Land Use Regulation of Marijuana Cultivation: What Authority is Left to Local Government*, 49 URB. LAWYER 505 (2017).

87. *Id.* at 506.

88. DeRuiter v. Twp. of Byron, 949 N.W.2d 91, 93 (Mich. 2020).

89. *Id.* at 94.

90. *Id.* at 95.

91. *Id.*

92. *Id.*

93. *Id.*

In 2020, the Supreme Court of Michigan addressed only conflict preemption on appeal, finding no preemption and upholding the validity of the ordinance.[94] The court defines conflict preemption narrowly: only where "its additional requirements do not contradict the requirements . . . in the statute."[95] So long as the municipality does not prohibit or penalize all medical cannabis cultivation or "impose regulations that are 'unreasonable and inconsistent with regulations established by state law[,]'" there is no conflict.[96] The court also found the permit requirement did not impermissibly infringe on the caregiver's medical use of cannabis, because "the permit requirement does not effectively prohibit medical use . . . ."[97]

In 2015, the Supreme Court of Washington found state law permitting patients to grow medical marijuana in "collective gardens" did not preempt a city from banning collective gardens in the city through its zoning ordinance.[98] The original purpose of the statute was to provide "an affirmative defense to criminal prosecution" of medical cannabis users.[99] The same statute permitting collective gardens also grants cities and towns the power to zone the "production, processing, or dispensing of medical [cannabis]."[100] Under this authority, the City of Kent enacted the zoning ordinance described by the court as follows: "Styled as a zoning ordinance, it prohibits collective gardens . . . in every zoning district within the city and deems any violation a nuisance per se that shall be abated by the city attorney. The city may enforce the Ordinance with criminal and civil sanctions."[101]

Despite this zoning ordinance banning a land use legalized by state law and defeating the purpose of protection of medical use from criminal prosecution, the Supreme Court of Washington upheld the ordinance as "a valid exercise of the [city's] zoning authority . . . because the [o]rdinance merely regulates land-use activity."[102] The court characterized the statute as clarifying that "local governments

94. *DeRuiter*, 949 N.W.2d at 101.
95. *Id.* at 100.
96. *Id.*
97. *Id.* at 101.
98. Cannabis Action Coal. v. City of Kent, 351 P.3d 151, 152, 155 (Wash. 2015) (en banc).
99. *Id.* at 153.
100. *Id.* at 153.
101. *Id.* at 153–54 (internal citations omitted).
102. *Id.* at 152.

retain authority to regulate . . . medical marijuana through zoning."[103] Local prohibition on cannabis in Washington has expanded since the state supreme court upheld a ban on what the statute permits. In 2014, the Attorney General's Office "opined that state law did not preempt local government[s]" from enacting local bans on cannabis sales.[104] In 2018, an appellate court upheld a "county ordinance that banned the retail sale of recreational [cannabis]."[105] The applicant seeking a cannabis retailer license argued that the ordinance "irreconcilably conflict[s] with state law" legalizing recreational cannabis.[106] The court determined "the ordinance does not prohibit what state law permits," does not "thwart legislative purpose," and that "the county did not exercise unauthorized power."[107] The applicant's "implied preemption argument assert[ed] that allowing piecemeal county-level bans would render the [legislative] intent to establish a regulated [cannabis] market 'meaningless.'"[108] The court disagreed, finding "a closer reading" of the statute and interpretation of legislative history "indicat[ing] the legislature intended to leave local governments' zoning authority undisturbed."[109] In sum, total bans of medical and recreational cannabis by zoning or other local ordinance appear immune from preemption.

In *Inland Empire*, the Supreme Court of California reached the same conclusion: its medical cannabis statutes do not preempt a local ban on facilities that distribute medical cannabis.[110] The City of Riverside amended its zoning ordinances to provide that medical cannabis dispensaries are "a prohibited land use within the city and may be abated as a public nuisance."[111] "The . . . ordinance also bans, and declares as nuisance, any use that is prohibited by federal . . . law."[112] Under this ordinance, the city brought a nuisance action against a distribution facility that argued "the local ban . . . conflict[s]

103. *Id.* at 153.
104. Emerald Enterprises, LLC v. Clark Cnty., 413 P.3d 92 (Wash. Ct. App. 2018).
105. *Id.*
106. *Id.* at 97.
107. *Id.* at 98–103.
108. *Id.* at 104.
109. *Id.* at 104–05.
110. City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc., 300 P.3d 494, 496 (Cal. 2013).
111. *Id.* at 496.
112. *Id.*

with, and is thus preempted by," state law.[113] The court found that "[n]othing in [the medical cannabis statutes] expressly or impliedly limits the inherent authority of a local jurisdiction . . . to regulate the use of its land, including the authority to prohibit distribution facilities within its borders."[114] Because some counties might come to the reasonable conclusion that a dispensary "facilit[ies] within its borders, even if carefully sited, well managed, and closely monitored, would present unacceptable local risks and burdens"; the court could not "lightly assume the voters or the [state legislature] intended a one size fits all policy" under which "each and every one of California's [local governments] must allow the use of land for" dispensary facilities.[115] The court characterized state law as "merely removing state law criminal and nuisance sanctions from" certain conduct, leaving local governments "free to accommodate [or prohibit] such conduct" within their borders, finding no conflict and no implied preemption.[116] Because state law merely "remove[s] state-level criminal and civil sanctions from specified medical [cannabis] activities," and does *not* "establish a comprehensive state system of legalized medical [cannabis,] . . . grant a 'right' of convenient access to [cannabis] for medicinal use[,] . . . override the zoning, licensing, and police powers of local [governments,] or mandate local accommodation of medical [cannabis] cooperatives, collectives, or dispensaries[,]" the court found local prohibition of cannabis use legalized at the state level was not preempted.[117] Similar county ordinances severely restricting cannabis businesses have been upheld under this decision.[118]

An appellate court in Arizona reached the opposite conclusion on the permissiveness of a total ban through local zoning. In 2010, Arizona voters passed a state law "decriminaliz[ing] and provid[ing] protection . . . for the medical use, possession, cultivation, and sale of [cannabis]."[119] The statute permits local jurisdictions "to 'enact reasonable zoning regulations that limit the use of land for [medical

113. *Id.*
114. *Id.*
115. *Id.* at 508.
116. *City of Riverside*, 300 P.3d at 512.
117. *Id.* at 513.
118. *E.g.*, Safe Life Caregivers v. City of Los Angeles, 197 Cal. Rptr. 3d 524 (Cal. Ct. App. 2016) (upholding an ordinance regulating medical cannabis businesses).
119. White Mountain Health Ctr., Inc. v. Maricopa Cnty., 386 P.3d 416 (Ariz. 2016).

marijuana dispensaries] to specified areas.'"[120] Maricopa County publicly opposed the statute and amended its zoning ordinance text to restrict industrial use that conflicts with federal law.[121] In 2012, the county "refused to issue the necessary zoning documents" to establish a medical marijuana dispensary.[122] The Arizona state appellate court affirmed the court below, which struck the text amendment.[123] The county argued the zoning issue turned on "whether [state law] preempts local jurisdictions from regulating . . . the location" of dispensaries, but the appellate court rejected this argument, stating the real issue was "whether a local jurisdiction can ban [dispensaries] under the guise of 'reasonable zoning' by authorizing [dispensaries] in an area but then adding a poison pill to that use, prohibiting [a dispensary] from conducting business in violation of [federal] law."[124] The court concluded that a county "cannot adopt . . . zoning . . . that is self-defeating by banning [dispensaries]" because "a ban . . . cannot be a 'reasonable zoning regulation.'"[125]

2. Nuisance

In the City of Claremont, California, the city planning director told a citizen seeking to open a medical cannabis dispensary that such use was not enumerated in the city zoning code and "could not be easily [included] under any existing permitted use," and that the dispensary "would not be permitted at any location within the city" and a code amendment would be necessary to permit such use.[126] Accordingly, the city denied the application for a business permit and business license for a dispensary.[127] The city then "impos[ed] a forty-five-day moratorium preventing the approval or issuance of any permit, variance, license, or other entitlement [to establish] a medical [cannabis] dispensary in the [c]ity" by ordinance.[128] The moratorium rendered the citizen's appeal of the city's denial of his business

120. *Id.* at 435 (internal citations omitted).
121. *Id.* at 420.
122. *Id.* at 418.
123. *Id.* at 423.
124. *Id.* at 435.
125. *White Mountain Health Ctr., Inc.*, 386 P.3d at 435.
126. City of Claremont v. Kruse, 100 Cal. Rptr. 3d 1 (Cal. Ct. App. 2009).
127. *Id.* at 6–7.
128. *Id.* at 7.

license and permit applications moot.[129] The moratorium was later extended for ten and a half months, and again for an additional year.[130] Meanwhile, the applicant opened a dispensary without a business license, prompting the city to direct him to cease and desist.[131] Upon the applicant's refusal to cease operation of the dispensary, the city sought "a temporary restraining order and a preliminary and permanent injunction to abate a public nuisance."[132]

An appellate court in California found state law neither expressly nor impliedly preempted the city's actions.[133] The court declined to find implied preemption for three reasons. First, "[n]either statute addresses, [let alone] completely covers the areas of land use, zoning, and business licensing[,]" so the court determined "[n]either statute imposes comprehensive regulation demonstrating that the availability of medical [cannabis] is a matter of 'statewide concern.'"[134] Second, there was no indication that local action should be precluded, except in a few areas enumerated by the statute, and there is simultaneously legislative intent to permit local regulations consistent with state law.[135] Finally, since state law does not "compel the establishment of local regulations to accommodate medical [cannabis] dispensaries; the City's enforcement of its licensing and zoning laws and its temporary moratorium on medical cannabis dispensaries do not conflict with [state law permitting dispensaries]."[136]

A medical cannabis user sought to invalidate an ordinance banning cannabis dispensaries, medical cannabis cultivation, and medical cannabis storage in Fresno County.[137] The county classified violations of the ordinance as both public nuisances and misdemeanors.[138] Among other challenges, the user alleged the ordinance's criminalization of cultivation and storage conflicted with state law that expressly states qualified users "shall not be subject to arrest for possession or cultivation of medical cannabis pursuant to [state law]."[139]

---

129. *Id.* at 7–8.
130. *Id.* at 8.
131. *Id.*
132. *City of Claremont*, 100 Cal. Rptr. 3d at 8.
133. *Id.* at 19–20.
134. *Id.* at 20.
135. *Id.*
136. *Id.* at 20–21.
137. Kirby v. Cnty. of Fresno, 195 Cal. Rptr. 3d 815, 819 (Cal. Ct. App. 2015).
138. *Id.* at 819.
139. *Id.*

The California appellate court found the provision of the ordinance criminalizing violations preempted by state law protecting against arrests relating to medical use of cannabis.[140] The court found the legislature intended to protect medical users from prosecution on a number of grounds. The Legislature's reference to "arrest and prosecution" indicated to the court an intent to preclude local law enforcement agencies and officers "from taking subsequent steps in the criminal justice process, including prosecuting protected persons under a local ordinance."[141] Another indication of legislative intent was derived "from the absence of limiting phrases deemed significant to the interpretation of statutory provisions at issue in *Inland Empire*" decided by the state supreme court.[142] The court concluded the state law "prohibition of arrests manifest the legislature's intent to fully occupy the area of criminalization and decriminalization of activity directly related to [cannabis]."[143] The criminalization provision of the ordinance, therefore, conflicts with state law and was severed from the ordinance by the court.[144]

3. Statutory Text Matters

Cases on other subject matter convey how preemption issues are a matter of statutory interpretation, and the scope of the statutory text is crucial. For example, an Oregon appellate court recently found that a local ordinance requiring homegrown cannabis for personal use be grown indoors was not preempted by state law prohibiting local government regulation on the production and use of plant seeds.[145] The court rejected the plaintiff's contention "that homegrown [cannabis] plants are grown for their [flowers] . . . and that therefore their seeds are 'flower seeds'" because the statute clearly defines flowers as those "grown for ornamental purposes, not flowers grown for medical or recreational consumption or processing."[146] The court also rejected the plaintiff's contention that her plants were

140. *Id.* at 830.
141. *Id.* at 829.
142. *Id.*
143. *Kirby*, 195 Cal. Rptr. 3d at 830.
144. *Id.*
145. Brown v. City of Grants Pass, 414 P.3d 898 (Or. Ct. App. 2018).
146. *Id.* at 901.

"nursery stock" simply "because they are botanically classified[,]" because "the requirement . . . that the plants be kept '*for* propagation or sale' suggests a commercial use[,]" for which home grown medical cannabis do not qualify.[147] Finding "[cannabis] seeds from plants grown at home do not fall within the [statutory] text[,]" the court found "they are not subject to the statute's preemptive effect "and affirmed the trial court below.[148]

4. Exclusion of an Initiative by Preemption

An appellate court in Minnesota, where cannabis has not been legalized, offers an example of how preemption has been used to bar the inclusion of an invalid initiative on a general election ballot for Minneapolis.[149] A citizen group filed a signed petition for a proposed charter amendment to legalize and protect medical use of cannabis in the City of Minneapolis.[150] After the city council conducted a hearing on the petition, it ruled against inclusion of the petition.[151] The council also found the amendment (1) violates the Supremacy Clause of the federal constitution and is therefore preempted by federal law; (2) "contravenes state public policy and is preempted by Minnesota law"; and (3) is an "unauthorized, [illegal] initiative that addresses specific operations of municipal government rather than a valid charter amendment [addressing] general form and structure of municipal government."[152] The county district court and state appellate court upheld the council's refusal to place the proposed amendment on the ballot, finding the initiative preempted by both state and federal law.[153]

C. Fracking

Hydraulic fracturing, also known as "fracking," has emerged as a valuable contributor to profitable oil and gas development in the United States. Fracking has been credited with reducing the country's

147. *Id.* at 902–03.
148. *Id.* at 903.
149. Haumant v. Griffin, 699 N.W.2d 774 (Minn. Ct. App. 2005).
150. *Id.* at 776.
151. *Id.*
152. *Id.*
153. *Id.* at 780–81.

dependence on foreign oil and gas while giving way to the possibility that the United States may soon be a future net exporter of natural gas.[154] Fracking is a necessary step to unlock oil and natural gas reserves embedded in shale and other tight, underground rock formations found across the country.[155] The process entails the injection of water and chemicals into rock at high pressure to release oil and gas.[156] Fracking was "[f]irst used commercially in 1949 and is now a process [used] common[ly] worldwide."[157] Such valuable technology, however, does not come without controversy. Proponents of fracking tout the tremendous amounts of natural gas that can now be economically extracted, and the resulting effect on natural gas prices.[158] Opponents, however, warn of reported "poisoned drinking water, polluted air, animal deaths, and industrial disasters and explosions" linked to fracking accidents.[159]

Every step of the way, including site preparation, well drilling, and waste disposal, is subject to regulation,[160] typically by state government.[161] State regulatory programs vary.[162] While some states require disclosure of chemicals and practices used during fracking, other states protect this information as confidential or make exceptions for trade secrets.[163] The expansion of fracking however, has caused some local governments to seek greater control over the industry within its jurisdictional lines.[164]

A New Mexico county board voted to adopt an ordinance seeking to ban fracking and in doing so, purporting to strip all challengers

---

154. *Hydraulic Fracturing*, AM. PETROLEUM INST., https://www.api.org/oil-and-natural-gas/wells-to-consumer/exploration-and-production/hydraulic-fracturing (last visited June 21, 2021).

155. *Id.*

156. *Id.*

157. City of Longmont Colo. v. Colo. Oil & Gas Ass'n, 369 P.3d 573, 576 (Colo. 2016) (en banc).

158. Fred Dews, *The economic benefits of fracking,* BROOKINGS (March 23, 2015), https://www.brookings.edu/blog/brookings-now/2015/03/23/the-economic-benefits-of-fracking/.

159. *Stopping Fracking*, EARTHJUSTICE, https://earthjustice.org/climate-and-energy/oil-gas/fracking (last visited June 21, 2021).

160. *Unconventional Oil and Natural Gas Development*, ENV'T PROT. AGENCY, https://www.epa.gov/uog (last visited June 21, 2021).

161. *Fracking: Regulatory Failures and Delays*, GREENPEACE, https://www.greenpeace.org/usa/ending-the-climate-crisis/issues/fracking/regulatory-failures-and-delays/ (last visited June 21, 2021).

162. James Knight & Bethany Gullman, *The Power of State Interest: Preemption of Local Fracking Ordinances in Home-Rule Cities*, TUL. ENV'T L. J. 297, 300 (2015).

163. *Id.*

164. *Id.* at 298.

of "the authority to enforce state or federal preemptive law."[165] The ordinance also included provisions stripping challengers of their rights under the First and Fifth Amendments, Commerce Clause, and Contract Clause.[166] Among a host of other issues, a federal district court found "state law impliedly preempts the [o]rdinance, because it conflicts with state law."[167] The court determined that the "[s]tate law does not [impliedly] preempt the entire oil and gas field" because there is "room for concurrent regulation."[168] However, the court found the ban on fracking was "antagonistic to state law" by "prohibit[ing] activities that . . . state law permits."[169] Since New Mexico has an extensive statutory and regulatory scheme to "regulat[e] oil-and-gas production in a manner intended to prevent waste," the court concluded that "the [s]tate has indicated oil-and-gas extraction is permitted."[170] But because "state law specifically allows certain activities or is of such a character that local prohibitions on those activities would be inconsistent with or antagonistic to that state law or policy," the court invalidated the ordinance because it was impliedly preempted by state law by virtue of the conflict created.[171]

Local regulation of fracking in Colorado, the state with the fourth highest number of gas and oil wells in the United States,[172] also provides a pair of cases that deal with state-local preemption in the area of fracking. In *City of Longmont Colorado v. Colorado Oil & Gas Association*, the court found the Longmont ban on fracking and the storage and disposal of fracking waste within the city limits "materially impede[d]" the application of state law and was thereby impliedly preempted.[173] In *City of Fort Collins v. Colorado Oil*, the court found the city's "five-year moratorium on fracking . . . operationally conflict[ed] with . . . state law" and was thereby impliedly preempted.[174] These decisions are especially noteworthy coming from a state supreme court in a strong home-rule state.

---

165. SWEPI, LP v. Mora Cnty., 81 F. Supp. 3d 1075, 1094 (D.N.M. 2015).
166. *Id.* at 1093–94.
167. *Id.* at 1193.
168. *Id.* at 1197.
169. *Id.* at 1198.
170. *Id.* at 1199.
171. *SWEPI, LP*, 81 F. Supp. 3d 1199–1200 (quoting Stennis v. City. of Santa Fe, 176 P.3d 309, 315 (2008)).
172. Knight & Gullman, *supra* note 162, at 299.
173. City of Longmont v. Colo. Oil & Gas Ass'n, 369 P.3d 573 (Colo. 2016) (en banc).
174. City of Fort Collins v. Colo. Oil, 369 P.3d 586 (Colo. 2016).

In 2012, residents of the home-rule municipality of Longmont voted to add an article to the city charter banning hydraulic fracking and the storage and disposal of fracking waste within the city.[175] The Supreme Court of Colorado began its preemption analysis by acknowledging confusion caused by its prior preemption cases before clarifying the applicable test for preemption.[176] The *Longmont* court then turned to the preemption issue. "To determine whether a regulatory matter is one of statewide, local, or mixed state and local concern, '[the court] weighs the relative interests of the state and the municipality in regulating the particular issue in the case,' making the determination on a case-by-case basis considering the totality of the circumstances."[177] The court considered "the need for statewide uniformity[,]" "extra-territorial impact of local regulation, . . . whether the state or local governments . . . traditionally regulate[] the matter, and . . . whether the [state] [c]onstitution specifically commits the matter to either state or local regulation[,]" to determine that fracking is a matter of mixed state and local concern.[178]

Next, the *Longmont* court reviewed the three forms of preemption it recognizes, all of which are "primarily matters of statutory interpretation."[179] Colorado's definition of express preemption and implied preemption have common distinguishing features: "[e]xpress preemption applies when the legislature clearly and unequivocally states its intent to prohibit local government from exercising authority over the [regulatory] matter[,]" and implied preemption applies when the language used and the scope and purpose of the legislative scheme "evince[] a legislative intent to completely occupy a field given by reason of a dominant state interest."[180] The third kind of preemption, operational conflict, is "whether the effectuation of a local interest would materially impede or destroy a state interest, recognizing that a local ordinance that authorizes what state law forbids or that forbids what state law authorizes will necessarily satisfy this standard."[181] The court noted that this is "a facial evaluation of the . . . statutory

175. *City of Longmont Colo.*, 369 P.3d at 577.
176. *Id.* at 578–83.
177. *Id.* at 580.
178. *Id.* at 581.
179. *Id.* at 582 (quoting Colo. Mining Ass'n v. Bd. of Cnty. Comm'rs of Summit Cnty., 199 P.3d 718 ,723 (2009)).
180. *Id.* (internal citations omitted).
181. *City of Longmont Colo.*, 369 P.3d at 582.

and regulatory schemes, and not a factual inquiry" as to how those schemes work in effect.[182]

Despite the state's arguments that implied preemption is at issue, the court disagreed based on prior cases finding state law does not preempt a local government's authority to enact land-use regulations of oil and gas and legislative recognition of the propriety of local land use ordinances that relate to oil and gas development.[183] The court rejected the state's "argument that preemption may be implied when state law manifests a 'sufficiently dominant' state interest[,]" because dominant state interest alone does not prove intent to exclude all local regulation.[184] The dominance of a state interest is instead "more appropriate [in determining] whether a regulatory matter involves an issue of local, statewide, or mixed concern than it is to the question of implied preemption."[185]

The only remaining theory for preemption was operational conflict. The pervasive state rules and regulations, "evinc[ing] state control over numerous aspects of fracking, . . . convince[d] [the court] that the state's interest in the efficient and responsible development of oil and gas resources includes a strong interest in the unfirm regulation of fracking."[186] The charter amendment banning fracking within Longmont "prevents operators from . . . fracking . . . even if the operators abide by state rules and regulations, rendering those rules and regulations superfluous."[187] Such a result led the court to conclude that "by prohibiting fracking and the storage and disposal of fracking waste, [the charter amendment] materially impedes the effectuation of the state's interest."[188] Because the charter amendment "materially impedes the application of state law," the court found the charter amendment was impliedly preempted by state law.[189]

In 2013, citizens of Fort Collins voted to enact a citizen-initiated ordinance imposing a five-year moratorium prohibiting fracking and storing fracking waste in the city.[190] The municipal charter was amended accordingly, allowing "[c]ertain wells that existed prior to

182. *Id.*
183. *Id.* at 583.
184. *Id.*
185. *Id.*
186. *Id.* at 585.
187. *City of Longmont Colo.*, 369 P.3d at 585.
188. *Id.*
189. *Id.*
190. City of Fort Collins v. Colo. Oil, 369 P.3d 586, 589 (Colo. 2016).

the amendment" an exemption from the prohibition.[191] Fort Collins argued "a five-year moratorium [was] sufficiently different from a perpetual ban" and "a valid exercise of zoning authority" because "the . . . moratorium affects only a nonessential phase of production" and creates "a temporary 'time-out'" giving the city time "to study the impact of fracking and waste disposal on public health."[192] The court found "the availability of alternatives to fracking" does not save the moratorium from preemption because the prohibition interferes with fracking for production which many operators have deemed necessary to ensure productive recovery, which in turn "materially impedes the state's goal" of maximum, efficient production.[193] The argument that the purpose and limited duration of the moratorium save it from preemption failed because the moratorium was not merely a regulation, but a length prohibition that "(1) deleteriously affects what is intended to be a state-wide program of regulation and (2) impedes the goals of the Oil and Gas Conservation Act . . . as well as the state's interest in fracking as reflected in the Act and the rules and regulations promulgated pursuant thereto."[194]

Applying the framework established in *Longmont*, the court stated that a home-rule city's ordinance seeking to regulate fracking involves a matter of mixed state and local concern and that the validity of the local regulation "turns on whether it conflicts with state law."[195] The court found the Fort Collins "moratorium renders the state's statutory and regulatory scheme superfluous" and thereby creates an operational conflict.[196] Expressing no views on the propriety of a moratorium of a materially shorter duration, the court invalidated the five-year moratorium as preempted by operational conflict with the Act.[197]

D. Inclusionary Zoning/Rent Control

State rent control laws arose as a reaction to economic distortions caused by the nationalization of our economy during World War I.[198]

---

191. *Id.*
192. *Id.* at 593.
193. *Id.*
194. *Id.* (citation omitted).
195. *Id.* at 591.
196. *Id.* at 593.
197. *Id.* at 594.
198. R. S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?*, 21 SW. U. L. REV. 1019, 1028 (1992).

As early as 1921, Justice Holmes explained the U.S. Supreme Court's decision to uphold rent control:

> [A] public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. . . . The regulation is put and justified only as a temporary measure. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.[199]

Today, a formal declaration of emergency is no longer a precondition to the constitutional validity of a rent control scheme.[200] Means of rent control have become more creative, including complicated systems of incentives, grants, in-lieu fees, among other sticks and carrots. While landlords are constitutionally entitled to a fair rate of return on their property,[201] the appropriate measure of that return is less clear. However, a number of jurisdictions agree that the appropriate standard is fair return on investment.[202]

As described in a 2020 treatise on local government law, local rent control ordinances are vulnerable to preemption:

> Landlords are entitled as a matter of procedural due process to a reasonably flexible and expeditious rent adjustment mechanism. A rent control ordinance must set forth standards and criteria

---

199. Block v. Hirsch, 256 U.S. 135, 156–57 (1921) (citations omitted).

200. *See, e.g.*, Birkenfeld v. City of Berkeley, 550 P.2d 1001 (Cal. 1976) (holding that the existence of an emergency is not necessary for rent control when such regulation is reasonably related to the furtherance of a legitimate governmental purpose); Berman v. Downing, 229 Cal. Rptr. 660 (Cal. App. Dep't Super. Ct. 1986) (justifying rent control based on housing shortage); *and* Colonial Arms Apartments v. Vill. of Mount Kisco, 104 A.D.2d 964 (N.Y. App. Div. 1984) (invalidating resolution based on housing emergency declared that lacked factual basis).

201. Adamson Co. v. City of Malibu, 854 F. Supp. 1476 (C.D. Cal. 1994); Baker v. City of Santa Monica, 226 Cal. Rptr. 755 (Cal. Ct. App. 1986); Oceanside Mobilehome Park Owners' Ass'n v. City of Oceanside, 204 Cal. Rptr. 239 (Cal. Ct. App. 1984); Hemsley v. Borough of Ft. Lee, 411 A.2d 203 (N.J. 1980); Niles v. Bos. Rent Control Adm'r, 374 N.E.2d 296 (Mass. Ct. App. 1978).

202. *See, e.g.*, Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851 (Cal. 1997) (finding twelve percent annual limit on rent increases deprived landlord of a fair return); Steinbergh v. Rent Control Bd. of Cambridge, 571 N.E.2d 15 (Mass. 1991) (upholding rational basis for regulating allowing small-scale landlords to recoup capital investments at a higher rate of return than large-scale landlords because large-scale landlords have greater ability to obtain finance capital); Cromwell Assoc. v. Mayor & Council of City of Newark, 511 A.2d 1273 (N.J. Super. Ct. App. Div. 1985) (maximum limit on annual return is facially unconstitutional since it precludes a case-sensitive determination of what is "fair and just" return).

> by which parties, administering agency, and reviewing court can be guided in determining adequacy of return on landlord's investment. The protections afforded to a tenant attach only to the primary place of residence, and cannot be assigned by the tenant. Contracts made by the tenant purporting to waive rent control protection are against public policy and unenforceable.
>
> The administrative mechanism for the enforcement of rent control does not violate state separation-of-powers principles, but a locality cannot prescribe a rule of evidence as by creating a presumption that a controlled tenant was evicted in retaliation for exercise of his rights. . . Rent control and condominium conversion ordinances are vulnerable to claims that the state has preempted local regulation. Local rent control of federally subsidized housing projects is subject to preemption by the Department of Housing and Urban Development. The Sherman Act does not tacitly preempt an ordinance requiring landlords to rent vacant apartments to would-be tenants.[203]

Unsurprisingly, many of the preemption cases in this category discussed below come from the state of California, which is rife with local land use controls on rent and housing. As of October of 2020, approximately fifteen California municipalities had enacted local residential rent control laws.[204]

1. Rent Restrictions

Simple rent restrictions appear to be declining in popularity as creative ways of achieving the same effects as rent control become more commonplace. Nevertheless, remaining rent control ordinances burdening properties result in landowners continuing to rely on preemption to avoid such controls. As rent-controlled buildings are transferred to new owners, so run the obligations and legal status of rent controllability, as the next three cases demonstrate.

In *Baychester Shopping Center v. San Francisco Residential Rent Stabilization and Arbitration Board of City and County of San Francisco*, the issue was whether the successor landlord was liable for rent charges exceeding the local ordinance controls charged by

203. JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 14:30 (2020) (footnote omitted).
204. TERRY B. FRIEDMAN ET AL., CALIFORNIA PRACTICE GUIDE: LANDLORD-TENANT 5-A (2020).

the predecessor landlord.[205] The successor landlord argued state law precluding a landowner from being held liable for a breach committed by a predecessor landlord preempted liability for the rent overcharges under the county ordinance.[206] The court disagreed, finding the successor's obligations under the rent ordinance, arising by operation of law, materially different from implied covenants that run with the land, arising out of a contract between parties, and that the state law therefore did not apply.[207]

Another successor landlord to a building on Central Park subject to below-market rent control under an agreement with HUD sought to avoid liability for his predecessor landlord's overcharging of rent.[208] The successor landlord argued that the use agreement, entered between the landlord and HUD, federally preempts local rent regulation.[209] The preemptive clause in the use agreement was explicit, so the question before the court was whether a private contract between HUD and a landlord can have the same preemptive effect as federal law.[210] Because "the critical question in any federal preemption analysis is . . . whether Congress intended that federal regulation supersede state law . . . any preemption of local rent regulation by the National Housing Authority must have been intended by Congress."[211] The court found that a contractual preemption provision "fails to withstand constitutional scrutiny" because the federally authorized contracts themselves are not "Laws of the United States."[212] The court concluded that because "Congress did not explicitly authorize the Use Agreement's contractual preemption of local rent regulation," local rent regulation still applies to the subject units.[213]

Just as liability for overcharge under a rent control ordinance can transfer to a subsequent landowner, so can an exemption from rent control ordinances. In *Block 268, LLC v. City of Hoboken Rent Leveling*

205. Baychester Shopping Ctr., Inc. v. S.F. Residential Rent Stabilization & Arb. Bd. of City & Cnty. of S.F., 81 Cal. Rptr. 3d 341 (Cal. Ct. App. 2008).

206. *Id.* at 345.

207. *Id.* at 345–46.

208. 435 Cent. Park W. Tenant Ass'n v. Park Front Apartments, LLC, 58 N.Y.S.3d 898 (N.Y. App. Div. 2017).

209. *Id.* at 904.

210. *Id.*

211. *Id.* at 908–09.

212. *Id.* at 910.

213. *Id.* at 911.

and Stabilization Board, a successor landlord successfully argued that its buildings were exempt from rent control ordinances, affirmed on appeal by a New Jersey state appellate court.[214] The court found the prior landlord legally obtained a rent control exemption under the state rent control statute and the exemption could not be nullified by either a transfer in title or by a conversion from rental units to condominiums due to a "hypertechnical omission or oversight."[215] The trial court found (and the appellate court affirmed), "that the [l]egislature had preempted the [county rent stabilization] [b]oard from taking any action that would impair the exception."[216] The statutory langue made it clear that the county rent stabilization board could not limit or impair an exemption, preempting the field, so that the city and board could not exercise a power that contradicts the state legislature's policy.[217]

In *Herzberg v. County of Plumas*, landowners upset by "their neighbor's cattle [coming] onto their property, eating the vegetation, defecating, and trampling the ground and sensitive creek beds . . . sued their neighbors" and the county.[218] A county ordinance regarding open range lands gives owners "of unfenced land within the designated open range the right to 'a reasonable rental fee from any person who pastures livestock thereon.'"[219] The plaintiff-landowners' general issue with this ordinance was that it "improperly shifted the burden of animal grazing from cattle ranchers to private [landowners] . . . within the open ranges."[220] The plaintiffs also complained that the burden of determining who the cattle belonged to, "collecting a reasonable rental fee, and erecting a lawful fence if the owner wanted to exclude the cattle, fell on the [land]owner."[221] In part, the plaintiffs sought to invalidate the ordinance due to conflict preemption with state law allowing commercial rent control.[222] The ordinance constituted illegal commercial rent control, according to the plaintiffs, "because it 'interferes with [landowners'] ability to negotiate

214. 952 A.2d 473, 479 (N.J. App. Div. 2008).
215. *Id.* at 477.
216. *Id.* at 476.
217. *Id.* at 478.
218. 34 Cal. Rptr. 3d 588 (Cal. Ct. App. 2005).
219. *Id.* at 591 (citing the ordinance).
220. *Id.* at 592.
221. *Id.*
222. *Id.* at 603.

rent from graziers at a price dictated by market conditions.'"[223] The court disagreed, finding no preemption under the state rent control law because the ordinance merely "place[s] a floor, not a ceiling, on the reasonable rent for pasturage" in the open range lands.[224]

In *Apartment Association of South Central Wisconsin v. City of Madison*, an appellate court in Wisconsin found the City of Madison had no authority to enact its inclusionary housing ordinance because such ordinance was preempted by state law.[225] A non-profit corporation of members of the rental housing industry challenged the city ordinance, which imposed a requirement that developers "charge no more than a specified amount of rent for no less than a specified percentage of rental dwelling units."[226] The statute prohibited certain governmental entities from "regulat[ing] the amount of rent or fees charged for the use of a residential dwelling unit."[227] The appellate court read the statute closely, concluding that "the legislature ha[d] expressly withdrawn the power of the City to enact [the ordinance]" because it "regulates the amount of rent that property owners . . . may charge for rental dwelling units[,]" which is the type of regulation the legislature expressly prohibited.[228] Therefore, the ordinance was void because it is preempted by state law.[229]

2. Eviction Controls

Relatively recently, the Ninth Circuit found a "good cause" regulation by HUD did not preempt Los Angeles County from enacting a local eviction control.[230] The county ordinance "restricts possible grounds for eviction to thirteen enumerated reasons, including violation of material terms of the lease, property damage, and criminal activity."[231] "The only business-related reasons [(economic justifications)] are renovation, removal of the unit from the rental market, or placement of a family member or resident manager into the

223. *Id.* at 604.
224. *Id.*
225. 722 N.W.2d 614 (Wis. Ct. App. 2006).
226. *Id.* at 616–18.
227. *Id.* at 618 (quoting Wis. Stat. § 66.1015).
228. *Id.* at 625.
229. *Id.* at 625–26.
230. Barrientos v. 1801–1825 Morton LLC, 583 F.3d 1197 (9th Cir. 2009).
231. *Id.* at 1206.

unit."[232] The relevant rule of HUD provided that "good cause" is required "for all mid-lease terminations and nonrenewals."[233] While the district court found the ordinance "conflict[ed] with the [federal] regulation because 'it takes away a right specifically granted by the HUD regulation[,]'"[234] the Ninth Circuit disagreed, finding no conflict because "[t]he HUD regulation does not create a 'right' to evict tenants to raise the rent . . . [but] merely creates a floor of protection which local laws may enhance."[235]

San Francisco's rent control ordinance was adopted in 1979 because "the lack of affordable rental housing was creating hardships . . . ."[236] The ordinance recites a number of purposes, including "the limitation of rent increases for tenants in occupancy, the arbitration of rental increase adjustments, and the restriction on the grounds on which landlords can evict tenants from their rental units."[237] The ordinance includes and has been amended to include a number of creative protections for its tenants, which sometimes appear to abut state law protecting landlords from rent control by local governance. The following two cases illustrate the particular tension created by local eviction controls in San Francisco, which are carefully drafted to elude preemption by state law.

In *Small Property Owners of San Francisco Institute v. City and County of San Francisco,* careful drafting was not sufficient to evade preemption under state law.[238] California's Ellis Act "allows property owners who seek to exit the rental business to evict residential tenants and prohibits local governments from 'compell[ing] the owner of any residential real property to offer, or continue to offer, accommodations in the property for rent or lease.'"[239] San Francisco adopted an ordinance that allowed property owners to make changes to nonconforming housing units—including expansion, alterations, and reconstruction—that were not previously allowed.[240] The ability to make such changes on units where tenants are evicted under "no-fault"

232. *Id.*
233. *Id.* at 1204.
234. *Id.* at 1207.
235. *Id.*
236. Foster v. Britton, 195 Cal. Rptr. 3d 800, 803 (Cal Ct. App. 2015).
237. *Id.* (internal citations omitted).
238. 231 Cal. Rptr. 3d 225 (Cal. Ct. App. 2018).
239. *Id.*
240. *Id.* at 226.

provisions, including tenants evicted in accordance with the Ellis Act, were subject to waiting periods of five to ten years under the ordinance.[241] Units from which tenants evicted in accordance with the Ellis Act were subject to a ten-year waiting period.[242] The ordinance was challenged, in part, "on the grounds that the ordinance imposes a prohibitive price on property owners exercising their right to exit the rental business and therefore conflicts with and is preempted by the Ellis Act."[243] The trial court denied the challengers petition for writ of mandate and complaint for declaratory relief in its entirety.[244] The appellate court, however, agreed with the challengers that the ordinance, on its face, penalizes a landlord exercising Ellis Act rights, and is therefore preempted.[245] The court "focused broadly on whether [the ordinance] 'duplicates, contradicts, or enters an area fully occupied by general law[.]'"[246]

The Ellis Act completely occupies the field of substantive eviction controls over landlords' desiring to exist the residential market.[247] The San Francisco ordinance does not merely regulate the particulars of remodeling a nonconforming unit, but instead prohibits changes for ten years after the property owner exists the rental business.[248] By imposing such a prohibition, the ordinance improperly attempts to regulate within the field of substantive eviction controls over such property owners.[249] The court found that "an inevitable burden of exercising Ellis Act [evictions] rights is a prohibition against" remodeling for ten years, which "far exceeds the scope of permissible local governance [permitted] by the Ellis Act."[250]

In *Foster v. Britton*,[251] the challenged ordinance provided that "a tenant may not be evicted for violating an obligation that was not included in the tenant's original rental agreement unless the change is authorized by San Francisco's rent control ordinance, is required

241. *Id.*
242. *Id.* at 227.
243. *Id.*
244. 231 Cal. Rptr. 3d at 230.
245. *Id.* at 230–31.
246. *Id.* at 232 (citing S.F. Apartment Ass'n v. City & Cnty. of S. F., 207 Cal. Rptr. 3d 684, 702 (Cal. Ct. App. 2016)).
247. *Id.*
248. *Id.* at 233.
249. *Id.*
250. 231 Cal. Rptr. 3d at 235.
251. Foster v. Britton, 195 Cal. Rptr. 3d 800 (Cal. Ct. App. 2015).

by law, or accepted by the tenant in writing."[252] "State law[, however,] provides that a landlord may change the terms of a month-to-month lease after giving [thirty] days' notice" and that the changed terms must be incorporated into the lease so long as the tenant continues to hold the premises after the notice takes effect.[253] Upon its acquisition of a multi-unit apartment building, the new landlord gave its tenants thirty days' notice of new house rules pursuant to state law.[254] A tenant refused to agree to the "unilateral changes to her rental agreement" and in the following dispute, the landlord took the position that state law preempted the city ordinance restricting eviction based on a tenant's refusal to acquiesce to a change in terms from the original lease agreement.[255]

The appellate court disagreed, finding the ordinance did not conflict with state law. Relying on the Supreme Court of California's decision of *Birkenfeld v. City of Berkeley*,[256] the court held that while a municipality cannot interfere with the procedural protections offered by the state, it retains its authority to limit the substantive grounds for eviction.[257] The court found that the "purpose of [the statute] is to establish procedural safeguards for tenants when landlords . . . change [the] terms of the tenancy, and does not prevent local governments from regulating the substantive grounds for eviction."[258] The ordinance does not interfere with any procedural protections conferred by state law but regulates the substantive grounds on which a landlord may evict a tenant.[259] Accordingly, the court concluded there was no conflict or preemption by state law.[260]

The City of Oakland, California's rent control ordinance, first enacted in 1980, differed from many other cities' rent control laws by virtue of not requiring landlords to show good cause to evict tenants.[261] A voter initiative was adopted by ordinance. In 2002, the Oakland Just Cause For Eviction ordinance required a landlord "to plead and

252. *Id.* at 803.
253. *Id.*
254. *Id.* at 804.
255. *Id.*
256. 550 P.2d 1001 (Cal. 1976),
257. Foster v. Britton, 195 Cal. Rptr. 3d 800, 809 (Cal. Ct. App. 2015).
258. *Id.*
259. *Id.*
260. *Id.* at 809–10.
261. Rental Hous. Ass'n of N. Alameda Cnty. v. City of Oakland, 90 Cal. Rptr. 3d 181 (Cal. Ct. App. 2009).

prove a specified ground for any eviction."[262] A group of landlords in the city sought a writ of mandate to prohibit enforcement.[263] The trial court found certain provisions of the ordinance preempted by state law.[264] The appellate court affirmed, additionally finding a portion of the ordinance that was not challenged also preempted.[265]

3. Mobile Homes

In California alone, approximately ninety jurisdictions regulate rents in mobile home parks, many of which go beyond classic "rent stabilization" to impose severe eviction controls as well.[266] The unique characteristics of mobile and manufactured home ownership—namely the difficulty and cost of moving the homes—gives the community operator tremendous leverage in establishing rent levels, fees, rules and other terms of tenancy.

A manufactured home park resident who received notice from the City of Burnsville, Minnesota of alleged property maintenance and zoning code violations brought a class action against the city, alleging the city's enforcement in the manufactured home park was preempted by federal and state law.[267] The county court granted summary judgment and permanent injunctive relief.[268]

On appeal, the court found the city's enforcement of its code was neither expressly preempted by the National Manufactured Housing Construction and Safety Standards Act,[269] nor preempted by express or field preemption by state law.[270] Federal law expressly preempted "construction or safety of the manufactured home itself."[271] "The city attempted to regulate carports, awnings, zoning setbacks, trash screening, and exterior storage within a manufactured home park."[272] Because these do not relate to the construction or safety of the

262. *Id.* at 186–88.
263. *Id.* at 186.
264. *Id.*
265. *Id.* at 190–91.
266. FRIEDMAN ET AL., *supra* note 204, at 5-k.
267. Eich v. City of Burnsville, 906 N.W.2d 867 (Minn. Ct. App. 2018).
268. *Id.*
269. *Id.* at 875–76.
270. *Id.*
271. *Id.* at 875.
272. *Id.* at 876.

manufactured home itself, the city code does not fall within the scope of the Act's express preemption.[273] Minnesota adopted state standards concerning the safety and construction of manufactured homes that are identical to the federal standards, so there was no express preemption under state law of the city codes for the same reasons that there was no express preemption under federal law.[274]

In *Cacho v. Boudreau*, mobile home park residents sued park owners in San Diego in small claims court, challenging a monthly pass-through charge for property taxes imposed on park land that was separate from and in addition to space rent.[275] The case was transferred to county court, where the park owners sought declaratory relief and residents asserted the local ordinance was preempted by state law.[276] The county court entered summary judgment for residents and imposed statutory penalties against the park owners for their willful violation of state law.[277] The Court of Appeals affirmed.[278] The Supreme Court of California reversed, finding the ordinance was not preempted by state law.[279]

The state Mobile Home Residency Law provides that "[a] homeowner shall not be charged fees other than rent, utilities, and incidental reasonable charges for services actually rendered"; "parks subject to local rent collection laws" must still be allowed to "separately charge park residents for certain government-imposed fees, assessments, and other charges" (except for ad valorem property taxes); and that a trial court has discretion to impose civil penalties up to "$2,000 for each 'willful violation' of the law."[280] The supreme court addressed whether this "state . . . law preempt[s] a local rent control ordinance that allows a mobile home park owner to separately charge park residents for property taxes imposed on the land on which the park is situated[.]"[281] To determine whether there was "an actual and irreconcilable conflict between state and law," which

273. *Eich*, 906 N.W.2d at 876.
274. *Id.* at 876–77.
275. Cacho v. Boudreau, 149 P.3d 473, 476 (Cal. 2007).
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.* at 474–75.
281. *Cacho*, 149 P.3d at 475.

the court of appeals concluded, or merely "an immaterial difference in terminology," as the park owners argued, the court used statutory analysis to harmonize the provisions of state law that restrict rental fees while permitting a park owner to separately charge residents for governmental fees or assessments.[282] Using legislative history, the court determined "the aim of the legislation was to [allow] park owners to pass through to park [tenants] the costs of new or increased fees and assessments imposed on the [rental units]."[283] The purpose is to relieve the park owner of the "unfair burden" otherwise imposed on them in rent-controlled areas where they could not increase rent to accommodate increased fees.[284] Because the ordinance treats property taxes as a component of the rental rate formula, it is treated as a rental charge, and not a fee prohibited by state law.[285]

In *Griffiths v. County of Santa Cruz*, tenants who occupied mobile home sites complained that the community operator violated a county mobile home rent control ordinance by failing to reduce rent commensurate to his discontinuance of garbage collection services.[286] The operator challenged the ordinance, in part on the grounds that state law preempts the County's ordinance.[287] The operator argued that because state law "excludes recreational vehicles from the definition of a mobile home," the County is preempted from including "recreational vehicles within its definition of mobile home."[288] The court disagreed, finding the state law relied on by the operator does not apply to the ordinance, where "the relevant purpose implicates the operator's landlord-tenant relationship with his . . . tenants."[289] Further, the county's "inclusion of recreational vehicles within the definition of 'mobile home' . . . is consistent with" the state law that does apply.[290] Thus, the court found that state law did not preempt the county ordinance and affirmed the court below.[291]

---

282. *Id.* at 477.
283. *Id.* at 480.
284. *Id.*
285. *Id.* at 483.
286. Griffith v. Cnty. of Santa Cruz, 94 Cal. Rptr. 2d 801, 802 (Cal. Ct. App. 2000).
287. *Id.* at 804.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.* at 804–05.

4. Relocation Assistance

Another mechanism of rent control is relocation assistance: financial assistance landlords are required to provide to tenants to relieve relocation costs when the tenant is permanently or temporarily displaced from a residential unit. Because displacement precedes the need for relocation assistance, it is often improperly understood as "rent control." Nevertheless, many rent control state and local laws seek to regulate the way landlords conduct their evictions, including requiring a landlord to set aside financial aid for relocation services in an escrow account upon providing notice of displacement.

In July of 2020, an appellate court in Oregon considered whether a provision in a Portland "ordinance . . . requir[ing] landlords to pay relocation assistance to tenants following a rent increase of [ten] percent or more if the tenant responds by terminating the tenancy," is "rent control" and therefore expressly preempted by state law prohibiting local rent control.[292] The City of Portland added tenant protections to address a city housing emergency, including a requirement that "landlords pay relocation assistance to tenants under certain circumstances."[293] The landlords challenging the ordinance argued that the statutory "text expresses an intention to preempt '[a]ny local enactment that has the *effect* of "controlling"—that is, restraining or exercising influence over to limit—the rent that may be charged.'"[294]

The appellate court disagreed, finding that the text of the statute, when read in context, demonstrates "the legislature did not intend to broadly prohibit any [local] regulation that could" affect a restraint on rent, but instead "is solely directed at prohibiting 'rent control'" as in the direct regulation of the amount of rent to be paid to a landlord.[295] Finding "nothing in the statut[ory] text, context, or legislative history" that would support finding the legislature intended to preempt other types of restrictions than direct regulation of rent charged to tenants, the court found no express or implied preemption.[296]

The court also disagreed with the landlords' argument "that the ordinance falls within the statute's prohibitory scope" because it

292. Owen v. Cty. of Portland, 470 P.3d 390 (Or. Ct. App. 2020).
293. *Id.* at 392–93.
294. *Id.* at 396 (citing plaintiff's brief).
295. *Id.*
296. *Id.* at 397.

regulates the "same area" as state law.[297] Instead, the court found the relocation assistance "does not fall within the common understanding of 'rent control' that the legislature intended when it enacted" the statutory prohibition on rent control.[298] The court also declined to find implied preemption by conflict, because "operation of the ordinance does not make it impossible to comply with the statute."[299] Concluding that the ordinance is not "in truth incompatible" with state law, the court found the ordinance was not preempted by state law.[300]

5. Affordable Housing Mitigation Requirements

The Town of Telluride enacted an ordinance "which imposes an 'affordable housing' requirement on [most] . . . new developments" in town.[301] Under the ordinance, property owners must "create affordable housing for forty percent of the employees generated by new development."[302] The ordinance provides four options to satisfy the affordable housing requirement, which can also be combined to meet the requirement: (1) "constructing new housing units with fixed rental rates," (2) "imposing deed restrictions on free market units in order to fix rental rates," (3) "paying fees in lieu of housing," or (4) "conveying land to the [t]own for affordable housing."[303] The Supreme Court of Colorado found the ordinance "fall[s] within the commonly understood meaning of rent control," therefore conflicting with the state's broad prohibition on local measures controlling rents.[304] The court further held that the statute addressed a matter of mixed local and statewide concern, concluding that the conflicting ordinance was invalid.[305]

The statute does not explicitly define rent control, but the court found it to be "clear on its face."[306] The ordinance "operates to suppress

297. *Id.* at 398.
298. *Owen*, 470 P.3d at 398.
299. *Id.* at 400
300. *Id.* at 401.
301. Town of Telluride v. Lot Thirty-Four Venture, LLC, 3 P.3d 30 (Colo. 2000) (en banc).
302. *Id.* at 33.
303. *Id.* at 32.
304. *Id.*
305. *Id.* at 40.
306. *Id.* at 35.

rental values below their market values[,]" thereby "restrict[ing] [a] property owner's ability to develop his land as he sees fit."[307] Therefore, the ordinance "violates the plain language of the state prohibition on" "any ordinance or resolution which would control rents."[308]

Developers in Los Angeles were issued a writ of mandate that precluded the city from enforcing an affordable housing ordinance against developers' mixed-use project.[309] In the as-applied challenge, the county court found "the affordable housing ordinance conflicts with[,] and is [accordingly] preempted by vacancy decontrol provisions" of state law, which permits "residential landlords to set the initial rental levels" at the beginning of a tenancy term.[310] The challenged ordinance required applicants for a multifamily residential or mixed-use project to comply with one of two options for "replacement and inclusionary dwelling requirements," whichever results in more affordable housing units.[311] The ordinance also provided a third option: if the applicant does not wish to build inclusionary housing, the applicant can pay an "'in-lieu' fee."[312] After the developer's administrative appeal was denied, it filed for writ of mandate, alleging the application of the ordinance's housing requirements to the project violated state law.[313]

The trial court agreed, issuing the developer such a writ to prevent the application of the ordinance to its project. State law clearly states that residential landlords "establish the initial rental rate for a . . . unit."[314] The ordinance, on the contrary, "require[d] [the developer] to provide [sixty] affordable housing units at regulated rent levels that must be preserved either of the life of the units or [thirty] years, whichever is greater."[315] Finding the ordinance's affordable housing requirements hostile to state law "by denying [the developer] its right to establish the initial rental rates for affordable

307. *Town of Telluride*, 3 P.3d at 35.

308. *Id.* (citing the statute).

309. Palmer/Sixth Street Properties, L.P. v. Cty. of L.A., 96 Cal. Rtpr. 3d 875, 877 (Cal. Ct. App. 2009).

310. *Id.* at 878–79.

311. *Id.* at 879.

312. *Id.* "The in lieu fee for a required Very Low Income Dwelling Unit shall be $100,576.14 per unit. The in lieu fee for a required Low Income Dwelling Unit shall be $78,883.41 per unit." *Id.*

313. *Id.* at 881.

314. *Id.* at 886.

315. *Palmer/Sixth Street Properties, L.P.*, 96 Cal. Rtpr. 3d at 886.

housing units[,]" the ordinance conflicted with state law and was therefore preempted.[316] The appellate court affirmed.[317]

6. Other Regulatory Burdens on Landlord

In *Lake Valley Associates, LLC v. Township of Pemberton*, a corporate owner of a 450-unit apartment complex challenged a township ordinance imposing "registration obligations and other regulatory requirements on landlords on landlords within the town."[318] The owner challenged "the ordinance [as] preempted because [its] registration is overseen by state agency and that the additional information [required] by the ordinance is forbidden" from being collected under other law.[319] Specifically, the owner argued "there is conflict between the ordinance and [state] law" pertaining to Hotel and Multiple Dwellings and that the state law "was intended to be exclusive in its field and is so pervasive that it precludes coexistence of a [local] ordinance."[320] The appellate court adopted the analysis of the court below, finding the explicit statement of legislative intent in both state laws cited by the owner did not "preclude the right of any municipality to adopt and enforce ordinances, or regulations, *more restrictive than the statutes any rules and regulations promulgated thereunder*" could not be clearer.[321] The court found the ordinance in some ways more restrictive and expansive than the state law, which is specifically allowed by the statute itself.[322] For these reasons, the appellate court affirmed the finding of no preemption under state law, upholding the validity of the ordinance.

Recently, a California appellate court found the state's Fair Employment and Housing Act ("FEHA") does not preempt a San Francisco ordinance banning discrimination based on tenant's participation in Section 8 housing program.[323] In 1998, San Francisco amended its "existing housing discrimination ordinance to [ban] discrimination based on a person's 'source of income,' . . . defined broadly to include

316. *Id.* at 886–88.
317. *Id.* at 888.
318. Lake Valley Assoc., LLC v. Twp. of Pemberton, 987 A.2d 623, 624 (N.J. App. Div. 2010).
319. *Id.* at 625.
320. *Id.* at 625–26.
321. *Id.* at 627.
322. *Id.*
323. City & Cnty. of S.F. v. Post, 231 Cal. Rptr. 3d 235 (Cal. Ct. App. 2018).

government rent subsidies" (like Section 8 housing vouchers).[324] The California legislature expanded FEHA the following year "to prohibit discrimination based on a tenant's 'source of income,'" but used a much narrower definition that "does not reach government rent subsidies."[325] An agent for a San Francisco landlord advertised available units "on Craigslist and ApartmentsInSF.com[,]" stating in each posting "that the landlord would not accept Section 8 vouchers."[326] The city sued, alleging such discrimination violated its ordinance prohibiting discrimination based on source of income.[327] The landlord filed a motion to dismiss "on the ground[s] that FEHA preempts the source-of-income provision" of the ordinance, which the court overruled.[328] The court then granted the city's motion for a preliminary injunction to prevent the landlord from continuing to discriminate against Section 8 participants.[329]

On appeal, the landlord argued FEHA preempts the ordinance in two ways.[330] First, that language in FEHA stating it is "the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by provisions of this part . . . expressly occupies the field . . . [and] exclud[es] all local laws."[331] Second, that FEHA impliedly preempts the ordinance's "source-of-income discrimination provision because FEHA leaves [the] landlord free to choose whether to participate in the Section 8 housing," but the ordinance "compels participation[,]" which "directly contradicts the policy choice" made by the state in FEHA.[332] The court rejected the argument that the preemption clause in FEHA preempts the broad field of discrimination in housing, focusing on the language "encompassed by the provisions of this part" to narrowly define FEHA's field of exclusivity to only the areas of discrimination explicitly encompassed by FEHA.[333] The court found FEHA does not cover discrimination against Section 8 participants,

---

324. *Id.* at 238.
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *City & Cnty. of S.F.*, 231 Cal. Rptr. 3d at 239.
330. *Id.* at 242.
331. *Id.*
332. *Id.* at 243.
333. *Id.* at 243–46.

whereas the ordinance is aimed at preventing such discrimination, finding no express preemption.[334] For similar reasons, the court found no implied preemption by FEHA.[335] Because FEHA expresses no policy preference toward landlords' decision to participate in the Section 8 program or not, there is no inherent contradiction between FEHA and the ordinance.[336]

7. Other Regulatory Burdens on Tenant

The Supreme Court of Illinois recently upheld a city ordinance as a valid exercise of home-rule authority, despite the condominium's contention that the ordinance conflicts with portions of state statutes pertaining to condominium ownership.[337] A Chicago condominium unit owner sought "production of specific documents and records relat[ing] to the building's management" under a city ordinance.[338] The ordinance permits condominium unit owners to inspect financial books and records of their condominium association within three business days of delivering written request.[339] The unit owner complained upon his request being denied.[340] The condominium association argued the ordinance conflicts with portions of two state statutes and is therefore unenforceable.[341] The "statutes require condominium unit owners to state a proper purpose for obtaining association financial books and records, . . . production of only [ten] years of records, and allow the association [thirty] days to gather and produce records."[342] The ordinance, however, requires no stated proper purpose, does not restrict the age of documents sought, and requires production within three business days of the request.[343]

The unit owner, joined by the city who intervened to defend the validity of its ordinance, argued that "the legislature has not specifically limited the authority of home rule units to regulate condominiums or reserved [such] power for itself, and [that] the state does not have

334. *Id.* at 247.
335. *City & Cnty. of S.F.*, 231 Cal. Rptr. 3d at 248.
336. *Id.*
337. Palm v. 2800 Lake Shore Drive Condo. Ass'n, 988 N.E.2d 75, 79 (Ill. 2013).
338. *Id.* at 77.
339. *Id.*
340. *Id.*
341. *Id.* at 79.
342. *Id.*
343. *Palm*, 988 N.E.2d at 79.

a vital interest in regulating condominiums" sufficient to preempt the city's ordinance.[344] Under the Illinois Constitution, "[c]omprehensive legislation that conflicts with an ordinance is insufficient [alone] to limit or restrict home rule authority."[345] Instead, the legislature must explicitly deny municipal exercise of home-rule power or require its exercise of that power to be consistent with statutory provisions.[346] Since the legislature has not expressly curtailed the city's power to exercise authority over condominium record production, the court concluded that the city's ordinance is a valid exercise of home-rule authority, and upheld the ordinance.[347]

8. COVID-19

In response to the COVID-19 pandemic, the Governor of Pennsylvania imposed a sixty-day moratorium on evictions and foreclosures.[348] The Philadelphia City Council enacted five separate bills temporarily amending the Philadelphia Code, collectively the Emergency Housing Protection Act ("EHPA"),[349] which provides:

> 1) [T]hrough August 31, 2020, landlords cannot evict residential tenants and cannot evict small businesses that can provide a certification of hardship due to COVID-19; 2) landlords must allow tenants who did not timely pay rent between March 1 and August 31, and who can prove that they suffered a COVID-19 financial hardship, to pay past due rent on a set plan through May 31, 2021; 3) through December 31, 2020, before taking steps to evict residential tenants who have suffered a COVID-19 financial hardship, landlords must attend mediation; and 4) through May 31, 2020, landlords are barred from charging late fees and interest to residential tenants who have experienced a COVID-19 financial hardship.[350]

An association of property owners and managers challenged these temporary city code amendments arguing, in part, that the state

344. *Id.* at 79–80.
345. *Id.* at 85.
346. *Id.*
347. *Id.* at 84–85.
348. HAPCO v. City. of Phila., 2020 WL 5095496, at *1 (E.D. Penn. Aug. 28, 2020).
349. *Id.* at *2.
350. *Id.* at *4.

Landlord-Tenant Act preempted conflicting amendments.[351] The challengers alleged state law, which providers a landlord can recover rent and interest from a tenant in an action of assumpsit, "preempts the EHPA's temporary prohibition on late fees and interests on late rent."[352] However, the statutory text allowing interest if "deemed equitable under the circumstances of the particular case," saved the ordinance from preemption, because "[t]he City's determination that it would be inequitable to require a tenant [experiencing] a COVID-19 financial hardship to pay interests or late fees" places those cases falling under the ordinance in the exception to the Landlord-Tenant Act.[353] Despite acknowledging there is "no mention of late fees" where it is inequitable, the court found there was no conflict between the ordinance and statute on these grounds.[354] The challengers also alleged that the section of "the Landlord-Tenant Act, which provides the process for summary eviction proceedings, preempts [local] limitations on evictions."[355] Relying on a state supreme court decision, the court concluded EHPA does not conflict with eviction procedures set forth in state law because it merely regulates *when* landlords have the right to evict.[356]

CONCLUSION

Preemption is an increasingly fundamental precedent issue addressed by state and local government prior to the regulation of real property across a range of subjects. Often as not, the question of whether a state regulation is preempted by federal regulations or a local government is preempted by federal or state regulations ends up in court. This review does not purport to judge which level of government is best suited to regulated across the categories of regulation summarized in the preceding sections. We seek rather to summarize relatively recent significant cases from a number of jurisdictions to demonstrate the factors courts consider in deciding which level of government is entitled to regulate. Few of the cases deal with express

351. *Id.* at *13.
352. *Id.*
353. *Id.*
354. *HAPCO*, 2020 WL 5095496, at *13.
355. *Id.* at *14.
356. *Id.*

preemption for the obvious reason that few cases arise. The question in such cases, if any, is only the source of authority for the preemptive regulation, particularly at the federal level which triggers 10th and 11th Amendment issues. Otherwise, the vast majority of the cases deal with the more difficult question of implied preemption, where the principal question is usually whether the preempting level of government has either occupied the field, promulgated a comprehensive scheme of regulation, or demonstrated a need for uniformity.

"ALL TEMPERATE AND CIVILIZED GOVERNMENTS"; A BRIEF HISTORY OF JUST COMPENSATION IN THE NINETEENTH CENTURY

JAMES W. ELY JR.*

In 1816, Chancellor James Kent of New York, in the landmark case of *Gardner v. Trustees of Village of Newburgh*, insisted that to sustain the exercise of the power of eminent domain "a fair compensation must, in all cases, be previously made to the individuals affected." This limitation on legislative authority, the eminent jurist explained, "is adopted by all temperate and civilized governments from a deep and universal sense of its justice."[1] Hence, compensation was required for diversion of a water stream from the claimant's land, although at that date the New York Constitution contained no such express mandate. As we shall see, other courts in the nineteenth century echoed Kent's views. Taking Kent's confident assertion as a starting point, these remarks explore the origins of the just compensation norm, the rationale behind the compensation requirement, and early attempts to define the contours of such compensation.[2]

I. SOURCES OF THE COMPENSATION PRINCIPLE

The compensation norm can be traced to several sources. Perhaps foremost is the English common law tradition. Chapter 28 of the 1215 Magna Carta provided: "No constable or other of [o]ur bailiffs shall take corn or other chattels of any man without immediate payment,

---

* Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, Vanderbilt University. This Article is an expanded version of remarks presented at the Seventeenth Annual Brigham-Kanner Property Rights Conference at William & Mary Law School on October 2, 2020. I wish to acknowledge the excellent research assistance of Katie Hanschke and Meredith Ashley Capps of the Massey Law Library of Vanderbilt University.

1. Gardner v. Trs. of the Vill. of Newburgh, 2 Johns. Ch. 162, 166 (N.Y. 1816). *See also* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 275, 339 (1827) ("A provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent; and this principle in American constitutional jurisprudence is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law.").

2. For my earlier examination of these issues, see James W. Ely Jr., *The Historical Context of Just Compensation,* 30 THE PRACTICAL REAL ESTATE LAWYER 9–19 (2014).

unless the seller voluntarily consents to postponement of payment."[3] This appears to be an affirmation of a settled practice. Starting in the sixteenth century, Parliament authorized the acquisition of property for fortifications, roads, bridges, and river improvements. These acts regularly provided for a compensation scheme.[4] In his influential *Commentaries on the Laws of England* (1765–1769), William Blackstone treated compensation as an established principle of the common law. Acknowledging that Parliament could acquire property for "the public good," Blackstone famously observed: "But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained."[5]

Although the experience in colonial America was not always consistent, especially with respect to roadways, the evidence demonstrates the broad acceptance of the compensation principle. By modern standards, colonial governments made modest use of eminent domain. Lawmakers utilized eminent domain to construct a variety of public buildings, including courthouses, forts, lighthouses, and custom houses, as well as roads.[6] In addition, mill acts empowered the owner of a grist mill to erect a dam across a stream and thereby flood the adjacent lands of riparian owners upon the payment of compensation.[7] Compensation statutes spoke in terms of "true worth,' "due satisfaction," and "just satisfaction."[8] William B. Stoebuck aptly concluded that "compensation was the regular practice in England and America, as far as we can tell, during the whole colonial period."[9]

The Revolutionary Era was a period of constitutional experimentation by the newly independent states. Several states placed the

3. Chapter 28 of the 1215 Magna Carta, *reprinted in* A.E. DICK HOWARD, THE ROAD FROM RUNNYMEADE; MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 387 (University of Virginia Press 1968). For a discussion of Magna Carta as a source of protection for property rights, *see id.* at 332–40.

4. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 578–79 (1972).

5. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, A FACSIMILE OF THE FIRST EDITION OF 1765–1769, 135 (Univ. Chi. Press 1979).

6. James W. Ely, Jr., *"That due satisfaction may be made:" the Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 4–13 (1992).

7. 1 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES, 544–48 (3d ed. 1906).

8. Ely, *supra* note 6, at 6–12.

9. Stoebuck, *supra* note 4, at 583.

common law principle of compensation in their constitutions. The Massachusetts Constitution of 1780 mandated that "whenever the public exigencies require that the property of any individual should be appropriated to public use, he shall receive a reasonable compensation therefor."[10] Congress, under the Articles of Confederation, followed suit. The Northwest Ordinance of 1787 declared that if a person's property was taken for public use, "full compensation shall be made for the same."[11] The language was clearly a precursor to the Takings Clause of the Fifth Amendment.

Since Kent spoke of "all temperate and civilized governments," however, it is necessary to consider sources beyond the English common law tradition. Writing in 1625, Dutch diplomat and jurist Hugo Grotius was the first to employ the phrase "eminent domain."[12] He insisted that when the state acquires property under the power of eminent domain "the state is bound to make good at public expense the damage to those who lose their property."[13] Later in the seventeenth century, Samuel Pufendorf, a German jurist and natural law theorist, agreed that compensation was necessary.[14] Both were cited by Kent, who helped to cement their views in American law. We will revisit these influential continental authorities at a later point.

Drawing upon these diverse sources, a number of state courts during the antebellum period invoked unwritten fundamental principles to mandate payment of compensation when property was taken for public use even if the state constitution was silent on the matter.[15] The Supreme Court of New Jersey in *Sinnickson v. Johnson* (1838) brushed aside the contention that, absent a provision in the

---

10. MASS. CONST. of 1780, part 1, art. X.

11. An Ordinance for the government of the territory of the United States North West of the river Ohio (July 13, 1787), 32 JOURNALS OF THE CONTINENTAL CONGRESS 334, 340 (1774–1789). The Ordinance was reenacted in 1789 by the first Congress under the Constitution. An Act: To provide for the government of the territory north-west of the river Ohio, ch. 8, 1 Stat. 50 (Aug. 7, 1789). *See* Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L. J. 409, 453–57 (2013).

12. HUGO GROTIUS, ON THE LAW OF WAR AND PEACE (1625) bk. III, at 420 (Stephen E. Neff ed., 2012) (discussing "the right of eminent domain over the property of subjects").

13. *Id.* at 429.

14. SAMUEL PUFENDORF, ON THE LAW OF NATURE AND OF NATIONS 1285–86 (1672) (C.H. Oldfather & W.A. Oldfather trans., 1934).

15. J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 71–81 (1930–1931) (reviewing state court cases that invoked natural law to require payment of compensation when property was taken).

state constitution, the state could take property without compensation. "This power to take private property reaches back of all constitutional provisions," the court declared, "and it seems to have been considered a settled principle of universal law, that the right to compensation, is an incident to the exercise of that power: that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle."[16] It added that compensation "is operative as a principle of universal law; and the legislature of this State, can no more take private property for public use, without just compensation, than if this restraining principle were incorporated into, and made part of its State Constitution."[17]

Indeed, a leading commentator maintained that the Takings Clause of the Fifth Amendment was simply "an affirmation of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law."[18]

In the same vein, the Supreme Court of Georgia affirmed the compensation norm notwithstanding its absence in the state constitution. The court determined that the Takings Clause of the Fifth Amendment did

> not create or declare any new principle of restriction, either upon the legislation of the National or State governments, but simply recognized the existence of a great common law principle, founded in natural justice, especially applicable to all republican governments, and which derived no additional force as a principle, from being incorporated into the Constitution of the United States.[19]

It viewed the Fifth Amendment as merely declaratory "of a great constitutional principle of universal application."[20] Other state courts

16. Sinnickson v. Johnson, 17 N.J.L. 129, 145 (1839).

17. *Id.* at 146.

18. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 661 (1833).

19. Young v. McKenzie, 3 Ga. 31, 44 (1847).

20. *Id.* at 45. *See also* Parham v. Justs. of the Inferior Ct. of Decatur Cnty., 9 Ga. 341, 349–51 (1851) (treating compensation requirement as a long-established principle of common law binding on lawmakers absent a state constitutional provision on compensation). *See generally* Jason Mazzone, *The Bill of Rights in the Early State Courts,* 92 MINN. L. REV 1,

followed suit, treating the compensation requirement as a fundamental principle of universal application.[21] In *Pumpelly v. Green Bay Company* (1871), the U.S. Supreme Court joined the chorus, recognizing that the compensation limitation on the exercise of eminent domain was an essential element of the common law, even before it was incorporated into the Bill of Rights.[22]

II. REASONS FOR COMPENSATION REQUIREMENT

Although the compensation principle was seemingly settled before being expressly adopted in the written Bill of Rights, it remains to consider the rationale for mandating such compensation. Put bluntly, why should the state be expected to pay anything when it acquires private property? Indeed, the writings of Thomas Hobbes[23] and Jean-Jacques Rousseau[24] suggest that private property rights are subordinate to the needs of the state. Under this approach, the will of the community must prevail over claims of private rights in property. Common law sources give almost no attention to why compensation was necessary. John Locke, for example, did not squarely address the compensation issue, but declared: "The great and chief end therefore

37–43 (2007) (discussing state court decisions that viewed the just compensation requirement of the Fifth Amendment as stating a fundamental principle applicable to the states).

21. *Ex parte* Martin, 13 Ark., 198, 206 (1853) ("The duty of making compensation may be regarded as a law of natural justice, which has its sanction in every man's sense of right, and is recognized in the most arbitrary governments."); Stuyvesant v. Mayor of New York, 7 Cow. 588, 606 (N.Y. Sup. Ct. 1827) (acknowledging "a fundamental principle of civilized society, that private property shall not be taken even for public use without just compensation"). The North Carolina Constitution does not contain an express provision requiring compensation, but courts in that state have long taken the position that the legislature cannot take property without payment. Raleigh & Gaston Rail Road Co. v. Davis, 19 N.C. 451, 459–61 (1837); Station v. Norfolk & Carolina R.R. Co., 111 N.C. 278, 182–83 (1892) (reviewing prior authority).

22. Pumpelly v. Green Bay Co., 80 U.S. 166, 179 (1871) (Miller, J.) (citing Gardner v. Vill. of Newburgh, 2 Johns. Ch. 162 (N.Y. 1816)).

23. *See* RICHARD PIPES, PROPERTY AND FREEDOM 32 (Alfred A. Knopf ed. 1999) (summarizing Hobbes's thinking about private property: "Since it is the king who has made property possible, he has a legitimate claim on it: he can tax and confiscate without his subjects' consent."); Johan Olsthoorn, *Hobbes on Justice, Property Rights and Self-Ownership*, 36 HIST. OF POL. THOUGHT 471, 472 (2015) (noting that Hobbes repeatedly insisted that "private property rights are introduced by the civil laws and remain dependent on the will of the sovereign").

24. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, ch. IX (1762) (Rose M. Harrington trans., 1893) (declaring that "for the state, in regard to its members, is master of all their property by the social contract, which, in the state, serves as the basis of all rights" and that "the right which each individual has over his own property is subordinated to the right which the community has over all").

of Mens uniting into Commonwealths and putting themselves under Government, is the Preservation of their Property."[25] Hence, one might infer that Locke would find it unacceptable for government to simply take property without recompense, as such a step would be inconsistent with his thesis protective of property.[26] More concretely, some continental writers and natural law theorists offered a rationale. Samuel Pufendorf explained:

> Natural equity is observed, if, when some contribution must be made to preserve a common thing by such as participate in its benefits, each of them contributes only his own share, and no one bears a greater burden than another . . . . [T]he supreme sovereignty will be able to seize that thing for the necessities of the state, on condition, however, that whatever exceeds the just share of the owners must be refunded by other citizens.[27]

Pufendorf seemingly maintains that there is a general principle of equal treatment that applies to property interests. Since exercises of eminent domain inevitably fall unevenly upon members of the community, an indemnity is essential to achieve this "natural equity" in sharing the societal burden.

In the leading case of *Vanhorne's Lessee v. Dorrance* (1796), Justice William Paterson, who had been a member of the constitutional convention, addressed the purpose of the compensation norm. He explicated the purpose of the compensation in words that paralleled Pufendorf: "[N]o one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. This would by laying a burden upon an individual, which ought to be sustained by the society at large."[28]

---

25. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, ch. IX, ¶ 124 (1689) (Locke defined property as encompassing "Lives, Liberties and Estates"). *Id.* at ¶ 123.

26. Locke, of course, was highly influential with the founding generation. Ellen Frankel Paul, *Freedom of Contract and the 'Political Economy' of* Lochner v. New York, 1 NYU J L. & LIBERTY 515, 528–37 (2005) (surveying Locke's impact on the constitution-making process and concluding: "The founding, it would seem fair to say, was a 'Lockean moment.'"). In a regulatory takings case, Justice Anthony Kennedy brushed aside the state's contention that a successive title holder who took with notice could not challenge an earlier-enacted regulation. Suggesting the continuing impact of Locke, Kennedy declared: "The State may not put so potent a Hobbesian stick into the Lockean bundle." Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001).

27. PUFENDORF, *supra* note 14, at 1285.

28. Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 310 (1795).

The Supreme Court of Kentucky, in *Sutton's Heirs v. City of Louisville* (1837), endorsed this view. Noting that the proposed extension of a municipal street burdened the owners of a particular lot, it observed: "Improvements, made for common benefit, should be made by common means, or by a just distribution of the public burden, by approximating as near equality as may be reasonably expected in the administration of the concerns of a diversified community."[29]

The Supreme Court first addressed the aim of the compensation mandate in the landmark case of *Monongahela Navigation Company v United States* (1893). Justice David J. Brewer, speaking for a unanimous Court, explained the compensation requirement in terms of "natural equity." Citing *Sinnickson* and *Gardner*, Brewer proclaimed that the compensation principle

> prevents the public from loading upon one individual more than his just share of the burden of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.[30]

Justice Hugo Black echoed this view a half century later. In 1960, he observed that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[31] Justices Brewer and Black were wrestling with a fundamental question posed by the Takings Clause: should individual owners or the general public bear the expense of providing social goods? To achieve "natural equity" espoused by Pufendorf, the Takings Clause prevents the government from singling out a few individuals to contribute disproportionately toward the cost of public projects. As one prominent scholar insisted, aptly characterizing the prevailing understanding, "we must say that compensation exists to insure that no more of an individual's property rights will be taken from him than represents his just share of the cost of government."[32]

---

29. Sutton's Heirs v. City of Louisville, 35 Ky. 28, 33 (1837). *See also* James River & Kanawha Co. v. Turner, 36 Va. 313, 339 (1838) (Tucker, J.) (explaining just compensation principle in terms of placing public burdens equally upon all).

30. Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893).

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

32. Stoebuck, *supra* note 4, at 588.

III. EVOLUTION OF THE JUST COMPENSATION NORM

A. Who Determines Compensation

In the early nineteenth century, nearly all appropriations of property were the result of actions by the state governments or private corporations to whom state legislatures delegated the power of eminent domain.[33] Consequently, state courts for the most part took the lead in grappling with the concept of "just compensation." A threshold question was which governmental body should assess the amount of indemnity. Lawmakers sometimes sought to either fix the amount of compensation or determine the formula by which such compensation should be determined. As early as 1795, Justice Paterson rejected this practice, stressing that in eminent domain proceedings, the legislature "cannot constitutionally determine upon the amount of the compensation, or value of the land."[34] State courts likewise reasoned that compensation was a judicial matter. St. George Tucker, speaking for the Supreme Court of Appeals of Virginia, explained in 1842 that "the question of compensation is a judicial question, and it is not in the power of the legislature to settle it, since this would be to unite judicial and legislative power, and so to enable the government to decide in its own cause."[35]Other state courts moved in the same direction.[36] In 1868, Thomas M. Cooley, a leading scholar and treatise writer, insisted that the proceeding to determine compensation was "judicial in character." He added that: "It is not competent for the State itself to fix the compensation through the legislature, for this would make it the judge in its own cause."[37]

---

33. Not until 1876 did the Supreme Court determine that the federal government had eminent domain authority as an inherent aspect of sovereignty. In *Kohl v. United States*, 91 U.S. 367 (1876), the Court upheld the exercise of eminent domain by the United States to acquire land for a post office and pointed out that historically the states had condemned land for use by the federal government. *See also* Miss. & Rum River Boom Co. v. Patterson, 98 U.S. 403, 406 (1878) (Field, J.) ("The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty."). *See generally* William Baude, *Rethinking the Eminent Domain Power*, 122 YALE L. J. 1738 (2013) (asserting that the federal government was not originally understood to have general eminent domain power).

34. Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 312 (1795).

35. Tuckahoe Canal Company v. Tuckahoe & James River R.R. Company, 38 Va. 42 ,78 (1840).

36. *See, e.g.*, Penn. R.R. Co. v. Balt. & Ohio R.R. Co., 60 Md. 263, 269 (1883); Isom v. Miss. Cent. R.R., 36 Miss. 300, 315 (1858).

37. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 563 (1868).

In *Monongahela Navigation Company,* the Supreme Court brushed aside an effort by Congress to ascertain the measure of compensation for the acquisition of a lock and dam by excluding from consideration the value of a franchise to collect tolls, and strongly affirmed the judicial role. Writing for the Court, Justice Brewer declared:

> It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.[38]

B. Measure of Compensation

Courts were also called upon to ascertain what measure should be employed to determine the amount of "just compensation." Courts spoke in terms of an equivalent value for the property taken. Yet this goal was not easy to achieve. As the Iowa Supreme Court elaborated in 1855, the words "just compensation" "undoubtedly, mean a fair equivalent; that the person whose property is taken, shall be made whole. But while the end to be attained is plain, the mode of arriving at it, is not without its difficulty."[39] Courts and commentators gravitated to the fair market value at the time of the taking.[40] This standard, however, proved easier to articulate than to always apply.

Courts grappled with how to ascertain market value.[41] A fair market test presupposes a price set as part of a voluntary bargain between

---

38. Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893). The Supreme Court has repeatedly reaffirmed this cardinal principle. *See, e.g.*, United States v. New River Colliers Co., 262 U.S. 341, 343–44 (1923) (Butler, J.) ("The ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard.").

39. Sater v. Burlington & Mt. Pleasant Plank Rd. Co., 1 Iowa 386, 393 (1855).

40. Harrison v. Young, 9 Ga. 359, 364 (1851) ("When land or any other property is taken for public use, the owner is entitled to compensation for its whole value; not for this or that particular object, but for all purposes to which it may be appropriated. . . . The value of the land or anything else, is its price in the market."); Troy & Bos. R.R. Co. v. Lee, 13 Barb. 169, 172 (N.Y. Sup. Ct. 1852) (treating "the market value of the property" as the governing principle); Little Rock Junction Ry. v. Woodruff, 49 Ark. 381, 5 S.W. 792, 793–94 (1887); San Diego Land & Town Co. v. Neale, 78 Cal. 63, 67–68, 20 P. 372 (1888).

41. Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U.L. REV. 721, 723–29 (1993) (outlining different evaluation techniques employed by courts to ascertain fair market value).

a willing seller and a willing buyer.[42] Speaking for the Supreme Court in 1878, Justice Stephen J. Field set forth the common standard:

> In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses.[43]

This was clearly fictitious in the context of a forced sale. There was no willing seller, so comparisons to a private transaction are misleading. Moreover, in many instances there would be no recent sales of similar property nor any current price rates by which to determine fair market value. Landed property is typically unique. Absent such evidence, courts typically turned to the opinions of knowledgeable persons who gave estimates as to value.[44] Yet persons can differ widely in their assessment of what a property would bring in the open market. At the end of the day, even expert opinion is still an estimate.

Still, the fair market test is seemingly objective, and this, no doubt, is part of its appeal. It takes no account of subjective values that an owner has in his or her property. This would exclude not only sentimental attachment but the suitability of the property for personal needs. Nor does it consider relocation costs. Cooley, for example, conceded that the circumstances of different appropriations were sometimes so different "that it has been found somewhat difficult to establish a rule that shall always be just and fair." He explained that the "question is reduced to one of market value." Cooley agreed that "the market value may not seem to the owner an adequate compensation" for his own reasons, but maintained that such personal reasons cannot be taken into account in eminent domain proceedings which must "measure the worth of property by its value as an article of sale."[45] The Supreme Court also noted complexities in

---

42. 2 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 1228 (3d ed. 1906).

43. Miss. & Rum River Boom Co. v. Patterson, 98 U.S. 403, 408 (1878).

44. *See, e.g.*, *Little Rock Junction Ry.*, 5 S.W. at 794; *San Diego Land & Town Co.*, 78 Cal. at 69.

45. COOLEY, *supra* note 37.

applying the market value test: "So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases."[46] Notwithstanding shortcomings, the fair market value test remains the prevailing rule in determining just compensation. The Supreme Court has never squarely addressed the reasons for its adherence to this standard, but apparently it is seen as practical and relatively easy to apply. In *Miller v. United States* (1943), the Court observed: "In an effort, however, to find some practical standard, the courts early adopted and have retained, the concept of market value."[47]

C. Mode of Compensation

In the antebellum era, new challenges complicated the assessment of just compensation. The Fifth Amendment and most of its state counterparts mandate payment of "just compensation," and do not specify what form such compensation must take.[48] In *Vanhorne's Lessee,* Justice Paterson asserted: "No just compensation can be made except in money. Money is a common standard, by comparison with which the value of any thing may be ascertained. . . . Compensation is a recompense in value, a *quid pro quo*, and must be in money."[49] A few state constitutions expressly mandated that no property could be acquired by a private corporation until full compensation was paid in money.[50] But this was not the only view.[51] States in practice

46. *Miss. & Rum River Boom Co.*, 98 U.S. at 408.

47. Miller v. United States, 317 U.S. 369, 374 (1943). *See also* Olson v. United States, 292 U.S. 246 (1934) ("that equivalence in the market value of the property at the time of the taking contemporaneously paid in money").

48. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 195 (1985) ("The Constitution speaks only in terms of 'just compensation,' not of the form it must take. In principle, therefore, the state may provide compensation in what ever form it chooses".).

49. Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 315 (1795). *See also* Henry v. Dubuque & Pac. R.R. Co., 2 Iowa 288, 300 (1855) (construing "just compensation" provision in Iowa Constitution of 1846 to require that a person whose property was taken for public use "shall have a fair equivalent in money for the injury done him by such taking; in other words, that he shall be made whole, so far as money is a measure of compensation . . ."); Deaton v. City of Polk, 9 Iowa 594, 596 (1859) (citing *Henry*, and requiring monetary compensation where land was taken for a roadway without consideration of any advantages that might result to the landowner).

50. ALA. CONST. of 1868, art. XIII, § 5; ARK. CONST. of 1868, art. V, § 48; KAN. CONST. of 1859, art. XII, § 4.

51. Alton & Sangamon R.R. Co. v. Carpenter, 14 Ill. 190, 192 (1852) ("The word

enjoyed some latitude to provide compensation in a variety of forms, including implicit compensation.

As a practical matter, lawmakers found it difficult to raise substantial revenue to pay for public undertakings. As J. Willard Hurst has observed that "through most of the nineteenth century government found it impractical to command sizeable resources by taxation in a chronically cash-scarce economy."[52] Notwithstanding constitutional guarantees, therefore, state legislatures had every incentive to hold down the cost of acquiring property in eminent domain proceedings. Consequently, they sought to circumvent the need to make monetary payments.

The same considerations applied to acquisitions by private enterprises.[53] There was a widespread public desire to improve transportation facilities.[54] The ensuing transportation revolution triggered frequent delegation of eminent domain authority to privately owned canal, turnpike and railroad companies.[55] Often thinly capitalized, these private enterprises were undertaking speculative projects with uncertain prospects of success. State legislatures frequently sought to promote transportation schemes by curtailing the amount of monetary compensation awarded in eminent domain proceedings.

Some state courts were receptive to legislation curtailing the amount of compensation awards. In 1848, the Supreme Court of Pennsylvania, for example, expressed concern that generous just compensation awards might retard construction of railroads in the state.

---

compensation means that which is given as an equivalent for a loss, and the constitution does not determine how that equivalent shall be made up."). *See also* San Fran., Alameda & Stockton R.R. Co. v. Caldwell, 31 Cal. 368, 374 (1866) ("The Constitution does not require the compensation in such cases to be rendered in money . . . "); James River & Kanawha Co. v. Turner, 36 Va. 313, 325 (1838) (Parker, J.) ("But [compensation] need not be made in money, nor in any thing admitting of a certain, precise and invariable value.").

52. J. WILLIARD HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 167 (1972).

53. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 124 (3d ed. 2005) ("More often than not in the first half of the nineteenth century it was not the state itself that used the power.").

54. GEORGE ROGERS TAYLOR, THE TRANSPORTATION REVOLUTION, 1818–1860 (1951); DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848 325–69 (Oxford University Press 2007) (detailing the impact of the transportation revolution on American society).

55. JAMES W. ELY JR., RAILROADS AND AMERICAN LAW 35–36 (University Press of Kansas 2001) (discussing delegation of eminent domain power to railroad companies). *See also* Tide Water Canal Co. v. Archer, 9 G. & J. 476, 482–83 (Md. 1839) (upholding exercise of eminent domain by canal company).

It worried that "the damages will be swelled to such an amount as greatly to embarrass, if not seriously to endanger, the ultimate success of a work destined at no distant day to increase the prosperity of the commonwealth to an extent beyond the most sanguine calculations."[56] Likewise, a Virginia judge worried that if courts "give to the owner of the land, in every instance, the full value of his land, enhanced in value by the actual location of the road or canal through it, without abatement, I very much fear a serious blow will be given to the cherished policy of the state."[57] Insisting that the state constitution requires that "compensation shall be made in money to the full value of the property taken to public use," an Ohio judge bitterly charged in dissent that both lawmakers and judges were more anxious to promote enterprise than to vindicate the constitutional norm of just compensation. He maintained:

> Any other construction would never have been for a moment entertained, except from the fact that public improvements were deemed of the utmost importance to the growth and welfare of the state. An anxiety to carry out a scheme of internal improvements at the least possible expense, has induced the legislature and the courts to forget the provisions of the constitution. But, however great the public benefit derived from public improvements, it should be remembered that the highest possible public good is to secure every person in the full and complete enjoyment of his property. This clause of the constitution was designed to check the license of power, and secure to every person the full enjoyment of the natural and constitutional right.[58]

IV. OFFSET OF BENEFITS

A. Overview

The fair-market-value standard in total taking cases did not readily fit the circumstances of partial takings. With partial takings, there could be advantages or injury to the remaining portion of the property. The question of considering such benefits in the calculation of compensation was first raised in the context of local governments

56. Penn. R.R. v. Heister, 8 Pa. 445, 450 (1848).
57. James River & Kanawha Co. v. Turner, 36 Va. 313, 330 (1838) (Parker, J.).
58. Symonds v. City of Cincinnati, 14 Ohio 147, 184 (1846) (Read, J., dissenting).

laying out roadways.[59] In the same vein, the Ohio legislature in 1825 authorized the state canal commissioners to acquire land and materials by eminent domain for a state-sponsored canal project. The statute directed that the appraisers should "make a just and equitable estimate and appraisal of the loss or damage, if any over and above the benefit and advantage to the respective owners."[60]

The advent of privately owned canal and railroad companies in the early nineteenth century presented this issue in a new and more pressing light. Rather than acquiring an entire parcel of land, such enterprises typically took a strip of land through a larger parcel. Determining the just compensation proved especially vexing in partial-takings situations. In these circumstances, just compensation related to the actual value of the land acquired, as well as the impact of the acquisition on the remainder of the estate. The Supreme Court of Kansas explained in 1878 that compensation

> includes more than the mere value of the property taken, for often the main injury is not in the value of the property absolutely lost to the owner, but in the effect upon the balance of his property of the cutting out of the part taken. He is damaged therefore, more than in the value of that which is taken.[61]

For example, a tract severed by a roadway or canal might well be less valuable when divided. The severance might result in limited access between the divided parcels, or cause one portion to be cut off from a water supply, or necessitate additional fencing.

---

59. *See, e.g.*, Commonwealth v. Coombs, 2 Mass. 489, 492 (1807) ("In estimating the damages, the committee are not confined to the value of the land covered by the road, and the expense of fencing the ground. The owner may suffer much greater expense by the road depriving him of water, or by otherwise rendering the cultivation of his farm inconvenient and laborious; or it may happen that the new highway may essentially benefit his farm, and that he may suffer very little or no injury by the location."); Livingston v. City of New York, 8 Wend. 85, 101–02 (N.Y. 1831) (benefit to person whose land was taken for city street offset against loss or damage).

60. An Act to provide for the internal improvement of the State of Ohio, by navigable Canals, February 4, 1825, Laws of Ohio. The wording of this statute suggests that lawmakers contemplated there would be few situations in which losses to landowners outweighed presumed benefits. Other curious features of the measure were that the appraisers were to be appointed by the canal commissioners, the taking party, and there was no provision for judicial review of the determination by the appraisers.

61. Pottawatomie Cnty. Comm'rs v. O'Sullivan, 17 Kan. 58, 60 (1876) (Brewer, J.). *See also* Lewis v. City of Seattle, 5 Wash. 741, 755, 32 P. 794, 799 (1883) (declaring "often the damage to the remainder of the tract is of much more consequence than the value of the part taken"); LEWIS, *supra* note 42, at 1176–77.

In respect to transportation projects utilizing eminent domain, state legislatures often mandated that the value of perceived benefits should be offset against any loss suffered by the taking. State courts generally upheld this arrangement, at least in part, against constitutional objection.[62] Indeed, a few courts even maintained that the enhanced value to the remaining land might fully satisfy the just compensation requirement, and thus there would be no need for any monetary award.[63] As a practical matter, the land could be taken for free.[64]

To complicate matters, courts were not in agreement as to their understanding of offsets. Did offsets speak to whether a taking of property occurred, or did they represent an alternative mode of just compensation for a taking? The Supreme Court of Illinois exemplified the former position. It declared that if the enhanced value to the part of a tract not acquired by eminent domain was equal to the damages to the owner

> then in the very act of appropriating part of his land to the public use, an equivalent is rendered to him, in the increased value given to the rest. In such a case it cannot in any just sense

62. San Fran., Alameda & Stockton R.R. Co. v. Caldwell, 31 Cal. 368, 374 (1866) ("Just compensation requires a full indemnity and nothing more. When the value of the benefit is ascertained there can be no valid reason assigned against estimating it as a part of the compensation rendered for the particular property taken, as all the Constitution secures in such cases is a just compensation, which is all that the owner of property taken for public use can justly demand."); Whitman's Ex'r v. Wilmington & Susquehanna R.R. Co., 2 Harr. 514, 524 (Del. 1839) (affirming constitutionality of legislative requirement that determination of compensation should take into consideration advantages as well as disadvantages to owner's land, and declaring: "It is not easy to perceive any other mode of arriving at a just compensation than by considering all the consequences of the act complained of, whether they enhance or mitigate the injury.").

63. Alton & Sangamon R.R. Co. v. Carpenter, 14 Ill. 190, 192 (1852) ("If the advantages really and substantially resulting from the increased value given to that part of a tract of land not taken for public use are equal to the damages which the owner will sustain by the deprivation to which he is subjected, then in the very act of appropriating part of his land to the public use, an equivalent is rendered to him, in the increased value given to the rest."). Penn. R.R. v. Heister, 8 Pa. 445, 450 (1848) ("Is the property benefited, or is it injured by the improvement, is a most material injury. If benefited, the owner neither is, nor ought to be, entitled to recover any compensation whatever."); *Livingston*, 8 Wend. at 101 ("The owner of the property taken is entitled to a full compensation for the damage he sustains thereby, but if the taking of his property for the public improvement is a benefit rather than an injury to him, he certainly has no equitable claim to damages.").

64. CARMEN F. RANDOLPH, THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 253 (1894) ("The allowance of benefits may effect, in some cases, so just a balance between advantage and disadvantage as to reduce pecuniary compensation to the vanishing point").

> be said that any portion of his property has been taken, and consequently he is entitled to no compensation.[65]

In contrast, the Supreme Court of Indiana viewed offsetting as a means of satisfying the just compensation norm. Recognizing that an owner was entitled to "a fair recompense—something equivalent" when property was taken for public use, it emphasized that compensation did not necessarily mean payment in money. "The real controversy," the court explained, "is not as to the measure of damages, but as to the mode of compensation."[66] Of course, most courts did not devote time to probing the nature of benefit offsets. They generally just viewed offsets as a deduction from the injury suffered by the owner, and thus as a means of satisfying the compensation mandate.[67]

It was hardly a surprise that from the outset, the legislative practice of offsetting alleged benefits was highly controversial.[68] In a revealing 1838 exchange, Virginia judges sharply debated the extent to which offsetting advantages was consistent with the constitutional norm of just compensation. Judge Richard E. Parker took the position that

---

65. *Alton & Sangamon R.R. Co.,* 14 Ill. at 192.

66. McIntire v. State, 5 Blackf. 384, 385–84 (Ind. 1840). *See also San Francisco, Alameda & Stockton*, 31 Cal. at 374 (treating benefits as part of compensation).

67. The uncertainty over the understanding of benefit offsets anticipated a similar issue in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978) involving transferable development rights (TDRs). The City of New York designated Grand Central Terminal an historical landmark, thus imposing regulations which severely limited future changes to the structure. As part of this scheme the city granted Penn Central TDRs over other properties. Brushing aside a challenge, the Supreme Court majority concluded that the deprivation of developmental rights over Grand Central did not constitute an unconstitutional taking of property. It conceded that the TDRs would probably not amount to payment of just compensation if there had been a taking, but seemingly considered these "valuable" rights as a factor in determining the existence of a taking. *Id.* at 137. The dissenting justices found that the city's actions constituted a compensable taking. They charged that TDRs should be analyzed as a proffered just compensation, and insisted that they did not bear on the question of a taking. The dissenters characterized TDRs as having uncertain and contingent market value, and expressed doubt that such rights would constitute just compensation. *Id.* at 151. *See* EPSTEIN, *supra* note 48, at 190 ("In *Penn Central* the government evaded the constitutional command by paying Penn Central with a set of twisted and contingent rights that cannot be valued sensibly.").

68. In 1831 a New York attorney argued:

> Again; the compensation to be made is to be a *just* compensation, not a prospective and conjectural benefit and advantage to the adjoining lands of the owner, by reason of the street being opened; in this way no compensation whatever is made for the property taken. . . . Nothing but the value of the property awarded to him in *money* is just compensation.

Livingston v. City of N.Y., 8 Wend. at 92.

advantages to the landowner should be offset even if others in the community also enjoyed such benefits. He was untroubled by the unequal impact of this approach on those who lost part of their land, reasoning that "inequality, and even injustice, is incident to every imposition of burdens, for the use of the public."[69] The other judges rejected this analysis. Judge William Brockenbrough insisted that to permit the offset of general benefits to the community would deprive the landowner "of the just compensation intended by the constitution."[70] He would only allow consideration of advantages to the particular parcel of which a portion was condemned, not benefits shared in common with the community. Brockenbrough further opined that the legislature could not have intended to authorize a canal company "under the pretext of making him[the landowner] a compensation for a general advantage, which will deprive him of the just compensation intended by the constitution." He explained that the legislature could not have intended "to *compensate* the riparian proprietor for the land taken for public uses, by the value of the real or supposed advantages derived from the improved navigation, when those same advantages were conferred freely on all others, without being viewed as a *compensation*."[71] Agreeing, Judge Henry St. George Tucker asserted that to offset "advantages of a general character" would render the just compensation norm "a mockery, instead of a wise, just and salutary safeguard of the rights of the people." Tucker pointed out that the purpose of the just compensation norm was "to place the public burdens equally upon all, by paying the proprietor for that which is taken from him. This is the very object of the constitution." This object would be frustrated, he continued, because the offset of general advantages placed the landowner in a worse condition than his neighbor who enjoyed the benefits of a project but had not lost any of his land.[72]

As this exchange indicates, the use of offsets to reduce compensation awards was open to several objections. First, legislative mandates

69. James River & Kanawha Co. v. Turner, 36 Va. 313, 326 (1838).

70. *Id.* at 334–35.

71. *Id.*

72. *Id.* at 339. Tucker also distinguished between the land actually condemned and incidental damage to the residue of the parcel. He maintained that the full value of the land taken must be compensated "and cannot be extinguished by setting off speculative advantages." The special advantages to the residue could only be offset against the peculiar damage to the remainder of the tract. *Id.* at 441.

to offset the supposed advantages of a project were seemingly inconsistent with the cardinal principle that the determination of just compensation was a judicial responsibility. Second, the anticipated benefits were highly speculative and might never in fact be realized.[73] Indeed, a sizeable number of canal and railroad companies became insolvent, leaving the landowner with no advantages and no effective redress.[74]

Third, attempts to offset general benefits received by the community at large were highly inequitable. Neighboring owners might well also enjoy enhanced land values but did not have to bear any of the cost by having part of their land taken. The offsetting of general benefits thus tended to single out an individual landowner to suffer a loss that would benefit the community at large, a result, as Judge Tucker pointed out, that contradicted the very purpose of the constitutional guarantee of just compensation.[75] In 1849, the Supreme Judicial Court of Massachusetts acknowledged a "great inequality" to landowners

> by way of reduction of damages for his land thus taken, to be charged for all the incidental benefits, which he receives from the location of the railroad in the vicinity of his other land and establishment, while his neighbor, who is equally benefited, is exempt from any contribution to this object.[76]

Prominent authorities stressed the unfairness of offsetting general benefits. Cooley, for example, declared:

---

73. *See* Jones v. Wills Valley R.R. Co., 30 Ga. 43, 46 (1860) (Lumpkin, J.) (directing offset of benefits against incidental damages to remainder of land, although acknowledging that the railroad might never be built).

74. TAYLOR, *supra* note 54, at 340 (pointing out that by the 1840s revenue from canals was "so disappointing as to bankrupt private companies and saddle state governments with unprecedented debts"); ELY, *supra* note 55, at 19 (observing that "railroading was an expensive and speculative venture"). *See also* Kennedy v. Indianapolis, 103 U.S. 599, 600–01 (1881) (noting that the canal project at issue was abandoned and never completed).

75. ELY, *supra* note 55, at 191 (noting that the offset of general benefits tended to single out individuals to suffer loss for community benefit).

76. Meacham v. Fitchburg R.R. Co., 58 Mass. 291, 297 (1849). Other courts also stressed the inequity of offsetting general benefits. *See* R.R. Co. v. Foreman, 24 W. Va. 662, 672–73 (1884) ("The reason for this is obvious; for if their general benefits would be thus offset, against actual damages done the owner of the land, it would impose on him an unequal burden for the common good, exacting in effect contribution from those whose property is taken, and relieving others who derive an equal advantage from the public work.").

> But, in estimating either the injuries or the benefits, those which the owner sustains or receives in common with the community generally, and which are not peculiar to him and connected with his ownership, use, and enjoyment of the particular parcel of land, should be altogether excluded, as it would be unjust to compensate him for the one, or to charge him with the other, when no account is taken of such incidental benefits and injuries with other citizens who receive or feel them equally with himself, but whose lands do not chance to be taken.[77]

John Lewis, in his early and important treatise on eminent domain, also criticized consideration of general advantages in the assessment of compensation for partial takings: "These advantages may never be realized, and, if they are, it is unjust that one person should be obligated to pay for them by a contribution of property, while his neighbor whose property is not taken enjoys the same advantages without price."[78] Despite this trenchant criticism, some judges were untroubled by the inequity of upholding the offset of general benefits.[79]

B. Varied Reactions to the Offset of Benefits

States responded to the controversy over offsetting in diverse ways. Constitution makers and lawmakers in a few states closed the door early on this practice. For example, the Ohio Constitution of 1851 and the Iowa Constitution of 1857 provided that an assessment of damages should not take into account any imputed advantages to the landowner on account of the improvements.[80] The

77. COOLEY, *supra* note 37, at 566.

78. LEWIS, *supra* note 42, at 1198. *See also* RANDOLPH, *supra* note 64, at 251 ("The argument for disallowing general benefits is that otherwise one whose property is taken for a public use would be in effect forced to pay for an advantage which his neighbors would freely enjoy, the amount paid being, of course, the value of the general benefit.").

79. *See, e.g.*, Alton & Sangamon R.R. Co. v. Carpenter, 14 Ill. 190, 191 (1852) ("It is immaterial how the owner of the land is benefited, or that others whose lands are not entered upon are benefited to an equal or greater extent."); McIntire v. State, 5 Blackf. 384, 389 (Ind. 1840) ("If others, whose property the public exigency does not require, are equally benefited, it must be set down as one of those chances by which fortune distributes her favors—a distribution which no Legislature or other earthly power can render equal among men."); Greenville & Columbia R.R. Co. v. Partlow, 39 S.C.L. 428, 439 (1852) ("If his neighbors are more benefited by the construction of the road than he may be, that is no loss to him.").

80. OHIO CONST. of 1851, art. I; IOWA CONST. of 1857, art. I, § 18. Even before adoption of the 1857 Iowa Constitution, the Supreme Court of Iowa had construed the "just compensation" requirement of the earlier 1846 Constitution to mandate payment of the full value of

Kansas Constitution of 1859 mandated that a corporation could not appropriate a right of way until full compensation was made in money "irrespective of any benefit from any improvement proposed by such corporation."[81] The New York general railroad acts of 1848 and 1850 barred consideration of benefits when railroads acquired property by eminent domain.[82] A 1852 Indiana law directed that when a canal, railroad, or turnpike acquired property by eminent domain, in calculating just compensation "no deduction shall be made for any benefit that may be supposed to result to the owner, from the contemplated work."[83] Similarly, an 1852 Illinois statute mandated that when a railroad, turnpike, or "other public work" should invoke eminent domain, the commissioners to assess damages "shall not estimate any benefits or advantages which may accrue to lands affected in common with adjoining lands, on which such road or canal or other work does not pass."[84] Absent such constitutional or legislative limitations, however, courts addressed the question of benefit offsets as an aspect of determining the meaning of "just compensation."

In so doing, courts were called upon to address several interrelated questions. Should they permit any offset of supposed benefits

---

the property taken "without any regard whatever to the benefits and advantages resulting" to the landowner. Sater v. Burlington & Mount Pleasant Plank Rd. Co., 1 Iowa 386, 388 (1855). Nonetheless, many delegates to the 1857 Constitutional Convention insisted that this principle should be expressly incorporated in the Constitution. The proposal was adopted by a close vote. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 202–07 (1857).

81. KAN. CONST. of 1859, art. XII, § 4. *See* Pottawatomie Cnty. Comm'rs v. O'Sullivan, 17 Kan. 58, 60–61 (1876) (construing this provision to apply to transportation corporations and not to opening public roads).

82. An Act to authorize the formation of railroad corporations, ch.140, § 20, Laws of New York, 1848; An Act to authorize the formation of railroad corporations, ch. 140, § 16, Laws of New York. New York courts construed this measure to require that railroads must pay full market value with no benefit deductions for any land acquired by eminent domain but that benefits could be considered in assessing damages to the residue. *Newman v. Metropolitan Elevated Railway Company,* 118 N.Y. 618, 623, 23 N.E. 901 (1890).

83. 1852 Revised Statutes of Indiana, § 711, at 193. *See* White Water Valley R.R. Co. v. McClure, 29 Ind. 538, 539 (1868) ("It was evidently the intention of the legislature, in enacting this provision, to change the old rule of assessment in such cases, and to require that property taken by these corporations should be paid for, without regard to any benefit or enhanced value of the residue of the owner's property by the facilities afforded by the construction of the road.").

84. An Act to amend an Act entitled "An Act to amend the Law Condemning Right of Way for Purposes of Internal Improvement, 1852 Ill. Laws 1038. This measure was construed to mean that the landowner must receive the full value of land taken in money without regard to benefits, but that benefits could be taken into consideration in assessing damages to the remaining land. Hayes v. Ottawa, Oswego & Fox River Valley R.R. Co., 54 Ill. 373, 378 (1870); Wilson v. Rockford, Rock Island & St. Louis R.R. Co., 59 Ill. 273, 274–75 (1871).

to reduce the amount of monetary compensation? If so, should they uphold the offset of general advantages to the community resulting from projects or just the special benefits to a particular parcel? How should they differentiate between general and special benefits? Should offsets be allowed against the value of the land actually taken, the damage to the remainder of the parcel, or both? As might be expected, these inquiries proved a fertile source of litigation. Courts reached a wide range of conclusions and generalization is difficult. Although many of these cases involved transportation projects, it should be noted that state and local governments continued to claim offsets for the construction of streets and highways. The full complexity of benefit offsets cannot be treated in detail here.[85] Some representative examples illustrate the range of approaches adopted by courts.

A few state courts totally rejected the offset of benefits on constitutional grounds. At issue in *Carson v. Coleman* (1856) was a claim for compensation arising from a legislative scheme to straighten the channel of a creek. The legislation contained no provision for compensation to the affected landowners. The commissioners proposed to cut a new channel across a landowner's property and argued that the benefits expected to accrue to the landowner from the improvement should constitute his compensation. Dismissing this contention, the New Jersey Court of Chancery reasoned:

> There is but one fair construction to be put upon the language of the constitution. It means that, where private property is taken by virtue of the authority of the sovereign power, compensation shall be made in *money*; that a fair valuation shall be made of the property taken, and the amount of such valuation in money shall be paid to the Individual before his property can be taken from him.[86]

Tellingly, the court warned: "Any other construction would make this provision of the constitution utterly worthless. A means of legislation could soon be devised to substitute an imaginary benefit for that just compensation which was intended to be provided."[87]

---

85. For a comprehensive survey of cases dealing with the offset of benefits in partial takings in the nineteenth century, see LEWIS, *supra* note 42, at 1177–1206. *See also* Comment, *Eminent Domain—Set-Off of Benefits Against Damages to Remaining Land Denied*, 43 IOWA L. REV. 303–08 (1958).

86. Carson v. Coleman, 11 N.J. Eq. 106, 108 (1856).

87. *Id.* Subsequent legislation in New Jersey mandated the offset of benefits from a

Lawmakers often required the offset of damages in determining the amount of just compensation payable in partial takings. Strongly rejecting this approach, a pair of decisions by the Supreme Court of Mississippi invalidated a provision in a railroad charter requiring the jury, in assessing the injury to the owner whose land was taken, to "take into the estimate the benefit resulting to such owner or owners, by reason of said road passing through or upon said land, towards the extinguishment of such claim for damages." Invoking the state constitution, the court in *Beatty v. Brown* (1857) declared that the landowner

> was entitled to the cash value of the land when the assessment was made, and also to be indemnified for the damage to his adjacent land, consequent upon the location of the road. He was entitled to be paid in money. It was as clearly incompetent for the legislature to prescribe in what he should be paid, as to prescribe how much or how little he should receive.

The court added that one whose property is taken for a railroad "cannot be compelled to receive as compensation the estimated enhancement in the value of his remaining property."[88] It declared the charter provision authorizing the offset of benefits to be invalid. A year later, the Mississippi court, citing *Vanhorne's Lessees*, underscored its insistence that monetary compensation was constitutionally required in eminent domain proceedings. Emphasizing that the determination of just compensation was a judicial, not a legislative function, it dismissed "prospective railroad benefits, which may never occur, and in most instances, are never realized" as a "moonshine standard of value."[89]

A number of other states limited but did not entirely close the door on the offset of incidental benefits. In *Woodfolk v. Nashville & Chattanooga Railroad Company* (1852), for example, the Supreme Court of Tennessee emphatically declared that a landowner

> is entitled to the value of the land taken from him . . . in money, and that this value, when ascertained, cannot be liquidated, in

project, and this provision was construed to encompass the offset of particular benefits derived by the landowner against the value of the land taken. Loweree v. City of Newark, 38 N.J.L.151, 155 (1875) (land taken for opening of street).

88. Brown v. Beatty, 34 Miss. 227, 241–42 (1857).

89. Isom v. Miss. Cent. R.R., 36 Miss. 300, 312–13 (1858).

> whole or in part, by any "benefit or advantage" he may in fact or by supposition, derive from the making of the road, in the appreciation of his remaining land, or otherwise.[90]

It revealingly explained: "To compel him to take anything else, would render the constitutional guarantee ineffectual and delusive."[91] Yet the court ruled that any enhancement in value particular to the remaining land of the owner by virtue of the railroad could be offset against incidental loss to the parcel.[92] It cautioned that this was a separate inquiry from the valuation of the land actually taken. It further cautioned that such offset could not encompass the general increase in value common to all in the neighborhood produced by the public work.[93]

Taking a somewhat different tack, courts in Kentucky adhered to the view that when property was acquired by eminent domain, the state constitution mandated that the owner must "be paid, in money, the actual value of the property, and the actual or supposed advantage to him, of the appropriation cannot be set off against that value."[94] With respect to consequential injury to the owner's remaining land, on the other hand, Kentucky courts took the position that both special and general advantages arising from the project could set off against the disadvantages to the remainder of the parcel in determining just compensation.[95]

Notwithstanding this line of decisions, which sought to confine the scope of benefit offsets, a sizeable number of state courts in the antebellum era sustained the balance of either special benefits, or

---

90. Woodfolk v. Nashville & Chattanooga R.R. Co., 32 Tenn. 422, 436–37 (1852).

91. *Id.* at 440.

92. *Id.*

93. *Id.* at 441 (declaring that offset of benefits must be confined "to such improvements in value as is the result of running the road at that particular place, and not to the general rise of property in the country, or in that neighborhood, produced by the public work. That which is common to all should not be charged to him, because this is an advantage to which he is entitled as a citizen and tax-payer of the state."). For the same approach, see Chi., Kan. & Neb. Ry. Co. v. Wiebe, 25 Neb. 542, 41 N.W. 297 (1889) (excluding general benefits shared in common from consideration in the assessment of damages to the remainder of the parcel not taken).

94. Sutton's Heirs v. City of Louisville, 35 Ky. 28, 33–34 (1837). *See also* Rice v. Danville, Lancaster & Nicholasville Turnpike Rd. Co., 37 Ky. 81, 88 (1838) (affirming that there "must be a pecuniary compensation equivalent to the value of the land intended to be taken"); Jones v. Wills Valley R.R. Co., 30 Ga. 43, 45–46 (1860) (owner must be paid cash value of land taken, but benefits may be offset against incidental damages to residue).

95. *Sutton's Heirs*, 35 Ky. at 33.

both special and general benefits, against the value of the property actually taken as well as the damage to the remainder of the parcel. A decision by the Court of Appeals of South Carolina in *Greenville & Columbia Railroad Company v. Partlow* (1852) well exemplified this reasoning. In assessing the compensation for the construction of a rail line through the claimant's land, the court declared:

> Compensation is an equivalent for property taken, or for an injury. It must be ascertained by estimating the actual damage the party has sustained. That damage is the sum of the actual value of the property taken and of the injury done to the residue of the property, by the use of that part which is taken, less the benefit which accrues to the residue of the said property by the use of that which is taken. The benefit is, in part, an equivalent to the loss and damage.[96]

It added that the "benefit may consist in the enhanced value of the residue of the land."[97] If such imputed benefit exceeded the amount of the damage, the landowner was deemed fully compensated. Drawing no distinction between benefits unique to the owner and those general advantages received by the community at large, the court dismissed the argument that it was inequitable for contiguous owners to enjoy these same benefits of increased land value while suffering no loss. The court concluded that the claimant was simply entitled to compensation and "cannot require a premium." It added: "If his neighbors are more benefited by the construction of the road than he may be, that is no loss to him."[98]

As this survey makes clear, with some exceptions state courts proved quite receptive to the use of offsetting supposed advantages. Indeed, some were openly supportive of prompting enterprise by holding down compensation costs. Public opposition to such practice, however, mounted following the Civil War. Accordingly, a number of states adopted constitutional provisions which prevented transportation corporations from relying on the offset of imputed benefits in calculating compensation for acquiring property through eminent domain. For example, the South Carolina Constitution of 1868 declared: "No right of way shall be appropriated to the use of any

96. Greenville & Columbia R.R. Co. v. Partlow, 39 S.C.L. 428, 437 (1852).
97. *Id.*
98. *Id.* at 438–39.

corporation until full compensation therefor shall be first made, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation. . . ."[99] Note that these provisions halted offsets for business corporations and did not pertain to just compensation for takings of property by state and local governments.

C. Supreme Court

The Supreme Court was a late participant in the vexing controversy over just compensation and offsetting benefits. Recall that the Bill of Rights, including the Takings Clause of the Fifth Amendment, was originally understood to apply only to the federal government.[100] In 1850, the Supreme Court emphatically rejected a challenge alleging that Illinois had taken property for private use and awarded no compensation. "It rests with state legislatures and state courts," the Court intoned, "to protect their citizens from injustice and oppression of this kind."[101] Not until the seminal case of *Chicago, Burlington and Quincy Railroad Co. v. Chicago* (1897) did the Court rule that compensation for private property taken for public use was an essential element of due process guaranteed by the Fourteenth Amendment against state infringement.[102] For its part, the federal government rarely invoked eminent domain in the nineteenth century.[103]

It followed that the Supreme Court had little opportunity to consider the question of offsetting benefits during most of the nineteenth century. In an 1880 quiet-title action, Chief Justice Morrison R. Waite recognized that the construction of a canal

> might confer benefits that would be a just compensation for the private property taken for its use; but until such a structure is actually furnished complete, it can in no proper sense be said that the works have been constructed from which the benefits that are to make the compensation can proceed.[104]

---

99. S.C. CONST. of 1868, art. XII, § 3. For similar language *see, e.g.*, ARK. CONST. of 1868, art. V, § 48; CAL. CONST. of 1879, art. I, § 14; FLA. CONST. of 1886, art. XVI, § 29; N.D. CONST. of 1889, art. I, § 14.

100. Barron v. Mayor & City Council of Balt., 32 U.S. 243 (1833).

101. Mills v. St. Clair Cnty., 49 U.S. 569, 585 (1850).

102. Chi., Burlington & Quincy v. Chicago, 166 U.S. 228 (1897).

103. *See* FRIEDMAN, *supra* note 53.

104. Kennedy v. Indianapolis, 103 U.S. 599, 605 (1881).

This comment suggested a guarded openness to the offset of advantages. On the other hand, Justice Brewer in *Monongahela Navigation* expressed a more skeptical view about the appropriate use of offsets. At issue was the amount of compensation payable in an action by the federal government to acquire through eminent domain. a privately owned lock and dam on the Monongahela River. In the course of his opinion, Justice Brewer observed that the concept of just compensation "excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated. . . ." To be sure, this was not a situation of a partial taking where the issue was the impact on the remainder of a parcel. But Brewer signaled a cautionary approach with respect to general benefits.

The Supreme Court first squarely addressed the offset question in *Bauman v. Ross* (1897).[105] The case involved congressional legislation authorizing the commissioners of the District of Columbia to extend highways and for that purpose to condemn rights of way. The law provided that where only part of a tract was taken, the jury to assess damages "shall take into consideration the benefits that the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder." The Supreme Court strongly affirmed the power of Congress to provide for the deduction of benefits from the compensation for taking part of a parcel and injuring the rest. "The just compensation required by the constitution to be made to the owner," it explained, "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."[106] The Court pointed out that 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."[107] It had no hesitancy in ruling that Congress could direct that "any special and direct benefits, capable of present estimate and reasonable computation" could be considered in assessing damages for the land taken, as well as for the part remaining.

105. 167 U.S. 548 (1897).
106. *Id.* at 574.
107. *Id.* at 584.

D. Summary of Offset Imbroglio

By the end of the nineteenth century, the practice of offsetting benefits in partial takings was widely accepted, but remained controversial and in flux. As we have seen, a number of states eliminated or curtailed this practice, either totally or with respect to transportation corporations. A majority of jurisdictions upheld the offset of special benefits, either against both the value of the land taken and damages to the remainder or just against the injury to the residue. Only a minority of jurisdictions permitted the offset of general advantages. The upshot was a high degree of confusion. In 1888, Issac F. Redfield, a leading commentator on railroad law observed: "But in consequence of numerous ingenious speculations in regard to possible advantages and disadvantages arising from public works for which lands are taken, the whole subject has become, in this country, especially, involved in more or less uncertainty."[108] "The constitutions, statutes, and decisions of the several States," another authority aptly pointed out, "so deal with this question as to create an inharmonious body of law."[109]

The distinction between special and general advantages was easy to articulate in the abstract but more difficult to apply in concrete situations. William A. Fischel has correctly pointed out: "The distinctions between general and special often seem arbitrary and unstable."[110] Courts repeatedly grappled with the tests to determine what amounted to special or general benefits.[111] Moreover, the assessment of damages and benefits was presented to a finder of fact, either jurors or appointed commissioners as state law dictated, under instructions from the trial court. These were fact-intensive inquiries based on different sets of circumstances. Accordingly, any generalization about results must be approached with caution.

V. SUBSIDY THESIS RECONSIDERED

A group of historians has posited the thesis that eminent domain policy in the nineteenth century functioned as a subsidy for transportation corporations. They maintain that courts developed doctrines

108. 1 ISSAC F. REDFIELD, THE LAW OF RAILROADS 270 (6th ed. 1888).

109. RANDOLPH, *supra* note 64, at 246.

110. WILLIAM J. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 85 (1995).

111. RANDOLPH, *supra* note 64, at 250–53 (differentiating special and general benefits); PHILIP NICHOLS, THE POWER OF EMINENT DOMAIN 332–37 (1909) (discussing tests for special benefits).

that minimized the expense of utilizing eminent domain, and in effect placed much of the cost on owners forced to sell their property at below market prices. "It is not too much to conclude," Harry N. Scheiber argued, "that in reality the states engaged in the systematic extraction of involuntary subsidies from persons on whom the costs of so-called public enterprises fortuitously fell."[112] According to this analysis, there was a sizeable gap between judicial rhetoric about the sanctity of property and the limited protection actually afforded landowners in eminent domain cases. In particular, these scholars allege that courts weakened the "just compensation" requirement. They insisted that the offset of estimated benefits was among the most potent devises to limit monetary compensation. "This offsetting doctrine," Scheiber maintained, "held down the state's costs, and provided the basis for a potentially large involuntary subsidy for the projects being undertaken."[113] Scheiber pointed to his research indicating that in Ohio (before 1851) and Illinois railroads were able to obtain land at virtually no cost due to generous assessments of offsets.[114] Similarly, Lawrence M. Friedman insisted that courts favored transportation companies over landowners, and that the offsetting doctrine amounted to a subsidy for such enterprise. He noted, however, that subsidies were generally popular because of the intense public desire for improved transport facilities.[115] Morton J. Horwitz advanced an even more sweeping subsidization theory, contending that courts in the antebellum era revamped the law governing eminent domain, nuisance, and torts in order to minimize compensation awards and facilitate economic development.[116]

A number of other scholars have cast a skeptical eye on the subsidy thesis from different perspectives. Peter Karsten, for instance, correctly pointed out that state courts tightened the scope of benefit offsets and that state constitutions increasingly prohibited the

112. Harry N. Scheiber, *The 'Takings' Clause and the Fifth Amendment: Original Intent and Significance in American Legal Development*, *in* THE BILL OF RIGHTS; ORIGINAL MEANING AND CURRENT UNDERSTANDING 241 (Eugene W. Hickok ed. 1991).

113. Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: the United States, 1789–1910*, 33 J. ECON. HIST. 232, 236 (1973).

114. HARRY N. SCHEIBER, OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820–1861, 277–78 (1969).

115. FRIEDMAN, *supra* note 53, at 124–25.

116. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, 63–108 (1977).

practice.[117] Fischel questioned the economic efficiency of offsets, noting the railroads received various kinds of gifts and subsidies. He pointed out that the perceived unfairness of offsets induced judges and lawmakers to substantially modify the application of offsets over time.[118] In his study of eminent domain awards in four mid-Atlantic states, Tony A. Freyer, directly challenged the subsidy thesis. He found that transportation companies preferred to avoid expensive and time-consuming litigation and rarely attacked compensation awards favorable to landowners in appellate courts.[119] Kermit L. Hall and Peter Karsten asserted that "the judiciary generally balked at allowing railroads such 'offsets,'" and concluded that "most railroads paid property owners considerably more than the objective value of the land they took."[120]

Given these disparate voices, this seems a propitious time to revisit the question of benefit offsets and their relationship to the constitutional norm of just compensation. We should begin by examining the relative position of lawmakers and judges. It bears emphasis that in many respects state legislatures played the most important role in determining eminent domain policy. After all, it was legislatures that delegated eminent domain authority to privately owned canal, turnpike, and railroad companies. Moreover, it was legislators who frequently mandated that perceived benefits should be offset against damages suffered by individual landowners. Judges were simply reacting to a legislative scheme. While some courts enthusiastically endorsed the notion of offsetting, others were more wary. A few insisted on payment of just compensation in money. In addition, the majority of courts modified the offset of benefits in ways that strengthened the rights of owners. By rejecting the offset of general advantages, they addressed the blatant unfairness of considering

117. Peter Karsten, *Supervising the "Spoiled Children of Legislation": Judicial Judgments Involving Quasi-Public Corporations in the Nineteenth Century U.S.,* 41 AM. J. LEGAL HIST. 315, 332–41 (1997).

118. FISCHEL, *supra* note 110, at 80–88.

119. Tony Freyer, *Reassessing the Impact of Eminent Domain in Early American Economic Development*, 1981 WISC. L. REV.1263, 1265–66, 1271–72. *See also* John D. Majewski, Commerce and Community: Economic Culture and Internal Improvements in Pennsylvania and Virginia, 1790–1860, 284–307 (1994) (Ph.D. diss, University of California, Los Angeles) (on file with the University of California, Los Angeles library) (finding that offset provisions were not consistently effective in reducing eminent domain awards in antebellum Virginia).

120. KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 130 (2d ed. 2009).

such widely shared benefits and curtailed the room for rank speculation about often speculative advantages. However imperfectly, courts generally took the lead in seeking to vindicate the just compensation principle. In due course, state constitution-makers and legislators followed the same path by curtailing or barring the use of offsets in compensation awards.

This is not to deny that transportation companies gained from the offset policy, but how much remains unclear. The subsidy thesis relies upon a large amount of guesswork. Scheiber, for example, maintained that offsets amounted to "a potentially large involuntary subsidy," but conceded that "a precise quantitative estimate of the subsidy cannot be calculated."[121] Freyer noted "the difficulties inherent in determining just how much of a benefit eminent domain was to transportation corporations, and who gained and who lost in the process."[122] No doubt the offset policy raised the distinct possibility of undercompensation for landowners by excessive evaluation of speculative benefits. On the other hand, railroads sometimes appealed without success from what they viewed as generous eminent domain awards.[123] Absent further empirical study of the frequency and extent to which compensation awards were reduced by offset, however, the subsidy thesis remains problematic. To place this matter in economic perspective, one must remember that, in addition to eminent domain, states showered benefits in the form of tax exemptions, monopoly privileges, direct financial aid, and land grants on transportation enterprises. These forms of assistance dwarfed offsets in eminent domain proceedings.

By the end of the nineteenth century, moreover, state and local governments undertook more complex projects, such as creating urban parks[124] and establishing municipal utility services.[125] They increasingly eclipsed private transportation companies as the prime beneficiaries of benefit offsets. The most common exercise of eminent domain by public agencies, of course, involved opening roads[126]

121. Scheiber, *supra* note 113, at 236–37.

122. Freyer, *supra* note 119, at 1285.

123. *See, e.g.*, White v. Charlotte & S.C. R.R. Co., 40 S.C.L. 47, 48–50 (Ct. App.1852).

124. Attorney General v. Williams, 174 Mass. 478, 479, 55 N.E. 77, 78 (1899) ("It is only within a few years that lands have been taken in this country for public parks. Now the right to take land for this purpose is generally recognized and frequently exercised.").

125. LEWIS, *supra* note 7, at 535–37.

126. Trosper v. Bd. of Comm'rs of Saline Cnty., 27 Kan. 391, 394 (1882) (value of special

and widening city streets.[127] Both raised the question of offsets. Any balancing benefits against damages in these instances, of course, had the effect of reducing the cost of public projects to the taxpayers while placing the burden disproportionally on individual property owners.[128]

VI. TOWARD THE FUTURE

Doctrines set in the nineteenth century regarding the determination of "just compensation" have continued to cast a long shadow in eminent domain proceedings to the present. "The problem of undercompensation," Gideon Kanner has explained, "is rooted in long-standing doctrinal and moral deficiencies in decisional law." He criticized judicial failure to "modify outmoded, largely nineteenth century rules of 'just compensation' law."[129] Three areas warrant further discussion.

A. Fair Market Value

The fair market value unquestionably remains the norm when an entire piece of property is acquired by eminent domain. Yet the inadequacy of this standard has been convincingly demonstrated. Unlike items which are the subject of frequent market transactions, establishing the value of a unique parcel of land is more complicated. Sales of comparable properties are not always available. Even the most conscientious appraisal is still ultimately an educated guess.[130] Moreover, the fair market standard as currently understood does not consider highly relevant factors, such as relocation costs, loss of

---

benefits may be deducted from special damages sustained by establishing highway); Newby v. Platte Cnty., 23 Mo. 258, 273–76 (1857) (offset of special benefits in calculating damages from opening of road); Beekman v. Jackson Cnty., 18 Or. 283, 287–89, 22 P. 1074 (1890) (offset of special damages against damages for opening county road).

127. Lewis v. City of Seattle, 5 Wash. 741, 754–57, 32 P.794, 798–99 (1893) (special benefits for widening street may be offset against damages to owner).

128. A change of street grade could injure abutting property without a taking. Many state statutes therefore allowed an award of damages to abutting owner who suffered a loss because of the new grade. As with analogous cases involving acquisition of property by eminent domain, special benefits could be considered in reduction of damages. LEWIS, *supra* note 42, at 1305–08. *See also* Chase v. City of Portland, 86 Me. 367, 29 A. 1104, 1106–07 (1894); Dayton v. City of Lincoln, 39 Neb. 74, 57 N.W. 754, 757 (1894).

129. Gideon Kanner, *"Fairness and Equity," or Judicial Bait-And-Switch? It's Time to Reform the Law of "Just" Compensation*, 4 ALB. GOV'T L. REV. 38, 40 (2011).

130. Miller v. United States, 317 U.S. 369, 375 (1943) (stating that "the application of this concept involves, at best, a guess by informed persons").

business goodwill, and litigation expenses.[131] Thomas W. Merrill has cogently concluded: "The most striking feature of American compensation law—even in the context of formal condemnation or expropriation—is that just compensation means incomplete compensation."[132] Put bluntly, the fair market value falls well short of the "full indemnification and equivalent for the injury" set forth by Blackstone.

B. Benefit Offsets

The balance of supposed benefits against damages remains a vexing dimension in eminent domain proceedings. The constitutionality of allowing states to offset benefits appears well settled. In *McCoy v. Union Elevated Railroad Co.* (1918), the U.S. Supreme Court rejected a contention that by allowing offset benefits a state deprived the owner of property without due process of law in violation of the Fourteenth Amendment. "It is almost universally held," the Court explained, "that in arriving at the amount of damage to property not taken allowance should be made for peculiar and individual benefits conferred upon it; compensation to the owner in this form is permissible."[133] In 1943, the Supreme Court simply remarked, with respect to a partial taking, that "if the taking has in fact benefited the remainder the benefit may be set off against the value of the land taken."[134]

In many respects, the debate over offsetting has not moved far from its nineteenth century roots. Most courts adhere to the special/general benefit dichotomy fashioned in the nineteenth century, and allow only special benefits to be offset in condemnation proceedings.[135] Hence, the Supreme Court of Texas explained: "The theory

131. Gideon Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W.L. REV. 57 (1969).

132. Thomas Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENV'T L.J. 110, 111 (2002). *See also* Lucas J. Asper, *The Fair Market Value Method of Property Valuation in Eminent Domain: "Just Compensation" or Just Barely Compensating?*, 58 S.C.L. REV. 489, 498–508 (2007) (arguing that current method of determining fair market value is inadequate and proposing revisions).

133. McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 365–66 (1918).

134. *Miller*, 317 U.S. at 375.

135. Note, *From Railroads to Sand Dunes: An Examination of the Offsetting Doctrine in Partial Takings,* 83 FORDHAM L. REV. 1539, 1561–65 (2014) [hereinafter Note, *From Railroads to Sand Dunes*].

underlying the distinction between special and general benefits is that the landowner's recovery should not be reduced by benefits that arise from the condemnation itself and that inure to the community at large, rather than only to the landowner."[136] Yet the difference still perplexes courts. "In practical application," a Missouri appellate court lamented, "the distinction between special benefits and general benefits is shadowy at best." It added that "the question of whether there are special benefits and the extent of them is a jury question."[137] Generally speaking, then, courts have not provided fresh analysis or broken new ground regarding the practice of offsetting.

In sharp contrast, two states have junked the long-standing separation of general and special benefits. The Supreme Court of California in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) adopted a rule permitting the offset "of all reasonably certain, immediate and nonspeculative benefits" against severance damages. It concluded that "in determining a landowner's entitlement to severance damages, the factfinder henceforth shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value, insofar as such evidence is neither conjectural nor speculative."[138] The Supreme Court of New Jersey adhered to the same view. Asserting that "the terms special and general benefits do more to obscure than illuminate" the calculation of just compensation, it held that "reasonably calculable benefits—regardless of whether those benefits are enjoyed to some lesser or greater degree by others in the community—that increase the value of property at the time of the taking should be discounted from the condemnation award."[139] To date, no other jurisdiction has adopted this approach.

This sweeping alteration of the rule for ascertaining just compensation in the case of partial takings is troublesome. It is a departure from the prevailing rule in the United States and marks a return to a consideration of general benefits widely rejected in the nineteenth century. It will likely result in the undercompensation of owners.[140]

---

136. Taub v. City of Deer Park, 882 S.W.2d 824, 828 (Tex. 1994) (holding that benefits at issue were general in nature and could not be used to offset damages to remainder).

137. State *ex rel.* State Highway Comm'n v. Koziatek, 639 S.W.2d 86, 88 (Mo. App. Div. 2 1982).

138. L.A. Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809, 824 (Cal. 1997).

139. Borough of Harvey Cedars v. Karan, 70 A.3d 524, 539–43 (N.J. 2013).

140. For a different assessment of this new rule, see Note, *From Railroads to Sand Dunes*,

Moreover, as one of the dissenting judges in *Los Angeles County* charged, the new formula opened the door to a grievously wrongful outcome in which neighbors enjoy similar advantages while suffering no pecuniary loss.[141] Justice Joyce L. Kennard persuasively explained:

> When a parcel of property is severed by a government taking, any damages to the remainder are part of the injury the landowner suffers. To refuse to compensate the landowner for those damages by offsetting against them the general benefits that all in the vicinity of the project receive unfairly forces the landowner to pay for benefits that others receive for free. Limiting offsets only to special benefits more equitably distributes among the entire community the benefits and burdens of the project.[142]

What would have prompted these courts to take such a radical and retrograde step? The opinions offer clues. Both the California and New Jersey courts assert that the separation of special from general benefits originated in the context of railroad expansion.[143] Hence, this division of benefits was pictured as an effort to curtail claimed offsets by private railroad companies exercising eminent domain power. "The historical reasons that gave rise to the development of the doctrine of general and special benefits," the New Jersey Supreme Court maintained, "no longer have resonance today."[144] The unspoken assumption was that governmental agencies, which initiate nearly all condemnation proceedings in modern times, should receive more favorable treatment than private transportation companies. Indeed, the Supreme Court of California in *Los Angeles County* made explicit its desire to hold down the cost of public projects through more generous offsets, declaring:

> One general principle relevant to this determination is that taxpayers should not be required to pay more than reasonably necessary for public works projects. Stated another way, compensation for taking or damage to property must be just to the

---

supra note 135, at 1566–75 (arguing that the distinction between special and general benefits should be rejected because "public policy concerns of the twenty-first century public are different," and maintaining that the offset of all nonspeculative benefits is fair to landowners).

141. *L.A. Cnty. Metro. Transp. Auth.*, 941 P.2d at 830 (citing *Lewis*, *Cooley*, and *Nichols*).

142. *Id.* at 836.

143. *Id.* at 816; *Borough of Harvey Cedars*, 70 A.3d. at 536, 542–43.

144. Borough of Harvey Cedars v. Karan, 70 A.3d. 524, 542 (N.J. 2013).

> public as well as to the landowner. A rule permitting offset against severance damages of all reasonably certain and nonspeculative benefits minimizes the cost of public works projects in two respects: Certain offsets would be permitted that presently are disallowed, and transaction costs would be reduced due to the new rule's greater clarity and certainty.[145]

Justice Marvin R. Baxter, in dissent, cast a critical eye on this revised rule, which minimized expense to governmental agencies by reducing monetary compensation to individuals whose property was taken. "For the first time in modern California history," he complained, "a public agency that condemns part of a larger parcel may reduce its monetary liability for severance damages by 'setting off' benefits to the remainder which are widely shared by condemned and noncondemned parcels alike." Baxter warned against abandoning a formula which "for nearly a century, has justly protected the rights of California property owners against abuse of the awesome sovereign power of eminent domain."[146]

No doubt the dichotomy between special and general benefits has long bedeviled courts. In practice, however, this distinction serves to safeguard, even if imperfectly, the rights of property owners by limiting the extent of benefit offsets. By eliminating this traditional division, the California and New Jersey courts signal that their primary concern is to shield government from financial liability. Yet one might well ponder whether, if the differentiation between special and general benefits is so vexing, courts should reject all offsets and, following the lead of Justice Paterson, hold that the constitutional requirement of "just compensation" contemplates payment in money. Arguably this approach would better effectuate the protective function of the compensation mandate.[147]

C. Troublesome Legacy of Undercompensation

Inadequate compensation for persons whose property has been taken by eminent domain has been a persistent theme originating in the nineteenth century. Despite brave words about "full and just

---

145. L.A. Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809, 823 (Cal. 1997).

146. *Id.* at 837.

147. *See* EPSTEIN, *supra* note 48, at 190 ("The state can always compensate with cash, so its unilateral decision to pay with nonstandard coinage properly invites heightened judicial scrutiny.").

equivalent," the actual performance by courts has too often fallen short of this goal. The fair market standard, as applied, simply did not put the owner in as good a position as before the taking of a parcel.[148] From the beginning of the nineteenth century, moreover, legislators mandated and courts broadly sustained the offset of supposed benefits in lieu of monetary compensation for partial takings.

Why did courts that extolled the importance of private property dilute the promise of just compensation when property was taken? Policy considerations bulk large in the continued deliberations over how much compensation should be payable in eminent domain proceedings. As one scholar has pointed out: "Yet behind the façade of those seeming clear legal standards lurks an underlying division between those who would require the government to provide a more generous measure of compensation and those who would require the government to pay less."[149] One line of thinking views just compensation as a bulwark against eminent domain abuse and an affirmation of the critical place of private property in the constitutional order. Another sees just compensation as a potential barrier to desired governmental action and thus favors a less fulsome measure of compensation. This is a variation on the ongoing debate over what governmental actions amount to a taking of property, with proponents of regulation and public projects supporting a narrow understanding of a taking.[150]

Although the pattern of decisions was uneven, we have seen that many courts in the nineteenth century devised formulas to hold down monetary compensation awards in order to promote transportation projects. This pattern continued into the twentieth century, but then the beneficiaries were largely governmental agencies pursuing a variety of expansive projects. Further, jurisprudential changes reinforced the weakening of the just compensation requirement. The Progressive movement of the early twentieth century downplayed claims of individual rights and expressed faith in government to reshape society. Progressives displayed little patience with constitutional doctrines which confined the reach of government. In particular, they challenged the central place of property rights in

148. THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTION TO U.S. LAW: PROPERTY 249–50 (2010).

149. Lunney, *supra* note 41, at 722.

150. RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 359–60 (2014).

the constitutional order. The political triumph of the New Deal in the 1930s brought this trend to fruition.[151] Distinguishing between the rights of property owners and other individual liberties, New Deal Constitutionalism afforded property rights a greatly reduced level of constitutional protection.[152] This was a radical departure, because neither the language of the Constitution and Bill of Rights nor the views of the framers draw any dichotomy between different categories of rights.[153] The effect, of course, was to strengthen governmental control over private property.[154] As signs of this profound change, the once-potent contract clause was virtually eviscerated[155] and the "public use" clause of the Fifth Amendment was drained of efficacy at the federal level.[156]

In this new constitutional climate of privileging governmental action, it was not surprising that the "just compensation" clause would be construed as narrowly as possible. In 1943, the Supreme Court pictured the measure of just compensation as the subject of a trade-off. Speaking for the Court, Justice William O. Douglas opined: "The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner."[157] Not only is this a highly simplistic rendering of eminent domain history, but it intimates that adequate compensation to persons whose property is taken is somehow antagonistic to public projects.[158] The Supreme Court of California was more explicit

---

151. James W. Ely, Jr., *The Progressive Era Assault on Individualism and Property Rights*, 29 SOC. PHIL. & POL'Y 255 (2012). *See generally* RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006).

152. *See, e.g.*, United States v. Carolene Products Co., 303 U.S. 144 (1938) (placing the rights of property owners in a subordinate category entitled to a lesser degree of protection under the due process norm).

153. Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, CATO SUP. CT. REV. 9, 19 (2003–2004) ("Economic rights, property rights, and personal rights have been joined, appropriately, since the time of the founding.").

154. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 123–41 (3d ed. 2008). *See also* Dellinger, *supra* note 153.

155. JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 216–37 (2016).

156. James W. Ely, Jr., *'Poor Relation' Once More: The Supreme Court and the Vanishing Rights of Property Owners,* CATO SUP. CT. REV. 39, 53–65 (2004–2005) (tracing Supreme Court decisions that gutted the "public use" clause). *See also* ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 55–60 (2015).

157. United States *ex rel*. Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 280 (1943).

158. Kanner, *supra* note 129, at 60–63 (analyzing *Powelson* and criticizing judicial assumption that full compensation would hamper public projects).

in articulating its policy preference favoring public projects. In a remarkable but disturbing opinion, the court insisted in 1960 that it had a duty to minimize the size of condemnation awards. Otherwise, it fretted, the cost of public improvements would increase and "impose a severe burden on the public treasury."[159] The court was more concerned with an imagined impact on government than with the constitutional right of an individual to receive a full indemnity. This bizarre reasoning entirely inverts the purpose of the just compensation norm to prevent government from singling out a few individuals to bear the cost of providing social goods. Indeed, it strongly indicates a dismissive attitude that the just compensation requirement is an unwelcome obstacle to be circumvented to the greatest extent possible.

Equally problematic, skimpy compensation awards encourage more aggressive use of eminent domain by government. Yet with the erosion of the "public use" limitation on the exercise of eminent domain, the "just compensation" requirement is the only meaningful check on governmental abuse. One authority has cogently observed: "Efficient just compensation should provide the significant legal check on the use of eminent domain that is now lacking. As long as the Court chooses not to permit meaningful review of public use claims, just compensation is the only effective constitutional check on governmental exercises of eminent domain."[160]

The melancholy trend of denying full compensation in eminent domain proceedings has continued. For example, in *Bay Point Properties, Inc v. Mississippi Transportation Commission* (2016), the Supreme Court of Mississippi upheld a jury verdict that a state agency effected a taking of land by exceeding the terms of an express easement for highway purposes in order to construct a park.[161] Generally, when an easement is created for a specific purpose, it terminates upon the cessation of that purpose and the land reverts to the landowner

159. People *ex rel.* Dept. of Pub. Works v. Symons, 357 P.2d 451 (Cal. 1960).

160. James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain,* 69 MINN. L. REV. 1277, 1312 (1985). *See also* MERRILL & SMITH, *supra* note 148, at 250–51 (pointing out the formulation of a "just compensation" standard "aimed at providing more complete compensation would enhance the security of property rights and would be consistent with a general objective of promoting governmental forbearance").

161. Bay Point Props., Inc. v. Miss. Transp. Comm'n, 201 So.3d 1048, 1051 (Miss. 2016), *cert. denied*, 137 S. Ct. 2002 (2017). I joined an amicus brief in *Bay Point* supporting the petitioner's request for a writ of *certiorari*.

free of the burden of the easement.[162] However, the majority incredibly ruled that because of a state statute requiring release of highway easements on the books of the transportation commission the easement was still in effect despite being converted to a very different use. Therefore, it denied just compensation for the unencumbered value of the land despite the taking for a park and upheld a nominal award.[163] The two dissenters charged that the state statute did not bar recovery of compensation for unencumbered property and that the outcome violated Bay Point's federal and state constitutional right to just compensation for the value of the land without the easement.[164] The United States Supreme Court declined review, but Justices Neil Gorsuch and Clarence Thomas separately stated:

> When a state negotiates an easement limited to one purpose but later uses the land for an entirely different purpose, can the State limit, by operation of statute, the compensation it must pay for that new taking? The Mississippi Supreme Court held that it may do just that. But this decision seems difficult to square with the teachings of this Court's cases holding that legislatures generally cannot limit the compensation due under the Takings Clause of the Constitution.[165]

In *Bay Point*, the Supreme Court of Mississippi in effect endorsed the taking of property without just compensation. One must be careful about generalizing from a single case, but the outcome does not bode well for judicial willingness to insist upon sufficient compensation when property is taken.

Nineteenth century courts, of course, cannot be held responsible for the dismissive attitude of the post–New Deal legal culture toward the rights of property owners. In many respects courts in the

---

162. JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 10:8 (2d ed. 2020).

163. *Bay Point Props. Inc*, 201 So.3d at 1055–57.

164. *Id.* at 1059–63. *See* Steven J. Eagle, *Land Use Regulation and Good Intentions,* 33 J. LAND USE & ENV'T L. 87, 140 (2017) (picturing *Bay Point* as an example of courts permitting state government to "reconfigure infrastructure more inexpensively by disregarding property rights"); Note, *Parks and Separation: How the Mississippi Legislature Decided Just Compensation in* Bay Point Properties, Inc .v. Mississippi Transportation Commission, 38 MISS. C.L. REV. 49, 68 (2019) (asserting that the state statute "put the state's financial interests ahead of private property rights," and that this "appears to be nothing more than a clever avoidance of just compensation").

165. Bay Point Props., Inc. v. Miss. Transp. Comm'n, 137 S. Ct. 2002 (2017).

nineteenth century were far more protective of property owners than is the norm today. For example, they upheld contracts against attempted impairment by state legislatures,[166] looked skeptically upon confiscation schemes,[167] and began to fashion a doctrine of regulatory takings.[168] In many states, starting with Illinois in 1870, constitution-makers strengthened the state's taking clause by requiring compensation when property was "taken or damaged for public use."[169] Still, the courts in the nineteenth century fell short of requiring adequate compensation when property was acquired by eminent domain, and this doleful legacy haunts us today.

166. ELY, *supra* note 155, at 30–191.

167. *See generally* DANIEL W. HAMILTON, THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND CONFEDERACY DURING THE CIVIL WAR (2007).

168. David J. Brewer, *The Protection of Private Property from Public Attack*, 55 NEW ENGLANDER & YALE REV. 97, 102–05 (1891) ("Property is as certainly destroyed when the use of that which is the subject of property is taken away, as if the thing itself was appropriated, for that which gives value to property is its capacity for use."); Bent v. Emery, 173 Mass. 495, 496, 53 N.E. 910 (1899) (Holmes, J.) ("It would open to argument at least that an owner might be stripped of his rights so far as to amount to a taking without any physical interference with his land."). *See also* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1259 (observing that "numerous state courts recognized devaluative takings to be compensable at an early stage. Both regulatory takings and consequential takings were acknowledged").

169. LEWIS, *supra* note 7, at 627–28. *See also* Chicago v. Taylor, 125 U.S. 161, 166 (1888) (Harlan, J.) (observing that state constitution framers added language to give greater security to private property).

"EQUITABLE COMPENSATION" AS "JUST COMPENSATION" FOR TAKINGS

BRIAN ANGELO LEE*

ABSTRACT

The Fifth Amendment's requirement that the government pay "just compensation" to owners of taken property is typically assumed to mean "full" compensation, equivalent to the taken property's fair market value. In this symposium contribution to the *Brigham-Kanner Property Rights Journal*, I explore an often overlooked alternative understanding of "just compensation" for takings, one freed from automatic equation with full, fair-market-value compensation. Rooted in traditional equity, this "equitable compensation" alternative has significant historical roots, starting with the Fifth Amendment's drafters' striking choice not to follow the Northwest Ordinance of 1787's requirement of "full" compensation, and running through a line of cases and commentary that has emphasized takings compensation's equitable nature. I argue that recognizing takings compensation's equitable dimension—particularly equity's attention to reciprocal obligations—can help takings law more naturally respond to thorny difficulties caused by specific rigidities in takings doctrine, rigidities that create challenges when takings doctrine is forced to address situations that differ from core cases of eminent domain. Attending to the relative weights of parties' reciprocal duties, and equitably adjusting compensation in response, can help resolve such cases more plausibly, including takings for private projects with public benefits (as in *Kelo v. New London*) and regulatory takings.

* Professor of Law, Brooklyn Law School. My thanks to Henry E. Smith and participants in the 2020 Brigham-Kanner Property Rights Conference for their comments on an earlier draft of this Paper. Any errors are my own. The Brooklyn Law School Dean's Summer Research Stipend provided financial support for this project.

INTRODUCTION

That the U.S. Constitution requires the government to pay "just compensation" to owners of property taken through eminent domain is well known, and what "just compensation" means may seem equally settled: The U.S. Supreme Court has said that "just compensation" for taken property is a "full and perfect equivalent in money of the property taken," an equivalent measured by the taken property's fair market value.[1] And as Justice Jackson famously noted of his Court, its finality makes it infallible.[2]

However, doctrines that have become so familiar as to seem infallible can evolve, even in the eyes of courts, when those doctrines no longer seem adequate to new problems or situations. I am grateful to the organizers of the 2020 Brigham-Kanner Property Rights Conference for their invitation to contribute a discussion of the "just compensation" requirement to the current volume, and I wish to take this opportunity to explore briefly an alternative understanding of "just compensation" for takings, one freed from automatic equation with full, fair market value compensation. For the sake of convenience, this alternative, rooted in traditional equity, might be called "equitable compensation." I shall suggest that the "equitable" understanding of "just compensation" both has significant historical roots and might help takings law more naturally respond to thorny difficulties that spring from specific rigidities in takings doctrine, rigidities that create challenges when takings doctrine is forced to address situations that differ from familiar core cases of eminent domain.

---

1. United States v. Miller, 317 U.S. 369, 373–74 (1943).

2. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J. concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

What follows is necessarily abbreviated and does not pretend to be definitive. If persuasive, it will do no more than make a *prima facie* case for the value of recognizing an equitable dimension in the just compensation requirement. My hope is, however, that establishing this *prima facie* case may open a fruitful discussion about the plausible ways in which "full" and "fair" compensation might sometimes be two different quantities, and how recognizing those situations might yield a more coherent and less contentious takings jurisprudence.

I. DISCRETE DOCTRINE FOR CONTINUOUS PROBLEMS

The constitutional foundation for prominent contemporary takings debates rests on the Fifth Amendment's Takings Clause,[3] which effectively provides a checklist of four elements, each of which must be satisfied for a governmental action to qualify as a justified taking. Each element corresponds to a separate word or phrase in the clause: "nor shall private [1] *property* be [2] *taken* for [3] *public use*, without [4] *just compensation*."[4]

A fundamental feature of the first three of these four elements is their binary, all-or-nothing nature. The item in dispute either is property or it is not. It either was taken, or it was not. And the intended use either was public, or it was not. Such determinations leave little room for shades of gray, and yet any one of these determinations can decide the outcome of a case. Thus, these determinations are absolute, both in nature and in consequence.[5]

Forcing every specific instance of an alleged taking onto one side or the other of these bright-line divides is straightforward enough when dealing with garden-variety takings cases, such as condemning a private home so that the city can build a police station there.[6] The

3. State constitutions also have a role to play, but since those constitutions commonly contain provisions closely modeled on the U.S. Constitution's Takings Clause, the issues raised here with respect to the latter can be expected to apply to the former as well. Independent of any state constitutional provisions, courts also read the Fourteenth Amendment as providing constitutional protections in the context of takings by state governments. *See, e.g.*, 1A NICHOLS ON EMINENT DOMAIN § 4.8 (Julius L. Sackman et al. eds., 3 ed. 2021).

4. U.S. CONST. amend. V (emphasis added).

5. In Carol Rose's terminology, takings doctrine is quite crystalline. *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577 (1988).

6. As the U.S. Supreme Court has noted, "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 528 (2005).

farther that a case is located from paradigm instances of takings, however, the less obvious it may become on which side of a relevant line the case belongs. As a result, each of these elements has spawned its own jurisprudence when courts have needed to apply these rigid categories to circumstances removed from the relatively easy core cases.[7]

Indeed, two of the most controversial areas of takings scholarship and takings law spring from the need to draw these binary distinctions: takings for private projects with public benefits, and regulatory takings. The central question in these cases is how to categorize the project or regulation, when only two options are available. And the consequences of that categorization can be enormous. If a project with both public and private benefits is deemed to be for public use, then the owner of property condemned to advance that project has no choice but to relinquish the property and accept in return whatever amount of money is deemed to be the property's market value. But if the project is ruled to be for private use, then the condemnation is prohibited altogether. Likewise, if a regulation is deemed to have gone "too far"—as Justice Holmes put it in *Pennsylvania Coal v. Mahon*—and thus to constitute a taking, the government must pay the burdened parties the full market value of the loss that they suffered, an obligation that in practice will often make the regulation infeasibly expensive, and thus impossible to impose altogether.[8] But if the regulation has not crossed the nebulous line that determines how far is "too far," then the state is free to impose that regulation, and the burdened owner gets nothing.[9]

The reason that such cases are controversial is that the facts that give rise to them do not easily fit within a binary doctrinal framework,

---

7. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (addressing whether the item in question qualified as property); Ark. Game & Fish Comm'n v. United States, 568 U.S. 23 (2012) (addressing whether the property was taken); Kelo v. City of New London, 545 U.S. 469 (2005) (addressing whether the taking was for public use); United States v. Miller, 317 U.S. 369 (1943) (addressing whether the owner received just compensation for the taken property).

8. Penn. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922). *See also* First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cty., 482 U.S. 304, 321 (1987) (specifying that once a regulation has been deemed a taking, the government's three possible options are "amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain."). For concerns about the infeasibility of paying compensation, see Section IV.B, *infra*.

9. Sometimes, as in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the regulation itself may provide partial compensation (see Section IV.B, *infra*.) However, regulations that do not constitute takings are not obligated to provide such compensation, and this sort of voluntary compensation can give rise to its own set of problems. *See, e.g.*, Christopher Serkin, Penn Central *Take Two*, 92 NOTRE DAME L. REV. 913 (2016).

resulting in high-stakes questions for which there are no obvious answers. The world which the law seeks to regulate sometimes is *continuous* rather than *discrete*.[10] Rather than neatly falling into one category or another, cases may lie at some intermediate point on a spectrum between two poles. As a result, government projects and regulations sometimes are partially one kind of thing, while simultaneously partially a different kind of thing.

Consider, for example, the challenge that faced the U.S. Supreme Court in *Kelo v. City of New London*, where the Court had to decide whether taking property for use by private companies as part of an economic redevelopment project qualified as a "public" use or as merely a "private" use.[11] The project in question involved building various attractions, including a hotel, a museum for the U.S. Coast Guard, and a large research center for the Pfizer pharmaceutical company. The plan later evolved to give a private developer a 99-year lease for $1 on some of the project property in exchange for agreeing to develop that land in accordance with the development plan.[12] The city claimed that the project was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas."[13]

When private property owners challenged the validity of the use of eminent domain to take their property for use in this project, takings doctrine required the Court to decide whether the project was "public" or "private," when in fact the project was simultaneously somewhat public and somewhat private.[14] Existing doctrine, however, provided no way to reach a decision that matched this reality,

---

10. Larry Alexander has used the terms "scalar" and "binary" in discussing related phenomena in moral philosophy. Larry Alexander, *Scalar Properties, Binary Judgments*, 25 J. APPLIED PHIL. 85 (2008).

11. Kelo v. City of New London, 545 U.S. 469 (2005). For similar examples, see *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010) (concerning the exercise of eminent domain to take property in a "blighted" Manhattan neighborhood for use by Columbia University); Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d. 164 (N.Y. 2009) (concerning the exercise of eminent domain to take property in the "Atlantic Yards" area of Brooklyn for a land improvement project involving a private developer's mixed-use development).

12. *Kelo*, 545 U.S. at 476 n.4.

13. *Id.* at 472.

14. Others have noted that the all-or-nothing nature of the "public use" determination can intensify the harmful consequences of judicial error in such determinations and can create incentives for governments to act in socially undesirable ways. *See* James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 864–65 (2004).

demanding instead an all-or-nothing choice. The result was a decision beset by controversy.[15] Such controversy was perhaps inevitable, for when courts are compelled to decide whether an effectively hybrid governmental act is wholly inside or wholly outside rigid doctrinal categories, either decision will necessarily be partially inadequate.

A similar challenge arises when courts attempt to determine which sorts of government restrictions on the use of private property constitute a "taking" of that property—i.e., whether a "regulatory taking" has occurred. Once again, the law requires a binary, all-or-nothing decision. If the regulation is deemed to constitute a taking, then the aggrieved property owner is entitled to full compensation for the inflicted loss. And the cost of providing that compensation, either to one particular owner or to everyone who is similarly burdened, may be so high that the government, as a practical matter, may not be able to afford to impose the regulation at all. On the other hand, if the court deems the regulation not to be a taking, then the property owner receives zero compensation, and the government can impose the regulation at no monetary cost to itself beyond the cost of enforcement.

But, as in the case of hybrid public-private uses, the world to which this doctrine is applied does not always fall neatly onto one side or the other of the regulatory takings threshold. Justice Holmes's question in *Mahon* (Did the regulation go "too far"?) implicitly acknowledged that the burdens imposed by regulations come in degrees. Nevertheless, the need to determine whether a taking either has or has not occurred requires drawing a sharp distinction between regulations on the near side of the "too far" line and regulations that have crossed that line.[16]

---

15. *See, e.g.*, Adam Liptak, *Case Won on Appeal (To Public*), NEW YORK TIMES (July 30, 2006), https://www.nytimes.com/2006/07/30/weekinreview/the-nation-case-won-on-appeal-to-public.html (noting that the *Kelo* decision "provoked outrage from Democrats and Republicans, liberals and libertarians, and everyone betwixt and between. Dozens of state legislatures considered bills to protect private property from government seizure, and many passed new legislation; Justice John Paul Stevens, the author of the decision, issued something like an apology; a campaign was started to use eminent domain to seize the home of another justice, David H. Souter . . . .").

16. Although regulatory takings questions commonly involve determining whether a regulation has gone "too far," U.S. Supreme Court jurisprudence has identified a few very narrow situations in which a regulation will automatically be deemed a taking. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (holding that a regulation requiring agricultural employers to allow union organizers onto the employers' property for up to three hours per day, 120 days per year constituted a per se taking); Lingle v. Chevron U.S.A. Inc., 544 U.S.

Such determinations are not self-evident. Holmes in *Mahon* presented a four-factor test to guide the Court in reaching that determination, but the factors offered do not promise a reliably neat binary conclusion.[17] Two of the factors rely on quantities that lie somewhere on a continuum of values: how much diminution in value the regulation had caused and whether the owner burdened by the regulation was also receiving benefits from that regulation's application to others ("average reciprocity of advantage"). A third factor—whether a regulation addresses a public nuisance—does involve a binary determination on its face, but nuisance decisions themselves can be contentious, as nuisance doctrine inherently lacks the bright-line character of trespass law.[18] And the fourth factor—whether the regulation destroyed an existing property or contract right—was itself controversial, rejected by Brandeis's dissent as irrelevant.[19]

Passage of time did not clarify matters, and when the Court revisited the regulatory takings issue in *Penn Central*, it offered a somewhat different set of factors.[20] Compounding the resulting uncertainty in regulatory takings doctrine, neither the *Mahon* Court nor the *Penn Central* Court offered any clear guidance about exactly how their stated factors should be combined and balanced to generate the required ultimate conclusion. This silence was not the courts' fault; the situations simply were not amenable to greater certainty.[21]

The need to make high-stakes, all-or-nothing choices between two possible outcomes in circumstances where neither answer is clearly

---

528, 528 (2005) ("Regulatory actions generally will be deemed *per se* takings for Fifth Amendment purposes (1) where government requires an owner to suffer a permanent physical invasion of her property, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, or (2) where regulations completely deprive an owner of 'all economically beneficial us[e]' of her property, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019.").

17. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

18. *See*, *e.g.*, 81 JOHN A. GEBAUER, N.Y. JUR. 2D NUISANCES § 1 (2021) ("There is no exact rule or formula by which the existence of a nuisance may be determined, but each case must stand on its own facts."); Rose, *supra* note 5, at 579 ("[N]uisance is one of those extraordinarily shapeless doctrinal areas in the law of property. . . . You don't know in advance how to answer these questions and how to weigh the answers against each other; that is to say, you don't know whether your building will be found a nuisance or not, and you won't really know until you go through the pain and trouble of getting a court to decide the issue after you have built it or have had plans drawn up.").

19. *Mahon*, 260 U.S. at 420 (Brandeis, J., dissenting).

20. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

21. The *Penn Central* court described these questions as "essentially *ad hoc*, factual inquiries." *Id.*

right is not unique to the takings context—many situations in life do not fit neatly in pre-existing categories—nor may it always be of concern.[22] If two parties find themselves in this sort of situation often, so that there are multiple cases, and thus multiple decisions, the judgments may tend to "even out" as some cases are deemed to fall on one side of the relevant line, while others are deemed to fall on the other side, causing the cumulative result to reflect something close to the average "correct" answer. Unfortunately, eminent domain cases are commonly quite different. Unless the owner of the taken property is quite unfortunate, he or she is unlikely to have property condemned more than once. Hence, there is little opportunity for evening out, and each private owner remains at a risk of suffering a considerable loss.[23]

Trying to force a continuous world into discrete, binary doctrinal categories can therefore produce an unfortunate combination of high stakes and low certainty. As courts have struggled with that combination in cases that differ significantly from the central paradigms of eminent domain, the result might seem to be a perpetually unsettled and ultimately unsatisfying doctrinal morass.

At first glance, this unfortunate state of affairs may seem inescapable. After all, the law has to reach one decision or another in such cases, and reality is unlikely to lose its sometimes graduated nature. Hence, binary takings decisions may initially seem to be unavoidable even when reality is non-binary.

That worrisome conclusion, however, overlooks the presence of the fourth takings element: the requirement of "just compensation." Unlike the other three elements—whether there was a "property" interest at stake, whether the property interest was "taken," and whether the taking was for a "public" use—the fourth, just compensation element is naturally amenable to gradation, because compensation can be awarded in different amounts. When deciding what

22. For a discussion of similar concerns principally in the context of criminal law and tort law, see Adam Kolber, *Smooth and Bumpy Laws*, 102 CALIF. L. REV. 655 (2014).

23. In theory, spreading that risk through private insurance might be possible, but in practice insurance against takings is not available. *See, e.g.*, Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 593–96 (1984) (noting the absence of private insurance against takings and attributing that absence to moral hazard and adverse-selection problems).

amount of compensation to award, the question isn't "whether," but instead "how much," and the answer to that question isn't limited to "yes" or "no" but could theoretically be any dollar amount imaginable. At least in principle, courts' decisions about how much compensation to award could therefore make smooth the sharp discontinuities created by the binary nature of the other three elements of takings doctrine. In cases which seemed truly to be partly one thing and partly another, the level of compensation could be adjusted to better reflect the reality of the situation, enhancing certainty and predictability, and reducing the number of extreme outcomes. Those benefits, in turn, might also reduce the risk of popular outrage and increase the perceived legitimacy of the property law system as a whole.

Later I will discuss how this abstract suggestion might be translated into practical applications in the two sets of controversial cases just mentioned, but first it is necessary to address what might seem to be two fatal objections to this suggestion: First, that well-established takings doctrine is quite clear that courts' flexibility in awarding compensation is very limited. And, second, that allowing courts this flexibility would be undesirable, even if it were doctrinally possible, because it would give judges dangerously unfettered discretion in awarding compensation. The answer to both objections, I shall suggest, lies in recognizing the equitable dimension of takings compensation. The Constitutional requirement of "just compensation" might sometimes best be understood as a requirement of "equitable compensation."

II. "JUST COMPENSATION" AND "FULL COMPENSATION"

A. Current Doctrine

Today, the Fifth Amendment's requirement of "just" compensation is canonically taken to be synonymous with "full" compensation. In the leading case on the question, *United States v. Miller*, the U.S. Supreme Court held that "just compensation" was a "full and perfect equivalent in money of the property taken."[24] That monetary equivalent, in turn, was determined by "what a willing buyer would pay in cash to a willing seller" in order to acquire the property.[25] In other

24. United States v. Miller, 317 U.S. 369, 373 (1943).
25. *Id.* at 374.

words, just compensation is full compensation, and full compensation is fair market value compensation.

Although this elaboration of the meaning of "just compensation" is now so familiar that its mention can easily pass without drawing a second glance, there is nothing logically necessary about equating "just" compensation with "full" or "fair market value" compensation. There are many competing understandings of justice, and even more potential different conclusions about what any one of those understandings would require when applied to specific contexts, such as government interactions with private property.[26]

Hence, a fundamental question is *why* the *Miller* Court thought that this particular elaboration of "just compensation" was the appropriate elaboration. Unfortunately, the Court's discussion of this point was quite thin, resting principally on the observation that the Court had said something similar in 1893 when deciding *Monongahela Navigation Co. v. United States*.[27] And the *Monongahela* Court in turn offered little more than a declaration that the equivalence is true.[28]

Perhaps these courts implicitly conceived of eminent domain as a form of "forced sale." Historically, that particular conception has been common. For example, in *Boston & Roxbury Milldam Corp. v. Newman*, the Massachusetts Supreme Court declared, "The principle is, that the lands of individuals are holden subject to the requisitions of the public exigencies, a reasonable compensation being paid for the damage. It is not taking the property of one man and *giving* it to another. At most, it is a forced sale, to satisfy the pressing want of

---

26. For one overview of various theories of justice, see David Miller, *Justice*, *in* STAN. ENCYCLOPEDIA OF PHIL. (2017), https://plato.stanford.edu/entries/justice/. For an example of how specific understandings of justice can affect conclusions about compensation for takings, see two papers by Hanoch Dagan arguing for adjusting takings compensation based on progressive egalitarian principles: Hanoch Dagan, *Re-Imagining Takings Law*, *in* PROPERTY AND COMMUNITY 39 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2009); Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741 (1999).

27. *Miller*, 317 U.S. at 373 (citing Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893)).

28. *Monongahela*, 148 U.S. at 325 ("when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him"); *id.* at 336 ("if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken.").

the public."[29] If a taking is merely a "forced sale," and the compensation paid is akin to the payment that would have been made in an ordinary purchase, then the property's current market price might seem to be a natural measure of the compensation owed.

The difficulty with this reasoning is that a "forced" sale is fundamentally different from a genuine sale, which depends upon a voluntary agreement between the parties, and for which the price is deemed to be just only to the extent that the parties voluntarily agreed upon that price. What a "willing" buyer would pay a "willing" seller in cash has little obvious relevance to what is owed in situations which arise only when the "seller" is *un*willing. Determining what justice requires in such circumstances necessarily must involve something more than merely invoking what would satisfy justice in fundamentally different circumstances. Thus, even the "forced sale" analogy leaves open the question of why the just "price" for that forced "sale" is determined by the property's market value.

Ultimately, these courts may simply have thought that the equation of "just compensation" with full market-value compensation was obvious. They would not have been the first to do so, and Nichols, in his prominent early twentieth-century treatise, went so far as to assert:

> It has never been disputed that when property taken by eminent domain is of such a character that its market value can be estimated with reasonable accuracy, such value is the measure of compensation. The use of market value as a test in land damage cases preceded the publication of judicial decisions in this country, so that we find it looked upon as an established principle in the earliest reported cases.[30]

---

29. Bos. & Roxbury Milldam Corp. v. Newman, 29 Mass. 467, 485 (1832). *See also* Miss. & Rum River Boom Co. v. Patterson, 98 U.S. 403, 407–08 (1878) ("In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties."); 1 NICHOLS ON EMINENT DOMAIN § 1.142[6] (2016) (asserting that acceptance of the theory that eminent domain is a compulsory sale "seems almost inevitable" in jurisdictions that require payment of compensation in advance for taken property); 1 WILLIAM BLACKSTONE, COMMENTARIES *139 ("The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price . . . .").

30. 1 PHILIP NICHOLS, THE LAW OF EMINENT DOMAIN § 217 (2nd ed. 1917). (The current edition of Nichols's treatise retains that language. 4 NICHOLS ON EMINENT DOMAIN § 12.01[3] (2021).) Another treatise from the same era raised the question "Is Market Value the Only Standard?" and then laconically answered, "The market value of property is usually the basis for assessment." CARMAN F. RANDOLPH, THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 252, at 234 (1894). *See also* United States v. New River Collieries Co., 262 U.S. 341, 344 (1923)

However, history shows that equating just compensation with full, fair market value compensation is not obvious. Indeed, it may not even have been what the Fifth Amendment itself actually was intended or understood to mean when it was drafted and ratified.

B. "Full" or "Just"?

Although there is little historical evidence about the drafting of the Takings Clause, and little record of debate about its ratification, it has often been noted that the Takings Clause had three historical antecedents: the Vermont Constitution of 1777, the Massachusetts Constitution of 1780, and the Northwest Ordinance of 1787.[31] Curiously, there has been little attention to the fact that the wording of these three predecessors differs, both from the Takings Clause and from each other. Where the Takings Clause required "just" compensation, the Vermont Constitution required payment of "an equivalent in money,"[32] the Massachusetts Constitution required "reasonable" compensation,[33] and the Northwest Ordinance required "full" compensation.[34]

One cannot draw definitive conclusions from a historical record as sparse as that which exists for the creation of the Takings Clause. Nevertheless, it is striking that those who created the Takings Clause chose not to adopt the "full compensation" wording of the Northwest Ordinance—a foundational constitutional document enacted only two years earlier—but instead chose to require compensation that is "just."

(stating, in rather circular fashion, "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. . . . More would be unjust to the United States, and less would deny the owner what he is entitled to.").

31. For a summary of these historical antecedents, see William Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 701–08 (1985).

32. Vt. Const. of 1777, ch. I, art. II ("whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money.").

33. Mass. Const. of 1780, part I, art. X ("And whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.").

34. Ordinance of 1787: The Northwest Territorial Government, § 14, art. 2, reprinted in 1 U.S.C. at LV (2006) ("should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same").

This choice cannot plausibly be attributed to ignorance of the Northwest Ordinance's language. The Congress that drafted the Bill of Rights certainly was familiar with the Ordinance's provisions, since one of Congress's first acts under the Constitution, executed the very same year that it was drafting the Bill of Rights, was "re-enacting" the Ordinance (with minor modifications), to address concerns that its original enactment had been beyond the powers granted Congress by the Articles of Confederation.[35] Nor is it plausible that the Ordinance might have been overlooked as insignificant, since, as Gordon Wood commented, "[a]part from winning the War of Independence, [the Northwest Ordinance] was the greatest accomplishment of the Confederation Congress."[36] Peter Onuff's similar appraisal of the Ordinance as "one of the most important documents of the American founding period" is now commonplace.[37]

Likewise, it is unlikely that the Bill of Rights' drafters would have considered the document to be inferior work unworthy of attention. Benjamin Fletcher Wright suggested that the Constitution's provision prohibiting the impairment of contracts was directly inspired by similar provision in the Northwest Ordinance, a provision that appeared in the very same article which contained the "full compensation" requirement for taken property.[38] And Joseph Story praised the Ordinance as "equally remarkable for the beauty and exactness of its text, and for its masterly display of the fundamental principles of civil and religious and political liberty."[39]

---

35. Dennis P. Duffey, Note, *The Northwest Ordinance as Constitutional Document*, 95 COLUM. L. REV. 929, 940 n.77 (1995).

36. GORDON S. WOOD, EMPIRE OF LIBERTY 122 (2009).

37. PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE xxiii (2019). *See also* Anon., *Introduction*, *in* THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS, AND LEGACY vii, vii (Frederick D. Williams ed., 1988) (describing the Ordinance as "one of the most important laws in the nation's history"); Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L.J. 409, 435 (2014) ("As a matter of legal history, [the Northwest Ordinance] also serves as excellent evidence of the original understandings of the founding generation, especially concerning the original meaning of the Constitution's property clauses."); James H. Madison, *Forward*, *in* THE NORTHWEST ORDINANCE, 1787: A BICENTENNIAL HANDBOOK vii, vii (Robert M. Taylor, Jr. ed., 1987) ("The Northwest Ordinance of 1787 is among the most important documents in American history.").

38. BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 8 (1938) ("it appears to be certain that [Northwest Ordinance Article 2's] guarantee of security to *bona fide* private contracts was the immediate cause for the proposal of a similar clause in the Federal [Constitutional] Convention.").

39. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 218, at 139 (1840).

Thus if "just" compensation was originally meant to be merely a synonym for "full" compensation, there is no obvious reason why the Takings Clause's drafters would not simply have followed immediately prior practice and said "full" compensation. Their declining to do so is not, of course, conclusive evidence that "just" compensation originally meant something different than "full" compensation, but it is at least suggestive.

An originalist might find this suggestion to be important in itself as helping to guide a proper interpretation of the Constitution. But even a non-originalist may find it useful as suggesting that alternative understandings of "just" compensation are possible. As the next section will discuss, one plausible alternative is "equitable compensation."

III. EQUITABLE COMPENSATION

A. Takings' Equitable Aspect

Historically, characterizing just compensation for eminent domain as equitable was a recurring theme in judicial decisions, although typically with little attempt to elaborate the implications of that characterization. For example, Chancellor Kent asserted that "to render the exercise of the [eminent domain] power valid, a fair compensation must, in all cases, be previously made to the individuals affected, under some equitable assessment to be provided by law."[40] A century later, the U.S. Supreme Court in *Seaboard Air Line Railway Co. v. United States* (1923) commented that the *Monongahela Navigation* Court's requirement that compensation be "the full and perfect equivalent" of the taken property "rests on equitable principles."[41] And in *United States v. Fuller* (1973), the Court acknowledged that *Miller* requires compensation equal to "fair market value" but added the qualification that "that [fair market value] term is not an absolute standard nor an exclusive method of valuation."[42] The *Fuller* Court then immediately added, "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law."[43]

40. Gardner v. Village of Newburgh, 2 Johns. Ch. 162, 166 (N.Y. Ch. 1816) (Kent op.).
41. Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 304 (1923).
42. United States v. Fuller, 409 U.S. 488, 490 (1973) (internal quotation marks omitted).
43. *Id.* (internal citation omitted).

These allusions to an "equitable" component to takings compensation raise the question of exactly what that means. The term "equity" has multiple meanings, and various taxonomies—often quite similar—have been offered.[44] For our purposes, an elaboration by John Salmond will be useful. Salmond noted that "the term equity possesses at least three distinct though related senses."[45]

In one sense, "which is peculiar to English nomenclature, ... [e]quity is that body of law which is administered in the Court of Chancery, as contrasted with the other and rival system administered in the common law courts."[46] Equity, in this sense, is a particular set of formal rules that now are principally distinguished merely by having a particular historical origin. Maitland's famous history of equity focused on this aspect of equity, asserting that "if we were to inquire what it is that all these rules [of equity] have in common and what it is that marks them off from all other rules administered by our courts, we should by way of answer find nothing but this, that these rules were until lately administered, and administered only, by our courts of equity."[47]

This formal aspect of equity does sometimes appear in the eminent domain context. The modern edition of *Nichols on Eminent Domain* notes that the judicial process in eminent domain cases involves aspects traditionally associated with equity, so much so that they are effectively a hybrid of law and equity.[48] And Thomas Merrill's recent discussion of anticipatory remedies for takings examined equity in its technical sense.[49]

However, this particular understanding of equity is tangential to the issue under consideration here. This Paper is not suggesting that takings compensation is (or should be) governed by the developed

---

44. *See, e.g.*, 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 43–45, at 46–49 (4th ed. 1918).

45. JOHN W. SALMOND, JURISPRUDENCE 47 (1902).

46. *Id.* at 50.

47. F.W. Maitland, *The Origin of Equity*, *in* EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES 1 (A.H. Chaytor & W.J. Whitaker eds., 1910) (*available at* ARCHIVE.ORG, https://archive.org/details/equityalsoformso00mait)

48. 6 NICHOLS ON EMINENT DOMAIN § 24.01[1] ("It is well settled that condemnation proceedings, although more analogous to a suit in equity than to an action at law (and although equitable rights are recognized and protected in such proceedings), are brought on the law, and not the equity, side of the court. Nevertheless, it has been said that a condemnation proceeding is not a common law action.").

49. Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630 (2015).

body of formal rules and doctrines that are bundled together under the label "equity." Such a suggestion would be both implausible—since there is little evidence that prior references to takings compensation as having an "equitable" basis had this technical meaning in mind—and fruitless—since it is hardly clear how equity's formal apparatus could offer much help in addressing the specific problem of binary takings doctrine being compelled to address non-binary issues. Indeed, Roscoe Pound believed that equity in this first sense was a late, "decadent" historical development that had strayed from the original motivations behind equity and that might someday be replaced by some new set of doctrines that would meet the need for flexibility no longer addressed by equity in its late, ossified form.[50]

A second meaning of "equity" in Salmond's taxonomy was the polar opposite of the first. Rather than identifying a particular set of formal rules, "it is nothing more than a synonym for natural justice."[51] Salmond added, "This is the popular application of the term, and possesses no special juridical significance."[52]

This meaning no doubt has played a role in prompting requirements of compensation when property is taken, and it too is reflected in influential understandings of the Takings Clause. Thus, for example, Kent asserted that "[a] provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent; and this principle in American constitutional jurisprudence, is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law."[53] And Story asserted that the Takings Clause "is founded in natural equity, and is laid down by jurists as a principle of universal law."[54]

---

50. *See* Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 24 (1905) ("It was remarked long ago that law and equity are in continual progression, that 'a part of what is now strict law was formerly considered as equity; and the equitable decisions of this age will unavoidably be ranked under the strict law of the next.' But in becoming law a principle of equity loses its quality of elasticity. Hence we may look, not unreasonably, for an action and reaction from law to equity behind this progression."). Salmond likewise believed that equity as a particular formal system was a third historical stage in the evolution of the meaning of "equity." SALMOND, *supra* note 45, at 50.

51. SALMOND, *supra* note 45, at 47.

52. *Id.*

53. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 339 (2d ed. 1832).

54. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1790, at 569–70 (5th ed. 1891) [1833]. In a similar vein, see *Youtzy v. Cedar Rapids*, 129 N.W. 351,

However, this very general sense of "equity" is not particularly useful for addressing the problem at hand. Allowing the government to pay whatever compensation seems "equitable" in this very vague sense would naturally raise concerns about indeterminacy and arbitrariness, concerns which historically have accompanied even more concrete implementations of equity.[55] Moreover, its vagueness leaves this sense of equity unable to point toward any particular solutions to concrete problems of the sort at issue here.

More useful for present purposes is equity in Salmond's third sense. In this "legal sense equity means natural justice, not simply, but in a special aspect, that is to say, as opposed to the rigour of inflexible rules of law."[56] This sense of equity lies intermediate between the relative rigidity of equity as a formal system of rules and doctrines, and the relative vagueness of equity as general "natural justice." It takes the general moral orientation of the latter sense of equity and makes it more specific by applying it within the existing context of the law. In this sense, equity adapts the law to better serve the ends of justice, stepping in where the law would otherwise be deficient in certain ways.

Equity's role in meeting the need for flexibility in the legal system has long been recognized. For example, Pomeroy's equity treatise praised equity on the grounds that "[n]o doubt (and this is a point of the highest importance) the system was, and is, much more elastic and capable of expansion and extension to new cases than the common law."[57] Flexibility also played a central role in Roscoe Pound's summary of the historical development of equity: "Equity, then, started as a reaction towards justice without law and in its development became a system wherein the element of judicial discretion was given greater play, and the circumstances of particular cases were more attended to than the fixety of legal rules would permit."[58]

---

352 (Iowa 1911) ("[I]t is to be remembered that in such proceedings the lot owner is not a willing seller of his property, and he is forced to yield his title and surrender his estate in the interest of the general public, not infrequently to his great and irreparable inconvenience, if not actual loss. It is therefore inevitable that juries looking at the apparent natural equities of the case and deciding between the individual and the public at large are inclined to solve the doubts if any in favor of the former.").

55. *See* discussion *infra* Section III.B.

56. SALMOND, *supra* note 45, at 47.

57. 1 POMEROY, *supra* note 44, § 59, at 64.

58. Pound, *supra* note 50, at 22.

And Douglas Laycock pithily summarized the "most general distinction between law and equity in the early days": "Law was formal and rigid; equity was flexible, discretionary—a court of conscience."[59] Nor is this understanding of equity's role merely historical. Samuel Bray has recently argued that one of the two principal functions of the system of equitable remedies in American law today is to "solve first-order policy problems: i.e., the circumstances that demand a remedy compelling action or inaction in flexible and open-ended ways."[60]

The specific sort of flexibility that theorists saw equity providing often was considered to be specific to each individual case. For example, E.C. Clark asserted that "'a reasonable view of the circumstances of the case' has been at the bottom of most of the decisions upon which our rules of English equity were founded: nor do I see how it can ever cease to be one ground of decision, until every possible case can be provided for by a previous rule."[61] Similarly, the U.S. Supreme Court in *Hecht Co. v. Bowles* commented, "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."[62]

Although finely grained flexibility of this sort may have a useful role to play in takings jurisprudence, the flexibility needed to mitigate problems created by the binary nature of takings doctrine could be more general, offering standardized approaches for different types of situations. The common thread connecting those approaches would be that when a specific category of situation does not fit neatly into existing takings categories, the compensation awarded could deviate flexibly away from "fair market value" compensation to reflect that fact. The deviation could be upward or downward—more or less than market value—depending upon the type of case at hand. Such an approach would mirror a particular sort of flexibility that Story

---

59. Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 71 (1992). *See also* Stephen N. Subrin, *How Equity Conquered Common Law*, 135 U. PENN. L. REV. 909, 934 (1987) ("Discretion and flexibility were at the heart of historic equity practice."). Laycock did express some reservations about the historical accuracy of this traditional understanding: "I suspect that this historical stereotype is exaggerated, because we also say that the genius of the common law was in its flexible stability and its capacity for growth within a tradition." Laycock, *supra*, at 71.

60. Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 534 (2016).

61. E.C. CLARK, PRACTICAL JURISPRUDENCE 246 (1883).

62. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

identified as distinguishing courts of equity from courts of law, the flexibility to "vary, qualify, restrain, and model the remedy so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties."[63]

Flexibility in setting the amount of compensation owed would allow the law to transform binary questions, such as "*Was* there a taking?" or "*Was* the taking for public use?", into graduated questions, such as "*How much* of a taking was there?" and "*How public* was the use?" As a result, questions that demand "yes" or "no" answers that in reality are impossible to give would be replaced with questions that are more tractable.

Part IV, below, will discuss how this sort of flexibility might help address the difficulties posed by hybrid public-private takings and regulatory takings. But first it will be useful to address a traditional concern about equitable approaches to legal problems: the danger of arbitrariness.

B. Equity and Arbitrariness

Concerns have existed for centuries that equity, because it is flexible, creates a danger of oppressively unpredictable and unconstrained judgments. In 1689, Selden charged that "[e]quity in Law is the same that the spirit is in Religion, what ever one pleases to make it." Selden then drew his famous analogy between measuring equity according to the idiosyncratic conscience of whoever happens to be chancellor at the time, and making the linear measure "one foot" equal to whatever happened to be the length of the current chancellor's foot. "[W]hat an uncertain measure would this be; One Chancellor has a long foot another, a short foot a third an indifferent foot; this the same thing in the Chancellors Conscience."[64] A century and a half later, Story raised similar concerns about equity's potential for arbitrariness:

> If, indeed, a Court of Equity in England did possess the unbounded jurisdiction, which has been thus generally ascribed to it, . . . it would be the most gigantic in its sway, and the most

63. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 28, at 22 (2d ed. 1839) [hereinafter COMMENTARIES ON EQUITY JURISPRUDENCE].

64. JOHN SELDEN, TABLE TALK 43 (1689) (Pollock ed. 1927).

> formidable instrument of arbitrary power, that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the Judge, acting, if you please, *arbitrio boni judicis* [with the judgment of a good judge], and it may be, *ex aequo et bono* [according to what is equitable and good], according to his own notions and conscience; but still acting with a despotic and sovereign authority.[65]

Story, however, was quick to add that these concerns were overstated, because equity jurisprudence included significant constraints that limited its discretion to within certain bounds.[66] Indeed, such constraints are consistent with equity in general. Pomeroy vigorously defended equity against charges of arbitrariness, asserting that fidelity to equity's fundamental principles would limit the discretion of judges in equity.[67] Over time, these principles came to be reflected in a relatively limited set of central maxims. These equitable maxims were (and are) not supposed to determine the outcome of cases. As we have already seen, avoiding the rigidity of such rules is one of the very points of equity. Moreover, attempting to determine outcomes simply by applying maxims would often be futile. As Austin Abbott noted over a century ago,

> When the attempt is made, under our system of jurisprudence, to solve a question by maxims, it usually results in resolving the question into another double question quite as debatable as the first, viz.: Which of two maxims is properly applicable? For instance, "Equality is equity," but on the other hand, "He who is prior in time is stronger in right," and "The law aids the vigilant, not the negligent." Upon almost every subject the maxims of jurisprudence balance themselves against each other in this way; and the function of justice is to hold the scales so that the preponderating principle shall determine the cause.[68]

---

65. COMMENTARIES ON EQUITY JURISPRUDENCE, *supra* note 63, § 19.

66. *Id.* ("So far, however, is this from being true, that one of the most common maxims, upon which a Court of Equity daily acts, is, that Equity follows the law and seeks out and guides itself by the analogies of the law.").

67. 1 POMEROY, *supra* note 44, § 59 ("[Equity] has, therefore, as an essential part of its nature, a capacity of orderly and regular growth, a growth not arbitrary, according to the will of individual judges, but in the direction of its already settled principles.").

68. Austin Abbott, *The Virtue of Maxims*, *in* GEORGE FREDERICK WHARTON, LEGAL MAXIMS 5 (1878). *Cf.* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950) (noting that

Since Abbott's observation appeared in the foreword to a compendium of legal maxims, it is little surprise that he recognized that maxims nevertheless do have a useful role to play in legal analysis: "The best use of maxims under our system is not as authorities, like a statute or precedent, but as aids to counsel in the investigation of the controversy, and in determining in preparation for trial what is the central principle involved, and where the weight of justice lies."[69]

One might add that maxims in equity have an additional, more concrete utility. They help direct equity analysis in directions that are productive of the aims of equity in general, focusing equitable discretion on particular categories of concerns that equity exists to address.

These general observations, however, do not by themselves address whether understanding "just compensation" to incorporate an aspect of "equitable compensation" might, in the specific context of eminent domain, still raise indeterminacy worries. In this context, two different types of indeterminacy might be of particular concern: indeterminacy about the amount of compensation that would be awarded when deviations from the fair-market-value standard occur, and indeterminacy about when those deviations would occur at all.

With respect to how much compensation would be awarded when the fair-market-value standard is not used—i.e., the concern with how flexibility in determining compensation would be used—permitting such flexibility would not necessarily create any more room for arbitrariness than already exists in compensation calculations. "Fair market value" calculations themselves are not purely mechanical and can require determinations made under conditions of considerable uncertainty if, for example, the taken property is significantly dissimilar to property that has recently traded on the market. Even in the 1930s, Orgel's treatise on the valuation of property in eminent domain ran over eight hundred pages.[70]

Moreover, flexible deviations from fair market value need not be unconstrained. Indeed, such deviations already exist in takings law.

---

canons of statutory construction often can point in contrary directions). Samuel Bray has described equitable maxims as "not rules, in the sense of outcome-determinative legal propositions. Rather they are concerns, topics of interest, matters on the agenda when judges are deciding whether to give equitable remedies." Bray, *supra* note 60, at 582.

69. Abbott, *supra* note 68, at 5.

70. LEWIS ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN (1st ed. 1936). The second edition expanded to two volumes. LEWIS ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN (2d ed. 1953). The length of Orgel's treatise was not unique; Bonbright's general treatise on valuation also filled two volumes. JAMES C. BONBRIGHT, THE VALUATION OF PROPERTY (1937).

In the aftermath of *Kelo*, several states enacted statutes or constitutional amendments that required paying compensation at specified fixed percentages above fair market value.[71] States also established distinctions among circumstances which would require additional compensation. For example, Indiana's statute applied one bonus to taken agricultural property and a different bonus to taken residential property.[72] Hence, establishing flexibility to deviate from fair market value does not preclude the existence of frameworks governing how that flexibility is to be exercised, nor of general rules applicable to every case in specified categories of takings situations.

The possibility of constraints on *how* deviations from fair market value would occur does not, however, address the distinct concerns of arbitrariness in decisions about *when* such deviations are allowed in the first place. As Blackstone noted:

> [T]he liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.[73]

To allay those concerns, some additional principle is needed that would help guide those decisions.

To begin, there is good reason to apply the well-established fair-market-value measure to compensation in core takings cases—e.g., when the government straightforwardly confiscates real property for use by the government. Academics have debated the adequacy of fair-market-value compensation in ordinary takings cases, but even if some modification of that standard might be desirable in general, there are several reasons why that modified standard still provides

---

71. *E.g.*, Michigan amended its constitution to require payment of at least 125% of fair market value for taken residential property. MICH. CONST. art. X, § 2 (2020). Missouri enacted a similar provision in a statute. Mo. Ann. Stat. §§ 523.001, 523.039 (2020).

72. Ind. Code Ann. §§ 32-24-4.5–8 (2020).

73. 1 BLACKSTONE, *supra* note 29, at 62.

an appropriate default baseline from which flexible deviations would need to be justified.[74]

First, as noted earlier, the fair-market-value standard has intuitive plausibility to those who conceive of eminent domain as a forced sale, as well as the obvious advantages of familiarity and being the subject of firmly established expectations.[75] However, the standard also has clear functional advantages. In general, paying compensation equal to the market value of what was lost can often enable the person who lost the property to purchase a replacement that is at least roughly equivalent.[76] Moreover, using a standard—market value—that is outside the control of the parties or the government reduces the risk of opportunistic "strategic" behavior to manipulate the amount of compensation paid.[77] And because a property's market value can be determined, at least in theory, without going to court, it is relatively easy for private parties and the government to use when making plans.

Taken together, these familiar facts about market value compensation make it understandable why the fair-market-value standard is so often used throughout the law, and why it would be desirable to retain that standard in ordinary takings cases, where the binary

---

74. For examples of this controversy, *see, e.g.*, Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957 (2004); Gideon Kanner, *Fairness & Equity or Judicial Bait-and-Switch—It's Time to Reform the Law of "Just" Compensation*, 4 ALBANY GOV. L. REV. 38, 42 (2011); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 83 (1986).

75. Even someone steeped in equity can recognize the importance of certainty and predictability. Thus Gibson's equity treatise noted,

> It is more important to a people to have their laws known and fixed than to have them precisely just; for our conceptions of justice differ, but what is fixed is certain, and can be conformed to. . . . It is better that the individual conform to the law than that the law conform to the individual; and it is better that a particular case of hardship be unredressed than that the law be violated, when the violation would occasion much mischief, and especially would unsettle the foundations of property rights, and disturb the landmarks of the law.

HENRY R. GIBSON, A TREATISE ON SUITS IN CHANCERY § 59, at 49 (2d ed. 1907).

76. In Douglas Laycock's terminology, such compensation, like money damages in general, is a "substitutionary" remedy. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 696 (1990). *See also* Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 315 (C.C. Pa. 1795) (noting as an advantage of monetary compensation in takings cases that money "is a[ ] universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property").

77. *See* Rose, *supra* note 5, at 591 ("Crystalline rules have a related advantage that has been much discussed of late: They discourage what is called 'rent-seeking' behavior in decision-makers, particularly when those decision-makers are legislators.").

nature of takings doctrine comfortably applies to situations that fall neatly into one category or another. Even Pomeroy's equity treatise conceded that

> it is also true that from the very necessities of the case there is another large part of the law which is and must be founded upon expediency rather than upon morality. The influence of ancient institutions, the motives of policy, the primary importance of certainty, the necessity of rules which shall correspond with the average conduct of men, . . . these and other facts of equal importance must exist in every society . . . . This inherent necessity of a constituent part which is arbitrary and expedient, rather than just and righteous, is a most important distinction between the "law" and "equity."[78]

C. When "Full," When "Equitable"?

Given that fair market value is a useful default baseline for "ordinary" takings cases, two questions now naturally arise: First, how to know when flexibly deviating from that baseline is appropriate, and, second, in what direction those deviations should occur. Avoiding arbitrariness requires having some principle or principles to provide coherent guidance in answering those questions.

Space does not permit an exhaustive exploration of principles that might count for or against deviations from the fair-market-value standard. However, discussing one candidate principle may illuminate how a constrained, principled flexibility could be possible. And in applying this principle to the specific examples of hybrid public-private takings and regulatory takings, the relevance of traditional aspects of equity will become apparent.

I have argued elsewhere that the government's authority to take private property rests most plausibly on the existence of reciprocal duties among members of a political community.[79] Property law has long recognized those duties. Consider, for example, the law of nuisance or of riparian water rights.[80] In the eminent domain context,

---

78. 1 POMEROY, *supra* note 44, § 66.

79. *See* Brian Angelo Lee, *Uncompensated Takings: Insurance, Efficiency, and Relational Justice*, 97 TEXAS L. REV. 935 (2019).

80. *See, e.g.*, Campbell v. Seaman, 63 N.Y. 568, 577 (N.Y. 1876) ("Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. For

these duties explain both why property owners may be required to relinquish their property to the community when it is needed for public use, and why the community in turn is obligated to compensate the owner upon whom it has imposed this loss.[81]

Thus, as the relative weights of the parties' duties toward each other wax or wane, the amount of compensation owed for takings might grow or diminish correspondingly. At one extreme, the amount owed might be zero; at the opposite extreme, it might be however much the property owner cares to demand, no matter how large that sum might be.

For example, if Jones's activities on Jones's own property violate duties that Jones has toward his or her neighbors, Jones can be compelled to cease those activities without receiving any compensation for losses caused by that cessation. Thus Jones is owed zero compensation for being compelled to remove a structure deemed to be a public nuisance or that blocks the flow of water in a natural stream running through multiple properties, including Jones's.[82] At the other extreme, if the government wished to take Jones's property solely to transfer it to some private person, the taking would not be allowed at all, because (absent some special circumstance) Jones has no duty to contribute toward that other person's private projects.[83] As a practical matter, then, that person could acquire Jones's property only by convincing Jones to sell it, which would require paying whatever price Jones chose to demand.

Some situations, however, fall somewhere between these two extremes. In such cases, considering the relative weights of the parties'

---

these they are compensated by all the advantages of civilized society. . . . But every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor."); Evans v. Merriweather, 4 Ill. (3 Scam.) 492, 495 (1842) ("Each riparian proprietor is bound to make such a use of running water, as to do as little injury to those below him, as is consistent with a valuable benefit to himself.").

81. *See* Lee, *supra* note 79, at 967–70.

82. *See, e.g.*, Pucci v. Algiere, 106 R.I. 411, 261 A.2d 1 (R.I. 1970) (affirming a court order requiring demolition of a building deemed to be a public nuisance); GIBSON, A TREATISE ON SUITS IN CHANCERY § 50, at 44 (2d ed. 1907) ("A man cannot so divert a stream on his own land as to turn water injuriously upon a neighbor's land; and he cannot dig so near the land of his neighbor as to cause the latter's land to cave in, or so near as to endanger his neighbor's wall; he cannot pollute a stream that flows through his neighbor's land; nor can he so stop, or change, the current of a stream as to prevent its ordinary flow through the land of another.").

83. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 477 (2005) ("[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.").

duties toward each other might naturally seem relevant to determining what level of compensation would produce an appropriate resolution. Here the equitable aspect of "just compensation" naturally comes to the fore, since addressing situations in which competing legitimate interests require accommodation has long been a fundamental part of equity. As Story's equity treatise noted:

> [T]here are many cases in which a simple judgment for either party, without qualifications or conditions or peculiar arrangements, will not do entire justice ex aequo et bono to either party. Some modifications of the rights of both parties may be required; some restraints on one side, or on the other, or perhaps on both sides; some adjustments involving reciprocal obligations or duties; some compensatory or preliminary or concurrent proceedings to fix, control, or equalize rights; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights or the redress of injuries.[84]

For example, a standard general maxim of equity is "He who seeks equity must do equity."[85] This maxim, Pomeroy elaborated, "says, in effect, that the court will give the plaintiff the relief to which he is entitled, only upon condition that he has given, or consents to give, the defendant such corresponding rights as he also may be entitled to in respect of the subject-matter of the suit."[86] Pomeroy further observed that "[t]his principle is not confined to any particular kind of equitable rights and remedies, but pervades the entire equity jurisprudence, so far as it is concerned with the administration of equitable remedies."[87] In a more specific context, the U.S. Supreme Court has used a doctrine of "equitable apportionment" to resolve disputes between states concerning rights to water and other natural resources.[88] And whenever an injunction is sought, courts will

84. COMMENTARIES ON EQUITY JURISPRUDENCE, *supra* note 63, § 27.

85. *See, e.g.*, JAMES W. EATON & ARCHIBALD H. THROCKMORTON, HANDBOOK OF EQUITY JURISPRUDENCE § 19, at 57 (2d ed. 1923); 1 POMEROY, *supra* note 44, § 385; COMMENTARIES ON EQUITY JURISPRUDENCE, *supra* note 63, § 59.

86. 1 POMEROY, *supra* note 44, § 385.

87. *Id.* § 388.

88. *See, e.g.*, Idaho *ex rel.* Evans v. Oregon, 462 U.S. 1017, 1025 (1983) ("At the root of the doctrine is the same principle that animates many of the Court's Commerce Clause cases: a State may not preserve solely for its own inhabitants natural resources located within its borders. . . . Consistent with this principle, States have an affirmative duty under the doctrine

grant that equitable relief only after "balancing the hardships" that would result from issuing or denying an injunction.[89]

Because of the fundamental role that reciprocal duties play in justifying eminent domain, it is not surprising that discussions of how much compensation is appropriate when eminent domain is exercised have echoed this basic equitable approach, albeit without explicitly invoking equity.[90] Thus, in *Searl v. School District No. 2 in Lake County*, the U.S. Supreme Court commented that

> [the right of eminent domain] cannot be exercised except upon condition that just compensation shall be made to the owner, and it is the duty of the state, in the conduct of the inquest by which the compensation is ascertained, to see that it is just not merely to the individual whose property is taken, but to the public which is to pay for it.[91]

And while Lewis's early twentieth-century eminent domain treatise observed that "'Just compensation,' . . . as used in the constitution, means a fair and full equivalent for the loss sustained by the taking for public use," Lewis immediately added:

> It may be more or it may be less than the mere money value of the property actually taken. The exercise of the power being necessary for the public good, and all property being held subject

---

of equitable apportionment to take reasonable steps to conserve and even to augment the natural resources within their borders for the benefit of other States. . . . Even though Idaho has no legal right to the anadromous fish hatched in its waters, it has an equitable right to a fair distribution of this important resource.").

89. *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right. . . . In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'") (quoting Amoco Production Co. v. Gambell, 480 U.S. 531, 542 (1987)); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) ("According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: . . . that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted . . . .").

90. The lack of explicit mention of equity, of course, does not imply that eminent domain lacks a fundamentally equitable dimension. It may show instead only that such a dimension has sometimes been overlooked. *Cf.* 1 POMEROY, *supra* note 44, § 65 ("[A]t the present day a large part of the 'law' is motived by considerations of justice, based upon notions of right, and permeated by equitable principles, as truly and to as great an extent as the complementary department of the national jurisprudence which is technically called 'equity.'").

91. Searl v. School District, 133 U.S. 553, 562 (1890).

> to its exercise when, and as the public good requires it, it would be unjust to the public that it should be required to pay the owner more than a fair indemnity for the loss he sustains by the appropriation of his property for the general good. On the other hand, it would be equally unjust to the owner if he should receive less than a fair indemnity for such loss. To arrive at this fair indemnity, the interests of the public and of the owner and all the circumstances of the particular appropriation should be taken into consideration.[92]

IV. APPLICATIONS

These somewhat abstract theoretical considerations have significant potential practical benefits. The two challenging categories of cases noted earlier—hybrid public-private takings and regulatory takings—provide examples of how attending to the relative weights of the parties' reciprocal duties, and equitably adjusting compensation in response, can plausibly address difficult cases.

A. Hybrid Public-Private Takings

As noted earlier, the doctrinal difficulty with hybrid public-private takings cases is that they do not seem neatly categorizable as either "public" uses or "private" uses. Instead, they are a mixture of the two, with the result that placing them in either category seems to lead to results that are intuitively unjust. If the use is categorized as "private," the taking becomes impermissible, and the public benefit that the project would have provided is lost. If the use is categorized as "public," then the property owners are forced to relinquish their property—sometimes their homes—for a price lower than the property may have been worth to them, and a private company increases its profits as a result. Neither result seems quite just, but no other alternative seems available.

Intuitively, these situations call for an intermediate solution that recognizes both the extent to which the project in question has public benefits and the extent to which it merely enhances private profit. Adjusting the amount of compensation paid for property taken in such cases is a natural way to effectuate that result. If the taking is

92. 2 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 685, at 1174 (3d ed. 1909).

permitted, but the compensation required is increased, then the public gets the benefit of the project's completion, and the extent to which private profit is increased at the expense of the taken property's owner diminishes.

This diminution may not only seem more just but also may reduce incentives for strategic behavior by private entities that might otherwise face greater temptation to try to exploit the state's eminent domain power for their own private ends.[93] Such a benefit would not be merely incidental to an equitable measure of compensation. For example, in Henry Smith's recent account of equity as a second-order system overseeing law, avoiding opportunistic exploitation of law's limitations is in fact a central function of equity.[94]

The idea of varying compensation for hybrid public-private takings is not new. During the Supreme Court's oral argument for *Kelo*, Justice Kennedy asked,

> Are there any writings or scholarship that indicates that when you have property being taken from one private person ultimately to go to another private person, that what we ought to do is to adjust the measure of compensation, so that the owner—the condemnee—can receive some sort of a premium for the development?[95]

As fate would have it, James Krier and Christopher Serkin had addressed that very question at approximately the same time,

---

93. The existence of strategic behavior can be difficult to prove, but it is sometimes suspected. For example, a newspaper column by Malcolm Gladwell, commenting on a controversial use of eminent domain to take property in Brooklyn for use by private developers in an urban development project, reported speculation that the project had included a sports arena (the present-day Barclays Center) merely to enable the developer to claim that the entire project was a "public" use and thus to use eminent domain to acquire the needed land. Malcolm Gladwell, *The Nets and NBA Economics*, GRANTLAND (Oct. 10, 2011), https://grantland.com/features/the-nets-nba-economics/. And in a similar case in northern Manhattan, a New York trial judge suggested that Columbia University had deliberately acquired and then failed to maintain properties in a specific neighborhood in order to justify a finding that the entire neighborhood was "blighted," which would enable Columbia to use eminent domain to acquire the remaining properties for use in Columbia's expansion plans. Kaur v. N.Y. State Urban Dev. Corp., 892 N.Y.S.2d 8 (N.Y. App. Div. 2009), *rev'd* 933 N.E.2d 721 (N.Y. 2010). *See also* Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1717 (2011) ("it is often less expensive for [a land] assembler to convince a local government to exercise eminent domain on its behalf than to purchase the parcels in the real estate market").

94. Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050 (2021).

95. Oral Argument at 21:43, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), https://www.oyez.org/cases/2004/04-108 (question from Kennedy, J.).

suggesting that "to avoid the clumsy all-or-nothing property rule approaches to public use . . . together with their high error costs, we propose a shift to liability rules, with compensation increasing as skepticism about the public nature and benefits of government action grows."[96] (The advocate who answered Justice Kennedy's question replied prudently but vaguely, "There may be some scholarship about that."[97])

Recognizing the role of reciprocal duties in justifying eminent domain enables us to see more clearly why it is that increased compensation is appropriate in these sorts of cases: Members of a community, including owners of property in that community, have obligations to the community as a whole that they do not have toward private businesses with which they are not involved. Suzette Kelo had civic duties toward the city of New London and the state of Connecticut that she did not have toward shareholders in the Pfizer pharmaceutical company and the Corcoran real estate group. Thus, to the extent that the project that required taking her property was not fully public, her duty to relinquish her property was less, and thus the reciprocal duty to compensate for the loss incurred by the taking was greater.[98] The net result is that compensation in a hybrid taking case should be higher than the compensation that would have been owed for a purely public taking, by an amount that reflects the relative amounts of public benefit and private profit expected from the project.

These considerations echo equity's concern, noted above, for attaining outcomes that reflect the extent of both parties' duties toward each other. It also reflects the equitable principle that unjust enrichment is to be avoided, a principle sometimes stated as a maxim that one shall not profit from imposing a loss on another.[99] In the context

96. Krier & Serkin, *supra* note 14, at 874.

97. Oral Argument at 22:05, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), https://www.oyez.org/cases/2004/04-108 (answer by Bullock).

98. Whether this analysis further implies that takings for use by public utilities or common carriers, such as railroads, should also require paying compensation greater than the taken property's market value is a question that space does not permit considering here. Historically, such takings have been a significant fraction of exercises of eminent domain. *See, e.g.*, JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 77 (3d ed. 2008).

99. The maxim is derived from Roman law and in the past was invoked in Latin phrasing such as *nemo debet locupletari aliena jactura* [no one should be enriched by another's loss]. *See, e.g.*, KAMES, PRINCIPLES OF EQUITY 91–92 (1825). In the context of property law, cases invoking this maxim commonly involve potential unjust enrichment from mistaken improvements.

of hybrid public-private takings, this equitable principle would prohibit the private beneficiary from profiting from a wrongful taking. Ordinarily, the state commits no wrong in merely exercising its power of eminent domain, because that power is well-established as legitimate, provided that the state pays just compensation for what it takes. Thus, payment of an appropriate amount of compensation is not compensation for a wrong but rather is a necessary element in preventing a wrong from occurring in the first place.[100] But to the extent that a special private benefit results from a hybrid public-private taking—for example, the benefit enjoyed by a private land developer as a result of takings used in an economic development project—paying an amount of compensation that is less than the owner would have demanded in a voluntary private exchange seems insufficient to avoid wrongdoing. Hence, to prevent the "private" part of the hybrid public-private taking from becoming wrongful—and thus to prevent the private beneficiary from unjustly enriching itself—an equitable approach to compensation would require that the private beneficiary pay more than fair market value compensation, to the extent that the benefit from the taking is private rather than public.[101]

See, e.g., McLaughlin v. Barnum, 31 Md. 425, 453 (1869) ("In such cases a Court of Equity practically enforces the rule of the civil law, founded in natural justice, '*nemo debet locupletari aliena jactura,*' as well as the cherished maxim of equity jurisprudence itself, that 'he who seeks equity must do equity.'"); Mickles v. Dillaye, 17 N.Y. 80, 92 (1858) ("Under such circumstances, he should not be allowed, in a court of equity, to enrich himself at the expense of one who has acted innocently."); Bright v. Boyd, 4 F. Cas. 127, 132–33 (C.C.D. Me. 1841) (Story, J.) ("Upon the general principles of courts of equity, acting ex aequo et bono [according to what is equitable and good], . . . compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value, upon the maxim of the common law, 'nemo debet locupletari ex alterius incommodo' [no one should be enriched by the inconvenience of another]. . . .").

100. I have elaborated on this point elsewhere. *See* Brian Angelo Lee, *Emergency Takings*, 114 MICH. L. REV. 391, 403–04 (2015).

101. Exactly how to calculate the proper amount of extra compensation is a significant question, challenging in ways that valuation questions in the law are commonly challenging. Space does not permit thorough consideration of this question, but one natural possibility would be to determine or stipulate what percentage above fair market value would have been demanded by an owner in order to agree to relinquish the property voluntarily—absent holding out strategically—and then to reduce that percentage by the extent to which the project was public rather than private. For example, if a payment of 50% above fair market value is what would have induced a voluntary transfer, and the project is determined to be 60% public and 40% private, then the awarded compensation would be 100% of fair market value plus (40%)*(50%), for a total of 120% of fair market value. If the project was purely public, then compensation would then simply be 100% of fair market value, since (0%)*(50%) equals 0%, and thus zero bonus would be added to the property's fair market value. In the aftermath of *Kelo*, Connecticut enacted a less nuanced but easily administrable version of this approach, requiring that all property taken by redevelopment agencies receive compensation

B. Regulatory Takings

Considering the equitable dimension of takings compensation may also help trim the thickets of regulatory takings doctrine. The jurisprudence and scholarship on regulatory takings are now vast, but for purposes of illustrating the potential usefulness of an equitable approach to just compensation, discussion of one landmark case will be sufficient—*Penn Central Transportation Co. v. New York City*.

At issue in *Penn Central* was a challenge to New York's landmarks preservation law, which prevented the Penn Central railroad company from constructing a tall office tower above Grand Central Terminal but granted Penn Central transferable development rights to mitigate the burden of not being able to build the desired addition.[102] In addressing this challenge, the Court explicitly declined to answer whether the transferable development rights constituted "just compensation."[103] Instead, the Court concluded that the regulation was not a taking, and thus there was no need for compensation at all.

However, the compensation issue did not disappear. It was merely pushed into the shadows, and it implicitly became a basis for the Court's decision:

> Stated baldly, appellants' position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a "taking" requiring the payment of "just compensation." Agreement with this argument would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation. We find no merit in it.[104]

The Court's assertion that deeming the law to be a taking requiring payment of "just compensation" would "invalidate" landmark-preservation statutes implied that concerns about compensation were

equal to 125% of the taken property's fair market value. Act of June 25, 2007, Pub. Act No. 07-141, § 8, 2007 Conn. Acts 407, 421 (Reg. Sess.) (codified at Conn. Gen. Stat. Ann. § 8-129(a)(2)). Rhode Island required compensation of at least 150% of fair market value for "property taken for economic development purposes." Rhode Island Home and Business Protection Act of 2008, ch. 64.12, sec. 1, § 42-64.12-8, 2008 R.I. Pub. Laws 1080, 1082 (codified at R.I. Gen. Laws § 42-64.12-8(a)).

102. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

103. *Id.* at 122–23.

104. *Id.* at 131.

central to the Court's decision, since merely finding that a regulation had effected a taking would not by itself invalidate the regulation. Takings become impermissible only if they are not for public use or if just compensation is not paid, and there was no suggestion that landmarks preservation laws were not for public use.[105] The Court's reasoning seems ultimately to rest upon two tacit assumptions: first, that "just compensation" meant "full" compensation; and, second, that governments could not afford to pay full compensation for the burdens imposed by landmark-preservation legislation.

These assumptions were plausible in light of both existing takings doctrine, which requires full compensation for all takings, and the limited budgets of state and local governments. New York City, in particular, at this time was in especially dire fiscal straits.[106]

However, as a matter of logic, these assumptions are peculiar considerations for determining whether a taking has occurred. While the government's ability to pay compensation might seem relevant to determining how much compensation to require, it is not obviously relevant to determining the nature of the loss that the government has imposed. How much money a city is capable of paying for "taken" property seems irrelevant to determining whether the city has in fact taken property, just as whether a trespass or theft has occurred is independent of whether the alleged trespasser or thief is wealthy enough to pay compensation for those acts.

Moreover, it is analytically incomplete to move, as the court's discussion tacitly did, from the assumption that governments could not afford to pay *full* compensation for the costs imposed by landmarks-preservation legislation to the conclusion that therefore they must not be obligated to pay *any* compensation. An alternative, more natural conclusion would have been that the inability to pay full compensation

---

105. The validity of the landmarks preservation law was uncontested. *Id.* at 129 ("[A]ppellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal. They also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law.").

106. The dissent in *Penn Central* acknowledged this fact explicitly. *Id.* at 152 ("The city of New York is in a precarious financial state . . . .") (Rehnquist, J. dissenting). Just three years before this case was decided, New York City had sought a federal bailout. President Gerald Ford's refusal to grant a bailout prompted a classic New York tabloid headline: "Ford To City: Drop Dead." *Ford to City: Drop Dead in* 1975, N.Y. DAILY NEWS (Oct. 29, 2015), https://www.nydailynews.com/new-york/president-ford-announces-won-bailout-nyc-1975-article-1.2405985 (originally published by Frank Van Riper, *Ford to City: Drop Dead*, DAILY NEWS, Oct. 30, 1975).

might have justified an obligation to pay only partial compensation. While the established doctrinal assumption that "just compensation" necessarily means "full compensation" obscured that possibility, recognizing the equitable dimension of takings compensation could have brought it to light.

Compensation considerations played an additional peculiar role in the Court's reasoning. Following the lead of *Pennsylvania Coal v. Mahon*, where a regulation's producing (or not producing) an "average reciprocity of advantage" was a factor in determining whether the regulation had created a taking, the *Penn Central* Court argued that Grand Central Terminal's owners' having enjoyed benefits from the regulation argued against the landmark law's having effectuated a taking.[107] Whether a regulation has provided benefits as well as burdens, with the result that the regulation's net burden is less than it might otherwise have been, is obviously relevant for determining the amount of compensation that would be necessary to make whole the loss created by that regulation. Less obvious, however, is its relevance to determining whether any compensation is owed at all. The assumption, in both *Mahon* and *Penn Central*, that whether an owner has received *some* compensation illuminates whether the government owes *any* compensation again involves an unmotivated logical leap.

A more natural and plausible way to address the Court's concerns about non-monetary compensation received by the burdened owner, and about the government's ability to pay monetary compensation, would have been to treat those concerns as questions about the amount of compensation owed, rather than as questions about whether compensation was owed at all. Such quantity questions, in turn, would naturally have lent themselves to resolution by "balancing the equities" of the situation. As the U.S. Supreme Court noted in *Hecht Co. v. Bowles*, "The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."[108]

---

107. Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *Penn Central*, 438 U.S. at 134–35 ("we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law").

108. Hecht Co. v. Bowles, 321 U.S. 321, 329–30 (1944). *See also* Case Note, *Injunction. Trespass to Land. Balance of Convenience*, 33 YALE L.J. 205, 206 (1923) ("It is not always

Thus freed to consider what amount of compensation would be equitable, given the circumstances of the case, the Court could more naturally have considered the dispute's intuitively salient features: the hardship to the public if the government had to pay a practically infeasible amount of compensation, with the result that a unique public landmark would be irretrievably lost at a time when trends in architecture ensured that nothing similar would arise to replace it; the hardship to the railroad if it was limited in its ability to seek sources of revenue ancillary to its struggling railroad business; and the fact that the landmark-preservation law required Penn Central to continue to provide a benefit to others—in the form of maintaining Grand Central Terminal in its original Beaux Arts glory—rather than discontinue inflicting a harm, contrary to American law's typical tendency to impose negative duties rather than positive duties.[109] And the Court could then have compared the required amount of compensation to the amount of compensation already received in the form of transferable development rights.

Ultimately, with multiple demands on public coffers, and not enough money to go around, a balancing of the equities between the railroad and the city might have produced the same outcome as actually occurred: the restriction was permitted and the railroad received partial, non-monetary compensation in the form of transferable development rights. However, the reasoning that led to that result might have been more straightforward and predictable, allowing the Court to use traditional equitable considerations to determine how much compensation was owned, rather than offering a potentially

---

realized that in applying the doctrine of the 'balance of convenience' courts not only compare the relative loss and gain to the parties in this litigation, but consider also the effect upon the community at large.").

109. In law-and-economics terminology, the landmark-preservation regulation required continuing to provide a positive externality rather than requiring cessation of a negative externality. Observations about the law's imposing negative duties more often than positive duties are well-established in the torts context. *See, e.g.*, Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908) ("There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive [inaction], a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.") *Cf.* KAMES, PRINCIPLES OF EQUITY 88 (1825) ("equity never obliges any man, whether by acting or suffering, to increase the estate of another."). *But see* Kenneth S. Abraham & Leslie Kendrick, *There's No Such Thing as Affirmative Duty*, 104 IOWA L. REV. 1649 (2019) (challenging the viability in tort law of the distinction between misfeasance and non-feasance).

arbitrary miscellany of considerations that somehow together pointed toward a conclusion that no taking had occurred, and therefore that zero compensation was required.[110] An equitable approach might have laid a more coherent and solid foundation for future development of regulatory takings jurisprudence.

CONCLUSION

If the foregoing discussion has been convincing, then eminent domain doctrine can benefit from greater attention to the equitable aspect of takings compensation for types of cases that do not fall neatly within established takings doctrines' binary categories. Compensation's natural amenability to gradation can mitigate the all-or-nothing nature of the other elements that determine whether an exercise of government power qualifies as a valid taking. And equity can provide established, principled guides in flexibly adjusting that compensation to address novel or atypical categories of cases—principles that can both reduce arbitrariness and direct the exercise of this flexibility in directions productive of takings compensation's underlying purposes.

110. Henry Smith has argued that the proliferation of unhelpful multifactor balancing tests in the law in general is, at least in part, a consequence of equity's eclipse following the fusion of law and equity. *See, e.g.*, Smith, *supra* note 94, at 1137. Smith's argument might recommend a more equity-based approach to regulatory takings jurisprudence in general. This Paper's suggestion is narrower, suggesting only that the compensation aspect of regulatory takings might benefit from an equitable approach. Whether equity might have potential benefits for other aspects of regulatory takings law is a question that lies beyond the scope of this Paper.

A PRACTITIONER'S PERSPECTIVE ON HOW BEST TO AVOID THE RISK OF UNJUST COMPENSATION

ANDREW PRINCE BRIGHAM, ESQ.* &
LINDSEY BRIGHAM KNOTT**

INTRODUCTION

The article below was written following the 17th Annual Brigham-Kanner Property Rights Conference, held virtually over a Zoom conference by host William & Mary Law School, on October 2, 2020. Four panelists presented on the subject "The Risk of Unjust Compensation": Professor James W. Ely Jr.,[1] Professor Brian Angelo Lee,[2] Andrew Prince Brigham, Esq., and Jonathan D. Brightbill, Esq.[3]

The purpose of this Article is to bring the multifaceted insights of the academy, the condemnee, and the condemnor into focus on a theme raised in all four of the panel's presentations: the significance attached to the measure of compensation when property is taken under the eminent domain power. This, the second of constitutional protections, is seldom commented upon and is more typically assumed to somehow materialize of its own accord when private property is taken by a public or quasi-public condemning authority.[4]

In retrospect of our conference, I draw upon the historical background elucidated by Professor Ely, the contemporary ethical issues

---

* Attorney, Brigham Property Rights Law Firm, Jacksonville, Florida. Andrew Prince Brigham is a third-generation trial lawyer with experience in complex, high-profile cases involving real estate of many kinds. He is best known for work throughout Florida representing property or business owners in eminent domain or other property right proceedings. He received an undergraduate degree in English literature from Wheaton College, Illinois (1988), and his JD from the University of Florida Levin College of Law (1991). *See* https://www.propertyrights.com.

** Lindsey Brigham Knott (BA, 2014, Wheaton College), whose writings for the CiRCE Institute, a resource provider for classical education, have been widely read and circulated. *See* CIRCE INSTITUTE, https://www.circeinstitute.org (last visited Mar. 26, 2021).

1. Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, Vanderbilt University.

2. Professor of Law, Brooklyn Law School.

3. Principal Deputy Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice.

4. The limitation on government's exercise of eminent domain requiring *public use* or *purpose*, the first of constitutional protections, receives far more scholarly attention.

engaged upon by Professor Lee, and even the cautionary case studies presented by Mr. Brightbill, to argue that the most sure way of avoiding the risk of unjust compensation is to require that the condemning authority exercising the power of eminent domain pay for the reasonable and necessary attorneys' fees and costs incurred by the property owner in determining the just measure of compensation for the taking.

My invitation is to not assume, once a court orders a taking, that *"just compensation"* is somehow automatically served up as some ready-made dish, but to step into the kitchen and really see what is going on in the preparation of such a meal.

CONTENTS

I. HISTORICAL FOUNDATIONS: COMMENT ON PROFESSOR ELY'S PRESENTATION

The 2006 Brigham-Kanner Property Rights Prize recipient, Professor James W. Ely, Jr., provided those of us attending the conference with an adept review of historical jurisprudence on the *"just compensation"*

norm in eminent domain. His commentary suggested that, from the earliest formation of American jurisprudence, the trial process itself has been considered integral in defining the scope of *"just compensation"* matched against the specific facts and circumstances of a particular case.

Professor Ely began with an overview of the common law and natural law origins of the compensation requirement. He pointed out that the principle was widely accepted in the American colonies before being incorporated into the U.S. Constitution's Bill of Rights or in respective state constitutions. According to Ely, the incorporation of the principle into the Fifth Amendment was not viewed so much as an innovation, but more as a declaration of the government's obligation to pay for what it takes as a fundamental right of private ownership, rooted in the rationale of natural law theorists who reasoned that individuals should only be expected to contribute their *"fair share"* for public benefits and that anything beyond that should be refunded as part of a *"natural equity."* He further noted this same rationale appeared in a number of early judicial opinions where courts recognized that the compensation requirement prevented property owners from being singled out so as to disproportionally contribute to the public good simply because it was their property that was being taken.

Regarding the measure of compensation, Professor Ely also cited to a sort of glossary of historical terms used by lawmakers and commentators alike prior to the drafting of the Fifth Amendment. Terms such as *"true worth," "due satisfaction," "full compensation,"* and *"full indemnification and equivalent"* were employed to provide a benchmark for what the government was obligated to pay. But, because neither the U.S. Constitution nor state constitutions that used the term *"just compensation"* provided any greater specificity as to its meaning, early judicial decisions were required to describe its measure more fully or provide a framework to determine the appropriate amount of compensation. These opinions reasoned through various issues:

(a) *"Who was to determine the amount of compensation?"*

(b) *"What would be the standard under which to consider its measure?"*

(c) *"How might imputed benefits associated with a public project be offset against any monetary award?"*

Professor Ely's historical insights parallel my own experience as a legal practitioner, wherein, in every takings case, property theory meets practical application. It is not as though the amount of compensation can be determined either by reference to a manual or by use of some ready-made formula. In considering the questions Ely traced above in a number of judicial decisions, practitioners must necessarily consider how answers to these questions may differ among the jurisdictions in which we practice.

For example, jurisdictions often differ as to who determines the amount of compensation. Some jurisdictions have the measure of compensation determined by jury, some by a judge, and still others by appointed commission.[5] As another example, jurisdictions may differ as to the exclusivity of the fair market value standard; some jurisdictions hold fast to fair market value as an exclusive standard by which to measure compensation while other jurisdictions, although considering fair market value to be a reliable tool of measurement, allow fact-finders to consider more robust word pictures to set the appropriate mark for the amount of compensation to be paid.[6]

---

5. For instance, in federal courts, Rule 71.1(h) of the Fed. R. Civ. Pro. allows a district court judge the discretion to either appoint a commission or empanel a jury to determine the measure of compensation.

6. In my jurisdiction, Florida, our state constitution requires the payment of *"full compensation"* and our standard jury instructions, as the measure of compensation is determined by jury, explains to jurors that fair market value is not an exclusive standard of measure, but a helpful tool. *See, e.g.*, Behm v. Div. of Admin., Dep't of Transp., 383 So. 2d 216 (Fla. 1980); Jacksonville Expressway Auth. v. Henry G. Du Pree Co., 108 So. 2d 289, 291 (Fla. 1959) ("Although fair market value is an important element in the compensation formula, it is not an exclusive standard in this jurisdiction. Fair market value is merely a tool to assist us in determining what is full or just compensation, within the purview of our constitutional requirement"); Dade Cnty v. Brigham, 47 So. 2d 602, 604 (Fla. 1959) ("Full compensation is guaranteed by the Constitution to those whose property is divested from them by eminent domain. The theory and purpose of that guaranty is that the owner shall be made whole so far as possible and practicable."); *see also* THE FLORIDA BAR, FLORIDA EMINENT DOMAIN PRACTICE AND PROCEDURE, §§ 11.3.C., 3.E. (10th ed. 2017). The standard Florida jury instructions place emphasis on more organic concepts of indemnity, such as *"making the owner whole"* or requiring *"the owner to be put in as good a position financially as the owner would have been if the property had not been taken,"* than an exclusive standard of measure such as fair market value. *See id.*

By contrast, the standard federal jury instructions define *"just compensation"* to mean fair market value as an exclusive standard of measurement. *See, e.g.*, Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 9–10 (1984) ("'Just compensation,' we have held, means in most cases the fair market value of the property on the date it is appropriated."); United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) ("The Court . . . has employed the concept of fair market value to determine the condemnee's loss. Under this standard, the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the

Professor Ely also discussed the origin of reducing the measure of compensation paid to the owner in partial taking cases through offsetting of benefits which may accrue to the owner resulting from the project for which property is taken.[7] In most jurisdictions, while *general* benefits are not offset, *special* benefits, which result from the project and particularly enhance the value of a remainder property, may be offset against severance damages but not against the value of the property taken. Practitioners recognize that these limits on compensation present some rather complicated evidentiary challenges. During a trial, testimony may differ on whether benefits are *general* or *special* and often add multiple layers of disputed expert testimony to opposing valuation opinions on the extent of offsets, if any.

Likewise, jurisdictions differ over what is commonly referred to as *"the scope of the project rule,"* which holds that any increase in value due to the anticipation of the project, as of the date of the formal announcement of the project's location, be excluded from the value of the property taken.[8] The *scope of the project rule* is a separate rule of valuation in eminent domain from the offset of *special* benefits, applying in both whole and partial takings, and typically manifesting itself as an exclusionary rule of evidence regarding sales which are transacted in the neighborhood after the date of the project's announcement. Some jurisdictions, however, have soundly rejected *the scope of the project rule*.[9]

In preparing a case for trial, practitioners must consider how these valuation rules shape the evidence that may be considered by the fact-finder in the valuation of the real estate in its *"before"* and *"after"* conditions. Essentially, when applied to the measure of compensation, these rules seek to indemnify an owner for what is lost, but consider as well what may be gained.

As Professor Ely's comments suggested, the trial process and the work of the attorney have always been required to mediate between

---

taking.") (quoting United States v. Miller, 317 U.S. 369, 374 (1943)); United States v. W.G. Reynolds, 397 U.S. 14, 16 (1970); *see also* 3A KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 154.30 (6th ed.).

7. *See, e.g.*, Bauman v. Ross, 167 U.S. 548 (1897); State Road Dep't v. Daniels, 170 So. 2d 846 (Fla. 1964).

8. *See, e.g.*, Campbell v. United States, 266 U.S. 368 (1924); United States v. Miller, 317 U.S. 369 (1942).

9. *See, e.g.*, Sunday v. Louisville & Nashville Ry., 57 So. 351 (Fla. 1912); Dep't of Transp., State of Fla. v. Nalven, 455 So. 2d 301 (Fla. 1984).

an owner's constitutional rights and the particular facts and circumstances of an owner's case—a relationship which continues to this day.

II. CONTEMPORARY ISSUES: COMMENT ON PROFESSOR LEE'S SCHOLARSHIP

Professor Brian Angelo Lee moved the purview of our panel from a review of historical jurisprudence to an examination of more contemporary perspectives over the measure of compensation looking from a vantage point of both law and economics.

Over the past decade, Professor Lee has written a number of articles on the measure of compensation and how it is determined. Beginning in 2013 with his article *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*,[10] Lee addresses a number of academic sources that suggest that owners are *"undercompensated"* by the fair market value standard when market prices do not reflect an owner's own personal valuations of the owner's own particular property. He cites to both a number of respected legal scholars[11] and also examples of emerging legislation from several states which propose to rectify this perceived unfairness through adding fixed-percentage bonuses above fair market value.

To illustrate, the bonus in some legislation was equal to a percentage point for each year the owner or owner's family has continuously occupied a home, business, or farm. Professor Lee questions this solution by arguing that:

(a) fair market value, to some extent, already includes compensation for more subjective value than what has been previously recognized;

---

10. Brian A. Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUMBIA L. REV. 3 (2013).

11. At least three of these scholars are also past Brigham-Kanner Property Rights Prize winners—*see, e.g.*, *The Kelo Decision: Investigating Takings of Homes and Other Private Property*: *Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 122 (2005) (statement of Thomas W. Merrill, Charles Keller Beekman Professor, Columbia Law School) ("Another promising reform idea would be to require . . . that when occupied homes, businesses or farms are taken, the owner is entitled to a percentage bonus above fair market value, equal to one percentage point for each year the owner has continuously occupied the property."); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 183 (1985) ("Bonus values . . . have a great deal to recommend them."); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 736–37 (1973) (suggesting use of market value damages plus "bonus award" to compensate nuisance claims).

(b) what fair market value may leave uncompensated is not altogether unfair; and

(c) fixed-percentage bonuses, themselves, may undermine the civic and moral equality of rich and poor property owners by relatively overcompensating the rich while undercompensating the poor for losses which have equal value to rich and poor alike.

Instead of a bonus based on a fixed-percentage of market value, Lee suggests that a more just alternative would be to pay each displaced resident of the taken property a fixed amount wherein the compensation paid is scaled to the number of persons affected, not to the price of the property that they own.

In his 2015 article *Emergency Takings*,[12] Professor Lee turns his scholarly attention toward a perceived gap in the understanding of takings laws with respect to the non-payment of compensation concerning *"emergency takings."* In so doing, he identified three pivotal, but commonly overlooked, distinctions from which he forged a general theory of compensation for emergency takings. More specifically, Lee examines the distinctions existing between:

(a) the different roles that the payment of compensation plays in any given situation;

(b) the different types of perceived "necessity" for takings, of which he distinguished two and discussed what is implied under each type; and

(c) the different amounts of compensation that might be owed.

Lee ultimately concludes that when the need to destroy property in an emergency is accompanied by grave constraints on the ability to pay compensation, then an obligation to pay *"just compensation"* for the destroyed property remains, but the amount of that compensation changes. Under such circumstances, he argues that justice requires that a *"partial compensation"* be paid.

Finally, in his most recent article in 2019 titled *Uncompensated Takings: Insurance, Efficiency, and Relational Justice*,[13] Professor

12. Brian A. Lee, *Emergency Takings*, 114 MICH. LAW REV. 391 (2015).

13. Brian A. Lee, *Uncompensated Takings: Insurance, Efficiency, and Relational Justice*,

Lee responds to legal scholars who suggest that government not be obligated to compensate for taken property and, instead, that property owners be left to purchase insurance from private companies. These scholars hold that substituting the latter compensation thesis for the former would benefit society, reduce moral hazards, and promote greater efficiency in administrative costs. Lee explains that such an *"anti-compensation thesis"* is a staple of an economic analysis of the law. He then delves into why, from his own analysis, the anti-compensation thesis through insurance is false. More specifically, the thesis fails to recognize the important aspects of *"relational justice"* when property is taken under the eminent domain power. In order to support his critique, Lee points to a fundamental distinction between relationships within the contrasting contexts of insurance and eminent domain. With insurance, the relationship is between (a) the party suffering a loss and (b) the party paying to alleviate such loss. With eminent domain, the relationships are among (a) the property's owner, (b) the community that took the property, and (c) the entity that pays compensation.

Professor Lee's synthesis of the subject matter leads to his conclusion that considerations of economic efficiency offer no true reason to disregard the requirements of *"relational justice."* Emphasizing the importance of *"relational justice,"* he finds the critical oversight in the assumption that takings compensation can be reduced to some form of government-provided insurance is that it loses sight of "the intrinsic value that is inextricably tied to the legitimacy of the power of eminent domain, a connection that springs from the particular relationships that exist between property owners and the rest of the community."[14] In such manner, Lee effectively brings to light "the indispensable role that compensation plays in making a transfer of ownership be legitimate."[15]

III. A PRACTITIONER'S PERSPECTIVE (ANDREW PRINCE BRIGHAM)

It is from the scholarship presented by Professor Lee that I, as a legal practitioner, wish to pivot. I would like for us to take a step or two further in considering the measure of *"just compensation"* paid

---

97 TEXAS L. REV. 935 (2019).

14. *Id.* at 989.

15. *Id.* at 940.

when private property is taken under the exercise of the eminent domain power. In my opinion, in order to satisfy concerns over *"undercompensation"* or address adequately *"the risk of unjust compensation,"* there is something even more vital than making an addition or adjustment to the measure of compensation under the standard of fair market value. So too, what I am about to suggest furthers the concept that *"relational justice,"* or that which makes legitimate the use of the eminent domain power, rests in part on how the public perceives how justly it is that owners are compensated for a taking.

For myself, my thirty years of law practice has been primarily devoted to representing owners in property rights cases. While I cannot profess to know all in the world of real property theory, I have seen my share of what goes on in the trenches where the issue before the judicial branch is the measure of compensation as determined in the *ad hoc* workings of the particular facts and circumstances of a given case. My experience is somewhat peculiarly derived from a law practice in the jurisdiction of Florida, wherein the state substantive measure of compensation includes having the condemnor pay for the owner's reasonable and necessary attorneys' fees and costs.

A. Stepping into the Kitchen

Professor Lee's first article on *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*[16] referenced those who suggest adding fixed-percentage bonuses above fair market value or making some other adjustment to compensation as a remedy for potential *"undercompensation"* when the taking involves a long-held family home, business property, or farm. To this let me say, *"Not so fast."*[17]

My reservation over rectifying perceived unfairness in the compensation paid for a long-held family home, business property, or farm

16. *See* Lee, *supra* note 10.

17. While the phrase, *"Not so fast . . ."* has established its way into the *Merriam-Webster Dictionary* as an informal idiom "to say that one disagrees with what someone has said or to tell someone to stop or slow down," it has become, of course, iconic to those of us who gravitate on Saturday mornings in the fall toward ESPN's College Gameday telecasts as the phrase is used almost on weekly basis by long-time co-host analyst, Lee Corso. *See not so fast*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/not%20so%20fast (last visited Mar. 19, 2021).

by adding fixed-percentage bonuses above fair market value springs from my own well of practical experience as a trial practitioner.[18] After representing both small and large property owners in case after case, I have come to know that concerns over *"undercompensation"* or the risk of *"unjust compensation"* in most eminent domain takings does not involve some incremental percentage over what is ultimately determined to be fair market value in a case. Opposing parties, the condemnor and the property owner, simply do not agree on fair market value. In a good number of cases, it is not just percentage differences between competing valuation theories, but orders of magnitude.

This is particularly the case when the initial amount offered by the government or other condemnor is inconceivably low. From there, insult may be followed by greater injury if the condemnor also puts forth the same figure at trial. In most cases, the difference between appraisers is not within a few percentage points. It is between *"night"* and *"day"* and, in some cases, between what is *"right"* and *"wrong."* It is this haplessly routine occurrence that, in my mind, has missed scholarly attention.

Beyond the notion that eminent domain results in a taking without the owner's consent, it is the risk of *"undercompensation"* or *"unjust compensation"* that raises the equitable stakes of eminent domain to an even higher level. Eminent domain deprives the private property owner from being able to say, *"No, thank you!"* when receiving an inconceivably low offer from the condemnor. This significantly adds to the harshness associated with the eminent domain power. Often, because of the extent of investment that most owners have in their real estate, the risk of being *"undercompensated"* transcends obvious monetary concerns and unfairly threatens the core of an owner's financial security and standing.

---

18. Briefly, before moving on, I wish to also comment on Professor Lee's suggestion that, instead of adding a fixed-percentage bonus paid to the property owner, the compensation paid should be scaled instead to the number of persons affected, not to the price of the property in which they have an ownership interest. The alternative Professor Lee suggests, driven by a concern to compensate loss resulting from a taking for rich and poor alike, may be already addressed, at least in my mind, by acquisition programs in federally funded projects which require condemnors to pay relocation benefits to displaced persons under the Uniform Relocation Assistance and Real Property Act ("URA"), 42 U.S.C. § 4601 et seq., 49 C.F.R. part 24. This, of course, is in addition to compensation paid to owners of the private property taken and is a program that is based upon a non-adversarial administration of entitlements, paying actual or estimated costs incurred to those displaced by condemnation when relocating or establishing a replacement home or business location.

Once again, Professor Lee's scholarship is helpful to me as a practitioner because of his elucidating upon the important aspect of *"relational justice"* when property is taken under eminent domain. While he is not the only member of the academy to delve into this theoretical property concept, it is the central theme of his article *Uncompensated Takings: Insurance, Efficiency, and Relational Justice*.[19] I could not agree more with Professor Lee that the legitimacy of the power of eminent domain has an intrinsic value that depends, to a great extent, on how well the relationships between property owners and the rest of the community are respected or highly regarded. I would add that the payment to the property owner of a measure of compensation that the community would agree is just and fair is part of what gives legitimacy to the eminent domain power or satisfies the social conscience which accepts that the public good, at times, is only accomplished at some individual's private expense. Rest assured, this informing principle is alive and well in the courtroom. It is in the air we breathe.

What if, then, the assumption that owners whose private properties are taken for public good receive a just or fair amount of compensation isn't true?

If not true, would this undermine the presumed legitimacy of the government's exercise of the eminent domain power?

Returning to my concern over the risk of *"unjust compensation*,*"* let me home in on exactly what it is that I contend responds best or counteracts such risk.

The condemnor should be required to pay for an owner's attorneys' fees and costs incurred in the defense of eminent domain proceedings as part of the measure of compensation.

Presently, attorneys' fees and costs are not customarily part of the measure of compensation in federal takings unless specifically provided for in the enabling legislation that authorizes the use of the eminent domain power. This is certainly the case in most direct condemnation cases wherein the condemnor is the federal government.[20]

19. *See* Lee, *supra* note 13.
20. *See, e.g.*, United States v. Miller, 317 U.S. 369 (1946).

There are, however, a few exceptions within federal jurisprudence where the owner's attorneys' fees and costs are recoverable. These exceptions concern more particularized legislative schemes, such as the Rails to Trails Act, 16 U.S.C.S. § 1241 *et seq.*, where jurisdiction is conferred through the Tucker Act, 28 U.S.C.S. § 1491(a)(1), upon the United States Federal Court of Claims to determine the measure of compensation. In such instance, attorneys' fees and costs are recoverable by the owner pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("URA"), 42 U.S.S. 4601 *et seq.* Still in other federal takings cases, the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 *et seq.*, may have applicability.[21]

Even so, in most federal takings cases, because the owner's attorneys' fees and costs are either unrecoverable or subject to limitations or uncertainties that make their prospect unattractive to private legal counsel, except those who perhaps have more altruistic purpose, it generally holds true that only owners with the economic means to pay their own attorneys' fees and costs or who possess more substantial property interests secure legal representation in federal takings cases. Owners without economic wherewithal proceed in an unrepresented fashion and are typically forced to accept a compromise close to the amount of the condemnor's low offer because they are not otherwise with the means to prepare their own valuation estimate and defend their constitutional entitlement to compensation.

With respect to state jurisdictions, the law varies from state to state. Presently, only twenty-one of fifty states have meaningful constitutional or statutory provisions that allow owners to recover attorneys' fees and costs as part of the measure of compensation that the condemnor must pay in direct condemnation cases.[22]

---

21. For the EAJA to apply, the owner must have a net worth not to exceed $2,000,000 and must be a "prevailing party" (wherein the difference between the owner's estimate of value and the final amount is equal to or less than the difference between the condemnor's estimate and the final award) unless the court finds that the government's position was "substantially justified" or "special circumstances makes an award unjust." 28 U.S.C. § 2412(d)(1)(A), (d)(2)(B). Attorneys' fees under EAJA, although based upon prevailing market rates for the kind and quality of the services furnished, are also not be awarded in excess of $125 per hour unless the court determines that the cost of living or a special factor, such a limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. 28 U.S.C. § 2412(d)(2)(A).

22. *See* William G. Blake, *Fifty-State Survey—The Law of Eminent Domain*, 2012 AM. BAR ASS'N; *see also Law and Policy Resource Guide—A Survey of Eminent Domain Law in Texas and the Nation*, 2016 TEXAS A&M UNIV. SCH. OF LAW. In review of respective state jurisdictions, these two sources, the former prepared by legal practitioners from each state in 2012, and the latter, prepared by a group of dedicated law students in 2016, allow a starting point

Of the twenty-one, a total of five states, Alaska, Idaho, Iowa, Oklahoma, and Washington, require the condemnor to pay the owner's attorneys' fees and costs when the final award exceeds the condemnor's pre-suit offer by 110%.[23] Three, Nebraska, Wisconsin, and Wyoming, require the condemnor to pay the owner's attorneys' fees and costs when the final award exceeds the condemnor's pre-suit offer by 115%.[24] Two, Arkansas and South Dakota, require the condemnor to pay the owner's attorneys' fees and costs when the final award exceeds the condemnor's pre-suit offer by 120%.[25] One, Colorado, requires the condemnor to pay the owner's attorneys' fees and costs when the final award exceeds the condemnor's pre-suit offer by 130%.[26]

Minnesota makes mandatory the payment of the owner's attorneys' fees and costs if the final award is in excess of 140% of the condemnor's pre-suit offer and discretionary if the final award is between 120% and 140% of the condemnor's pre-suit offer.[27]

South Carolina allows the owner to recover attorneys' fees and costs if the amount awarded by the court is as close to the highest valuation of the property attested to at trial by the owner as it is to the highest amount attested to at trial by the condemnor.[28]

Michigan and Utah allow the owner to recover attorneys' fees and costs if the compensation awarded exceeds the condemnor's settlement offer, but the additional amount awarded to the owner for attorneys' fees and costs may not exceed one-third the difference between the compensation awarded and the condemnor's settlement offer.[29]

Louisiana and Montana allow the owner to recover attorneys' fees and costs if the amount awarded by the court exceeds the expropriating or condemning authority's highest offer prior to trial.[30]

---

from which to update one's consideration to current law.

23. *See* ALASKA R. CIV. PRO. 72(k); IDAHO CODE ANN. § 7-711A; IOWA CODE ANN. § 6B.33; OKLA. STAT. tit. 27, §§ 11–12; WASH. REV. CODE § 8.25.075 and WASH. REV. CODE § 8.25.070(1)(b).

24. *See* NEB. REV. STAT. § 76-720 (Nebraska); WIS. STAT. § 32.28(1) (Wisconsin); WYO. STAT. ANN. §§ 1-26-502 to 1-26-817 (Wyoming).

25. *See* ARK. CODE ANN. § 18-15-103(b)(11)(A); S.D. CODIFIED LAWS § 21-35-33 (Arkansas).

26. *See* COLO. REV. STAT. § 38-1-122 (Colorado).

27. *See* MINN. STAT. § 117.031 (Minnesota).

28. *See* S.C. CODE ANN. § 28-11-3-(2)(b) (South Carolina).

29. *See* MICH. COMP. LAWS § 213.66 (Michigan); UTAH CODE ANN. § 78-B-6-509(7) and UTAH CODE ANN. § 78-B-6-509(8) (Utah).

30. *See* LA. REV. STAT. § 19:8 (Louisiana); MONT. CODE ANN. §§ 70-30-305(2)–306 (Montana).

Oregon allows the owner to recover attorneys' fees and costs if the amount awarded by the court exceeds the condemnor's highest offer prior to filing its condemnation suit.[31]

New York gives the court discretion to award attorneys' fees and costs to the owner if the compensation award is substantially in excess of the amount of the condemnor's proof at trial and where an additional award to the condemnee is deemed necessary to achieve just and adequate compensation.[32]

North Dakota also gives discretion to the court to award attorneys' fees and costs to the owner in addition to the compensation awarded.[33]

Florida, more demonstrably than any other state jurisdiction, includes the owner's attorneys' costs as part of its constitutional measure of *"full compensation."*[34] As such, whether or not the owner prevails at trial, the owner is entitled to have all necessary and reasonable attorneys' fees and costs paid by the condemning authority.[35] Florida, though, like many other states, has an offer of judgment provision in its rules of civil procedure that allows parties to shift the burden of the costs incurred after rejection of the offer and a subsequent jury verdict which is at or below the amount of the offer.[36]

The roll call leaves off Alabama, Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, and West Virginia.[37] If having constitutional or statutory provisions

---

31. *See* OR. REV. STAT. § 35.346(7) and OR. REV. STAT.§ 35.300 (Oregon).

32. *See* N.Y. EM. DOM. PROC. LAW § 701 (New York).

33. *See* N.D. CENT. CODE § 32-15-35 and N.D. CENT. CODE § 32-15-32 (North Dakota).

34. *See* Dade Co. v. Brigham, 47 So. 2d 602 (Fla. 1950); §§ 73.092, 73.091 FLA. STAT. (Florida).

35. *Id.*

36. *See* Fla. R. Civ. P. 1.442; *see also* § 73.032 FLA. STAT.

37. *See* ALA. CODE, §§ 18-1A-3(12), 18-1A-95, and 18-1A-290; White v. State, 319 So.2d 247 (Ala. 1975), *cert. den.* 424 U.S. 954 (Alabama); State *ex rel.* Morrison v. Helm, 86 Ariz. 275, 345 P.2d 2020 (1959); State *ex rel.* Morrison v. Jay Six Cattle Co., 88 Ariz. 97, 353 P.2d 185 (1960) (Arizona); CAL. CIV. PROC. CODE § 1250.410 (California); C.G.S. § 48-17a, C.G.S.§§ 48-26 and 13a-76 (Connecticut); 29 DEL. C. § 9503 and 10 DEL. C. § 6111; 29 DEL. C. § 9504 (Delaware); DeKalb County v. Trustees, B.P.O. Elks, 242 Ga. 707, 251 S.E.2d 243 (1978); DeKalb County v. Daniels, 174 Ga. App. 319, 329 S.E. 2d 620 (1985); O.C.G.A. § 22-4-8 (Georgia); State v. Davis, 53 Haw. 582, 499 P.2d 663 (1972); HAW. REV. STAT. § 101-27 (Hawaii); 735 ILCS 30/10-5-110 (Illinois); IC 32-24-1-14 (Indiana); Gault v. Board of County Comm'rs, 208 Kan. 578, 493 P.2d 238 (1972); Schwartz v. Western Power & Gas Co., Inc., 208 Kan. 844, 494 P.2d 113 (1972); City of Wichita v. B G Products, 252 Kan. 367, 855 P.2d 956 (1993) (Kansas); Department of

that address the recovery of the owner's attorneys' fees and costs as part of the measure of compensation outside of abandonment or inverse condemnation, these twenty-nine states either entirely exclude recovery or only provide for recovery of attorneys' fees and costs from the condemnor to a *de minimis* extent.[38]

Similar to takings cases under federal law, owners without the economic means to pay their own attorneys' fees and costs or who do not possess more substantial property interests forego legal representation. Private legal counsel typically seek attorneys' fees equal to one-third of the difference between the final award and the condemnor's initial offer. This amount does not include appraisal fees or fees of other expert witnesses. Without attorneys' fees and costs being included in the measure of compensation that the condemnor is required to pay, such amounts are typically subtracted from the final award of compensation disbursed to the owner. This explains why owners without economic wherewithal and whose property interest is not of great substance can only marginally afford to retain private legal counsel.

As more recent scholarship has found social justice lacking with respect to blight removal, economic development condemnations, or certain targeted highway projects, the discordant trumpet of injustice resounds most steadily in routine direct condemnations when private property is taken from those situated within poor or minority communities where applicable jurisdictional law does not allow for the recovery attorneys' fees and costs as part of the measure of

---

Transportation, Bureau of Highways v. Knieriem, 707 S.W.2d 340 (Ky. 1986); KY. REV. STAT. § 416.560(3) (Kentucky); 23 M.R.S. § 154; 23 M.R.S. § 157 (Maine); ANN. CODE MD. § 12-106(a), (b)(1)–(4), Real Property Article (Maryland); Griefen v. Treasurer & Receiver General, 390 Mass 674 (1983); (Massachusetts); Maples v. Miss. State Hwy. Comm'n, 617 So.2d 265 (Miss. 1993) (Mississippi); City of St. Louis v. Meintz, 107 Mo. 611, 18 S.W. 30 (1891); *but see* MO. REV. STAT. §§ 523.256– 523.259 (Missouri); NEV. CONST. Art. I, § 22(4); *but see* NEV. REV. STAT. § 37.185 (Nevada); N.H. REV. STAT. ANN. § 498-A-26-a; N.H. REV. STAT. ANN. § 498-A-26-b (New Hampshire); N.J. STAT. ANN. §§ 20:3-35, 20:3-24, 20:3-26(b) (New Jersey); N.M. STAT. § 42-2-1; § 42A-1-25(A)(1) (New Mexico); N.C. GEN. STAT. §§ 40A-8, 40A-13, 40A-56, 136-119, 136-121, and 1-209.1 (North Carolina); OHIO REV. CODE §§ 163.51(B), 163.62 (Ohio); PA. CONS. STAT. ANN. § 710; PA. CONS. STAT. ANN. § 709 (Pennsylvania); Bibeault v. Hanover Insurance Co., 417 A.2d 313 (R.I. 1980) (Rhode Island); TENN. CODE ANN. §§ 29-16-106, 29-17-912; TENN. CODE ANN. § 29-16-123 (Tennessee); TEX. PROP. CODE ANN. §§ 21.019, 21.0195 (Texas); Raymond v. Chittenden County Circumferential Highway, 158 Vt. 100 (1992); VT. STAT. tit. 19, § 514; VT. STAT. tit. 19, § 512(b) (Vermont); VA. CODE §§ 25.1-249, 25.1-419, 25.1-245; VA. CODE §§ 8.01-187, 25.1-420 (Virginia); West Virginia Dep't of Transp. v. Dodson Mobile Home Sales & Services, Inc., 218 W. Va. 121, 624 S.E.2d 468 (2005); W. VA. CODE §§ 54-3-1-5 (West Virginia).

38. See sources cited *supra* note 37.

compensation. Equal footing is not afforded to those who are unable to contest the value placed upon their taken property or the damages estimated for their remaining property who so not have the means to pay for their own lawyers and appraisers and whose case, frankly, is not sufficiently attractive to private legal counsel to take on the matter other than on a *pro bono* basis. Social justice amplifies the concern over *"undercompensation,"* because not only are such owners forced to pay a disproportionate share of the burden imposed for the public good than society at large but also because these owners are already disadvantaged because of their belonging to an impoverished economic, racial, or ethnic community.

For those truly concerned about unfairness in the measure of compensation paid for private property taken under the power of eminent domain, what merits consideration is how best to assure that an owner is equipped to contend with the condemnor's low estimate of value. My invitation is not to look at the exercise of eminent domain assuming that, once a court determines a taking, *"just compensation"* is automatically served, but to step into the kitchen and really see what is going on in preparation of such a meal. This seems to me to be the most compelling of arguments for inclusion of the owner's attorneys' fees and costs as part of the measure of compensation paid for the taking of private property for public use or purpose.

It is because I have practiced law for my entire career in a jurisdiction that includes payment of an owner's attorneys' fees and costs as part of the constitutional measure of compensation that makes my thinking on this credible. Instead of just taking my word for it, however, let me provide you as well with some experiential evidence on the matter.

Because I have not seen any academic scholarship proposing what I've stated above, I am, to use another kitchen analogy, seeking *"to stir the pot"* on this subject matter. If you permit me, I'll make a proffer. I've selected two different case studies that I believe illustrate what is typically involved when representing private property owners in eminent domain proceedings.

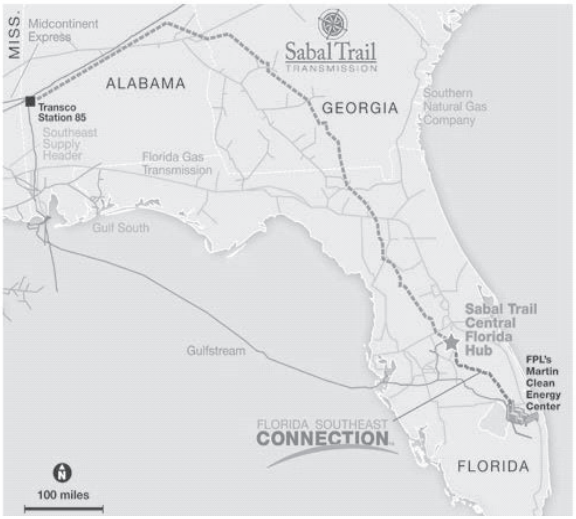
B. Case Study #1: Sabal Trail Natural Gas Pipeline

The first of my two case studies is current and, in fact, remains ongoing in that a number of subject matters are still pending in

appeals before the United States Eleventh Circuit. It involves the use of eminent domain to acquire both temporary and permanent easements for the Sabal Trail Natural Gas Pipeline.

Commencing in March 2016, Sabal Trail Transmission, LLC ("Sabal Trail")[39] filed 263 condemnation cases in federal courts for a lineal corridor of some 247 miles through Florida needed to construct a thirty-six-inch diameter pipeline capable of transmitting up to one billion cubic feet of natural gas a day. As a private licensee pipeline company, Sabal Trail was authorized to use the eminent domain power under the Natural Gas Act ("NGA")[40] and to file its condemnation cases in either state or federal court.

Figure 1. Sabal Trail Natural Gas Pipeline Project[41]



39. Sabal Trail is a joint venture of Spectra Energy Partners, NextEra Energy, Inc., and Duke Energy, which has now constructed an interstate pipeline to service electrical power plants owned by Florida Power and Light ("FPL") and Duke Energy of Florida ("DEF"). *See About Sabal Trail*, SABAL TRAIL TRANSMISSION, https://www.sabaltrailtransmission.com/about/ (last visited Mar. 19, 2021). More recently, Enbridge, Inc., acquired Spectra Energy Partners. *See* SPECTRA ENERGY, http://www.spectraenergy.com ("We are now Enbridge") (Spectra Energy alone, via its merger with Enbridge Inc., has an enterprise value of $126 billion.).

40. 15 U.S.C. §§ 717–717z (2012).

41. Plaintiff's Trial Exhibit No. 1: Sabal Trail v. 3.921 Acres of Land in Lake County (Sunderman Groves, Inc.), No. 5:16-cv-000178-JSM-PRL (M.D. Fla. Jan. 9, 2018). Photo credit: FPL, http://www.FPL.com (2019); SABAL TRAIL TRANSMISSION, http://www.sabaltrailtrans mis sion.com (2013).

Sabal Trail is only the fourth interstate natural gas pipeline system in Florida. Over the past fifty years, at least in Florida, natural gas pipeline companies consistently chose to file their condemnation cases in state court because state law provided for *"quick-taking"* authority while federal law, until recently, was uncertain on this point.[42] Beginning in 2004, federal courts began allowing pipeline companies to file for *"immediate possession"* at the initial stage of federal eminent domain proceedings.[43] Because of this, Sabal Trail filed all of its condemnation cases in the U.S. Northern and Middle District Courts of Florida. As it happens, this became the first instance in Florida that a lineal corridor project of this scope and nature proceeded with eminent domain in federal, not state, courts.

In April and May 2016, following the precedent case of *East Tennessee Natural Gas Co. v. Sage*,[44] federal courts in both the U.S. Northern and Middle Districts entered orders granting partial summary judgment motions on the *"right to take"* and motions for injunctive relief requesting *"immediate possession"* filed concurrently with Sabal Trail's complaints in all of Sabal Trail's pending cases.[45] Securing these rights of possession at the initial stage of litigation is paramount to any condemning authority because it allows a project's construction to commence immediately. Once accomplished, however, Sabal Trail, like other condemnors, is in position to slow burn its litigation with property owners over the measure of compensation.

Notwithstanding, a year after initial proceedings began, the Sabal Trail litigation took a significant turn in favor of the property owners. In June 2017, federal courts in both the U.S. Northern and Middle Districts entered orders holding that state substantive law, not federal, would serve as the federal rule of decision for determining the measure of compensation when private licensee companies exercised the delegated use of the eminent domain power under the NGA.[46]

---

42. "Quick-taking" authority allows vesting of title at the initial stage of the state eminent domain proceedings prior to payment of compensation which occurs at the final stage.

43. *See* East Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 828 (4th Cir. 2004), *cert. denied*, 543 U.S. 978 (2004); Transcon. Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d 1130 (11th Cir. 2018).

44. 361 F.3d 808, 828 (4th Cir. 2004), *cert. denied*, 543 U.S. 978 (2004).

45. *See, e.g.*, Sabal Trail Transmission, LLC v. Real Estate, No. 1:16-CV-063-MW-GRJ, 2016 U.S. Dist. LEXIS 192660 (N.D. Fla. May 23, 2016).

46. Sabal Trail Transmission, LLC v. Real Estate, No. 1:16-CV-063-MW-GRJ, 2017 U.S. Dist. LEXIS 99370, at *2 (N.D. Fla. June 27, 2017); Sabal Trail Transmission, LLC v. 1.127

These cases followed a prior precedent of the Fifth Circuit in *Georgia Power v. Sanders*,[47] which held that state law controls regarding condemnation cases filed under the Federal Power Act ("FPA").[48] As will be discussed later, the significance of the ruling is best understood by recalling that under Florida's substantive law the condemnor's payment of the attorneys' fees and costs incurred in defense of eminent domain proceedings is part of its *"full compensation"* measure.

Figure 2. Sabal Trail Pipeline[49]

Acres of Land, No. 3:16-CV-263-J-20PDB, 2017 U.S. Dist. LEXIS 92003 (M.D. Fla. June 15, 2017).

47. 617 F.2d 1112, 1113 (5th Cir. 1980).

48. Because the creating and defining the scope of property interests, especially in real property, is a quintessential area in which state law has historically provided the source of pertinent authority, the courts found that principles of federalism inform the choice-of-law analysis so as to favor state substantive law. Also, because the condemnor was a private licensee company and not the federal government, there was neither the presence of a federal policy or federal interest strong enough to dislodge the presumption of utilizing state substantive property law as the federal rule of decision.

49. Unless otherwise indicated, all photographs and figures in this Article are the property of the author and the Brigham Property Rights Law Firm (on file at the Brigham Property Rights Law Firm).

Peering behind the curtain of the condemnor's program of acquisition, truth be told, Sabal Trail was able to acquire easements from 1,248 of 1,582 property owners in Florida for its project through voluntary acquisition without having to file eminent domain. Because of this, when arriving in federal court, Sabal Trail was not silent about its success with *"willing sellers"* when filing its initial pleadings in federal court. In an all too familiar sense, Sabal Trail considered the 263 property owners who were made defendants in its federal condemnation case to be *"hold-outs"* of sorts. Owing to the fact that they did not consent to voluntary acquisitions, these owners were subjected to the exercise of eminent domain power.

- *Why was it that these owners did not voluntarily consent to Sabal Trail's taking?*

- *Stated otherwise, were these owners irrationally standing in the way of progress or, perhaps, completely unreasonable in their expectations of what constitutes a just or fair measure of compensation?*

As I have previously commented,[50] in nearly all pipeline easement acquisitions, there is a substantial dispute as to the measure of compensation insofar as the issue of damages to the remainder property is concerned—particularly when purported damages result from *proximity to the pipeline in and of itself*, or based on *market fear*, *perception*, or *stigma*.

Simply put, most in the pipeline industry maintain that, because the pipeline's infrastructure is located underground, severance damages of this kind or nature are extremely minimal or non-existent. Their mantra, effectively, is: out of sight, out of mind. The industry maintains that property owners are compensated sufficiently by pipeline companies that only pay a percent of the fee value for the land acquired within the right of way because there are no damages to the remainder property based upon proximity to the pipeline.

50. Andrew P. Brigham, *Natural Gas Pipeline Easements: An Overview of the Takings Jurisprudence Associated with the Acquisition of a Lineal Corridor When the Condemnor Is a Private Licensee of the Eminent Domain Power Under the Natural Gas Act*, 8 BRIGHAM-KANNER PROPERTY RIGHTS J. 121 (2019).

Property owners, however, disagree. They contend that a pipeline transmitting one billion cubic feet of natural gas a day just three to four feet underground is a classic "Not-In-My-Backyard" ("NIMBY") use and that property encumbered with a natural gas pipeline easement is less valuable than property not so encumbered.

As part of my first case study, I am including some of the trial exhibits depicting the subject property, the location of the permanent and temporary easements taken by Sabal Trail, as well as photographs of the *"before"* and *"after"* conditions.[51] These exhibits are representative of what is typically shown to the fact-finder at trial in the condemnation of a lineal pipeline corridor through rural lands.

Figure 3. Sunderman Groves, Inc.

51. *See* Andrew P. Brigham, Michael F. Faherty & Dwight H. Merriam, *How to Avoid Problems and Persuade the Jury as to the Measure of Compensation (Natural Gas Pipeline Takings in Federal Court: Compensation Pitfalls)*, AMERICAN LAW INSTITUTE, Jan. 24–26, 2019 (PowerPoint presentation for ALI-CLE Eminent Domain and Land Valuation Course of Study).

Figure 4. Before Taking

Figure 5. After Taking

Figure 6. Lee Thomas Trust—Pipeline Taking

Figure 7. Ryan Thomas—Pipeline Taking

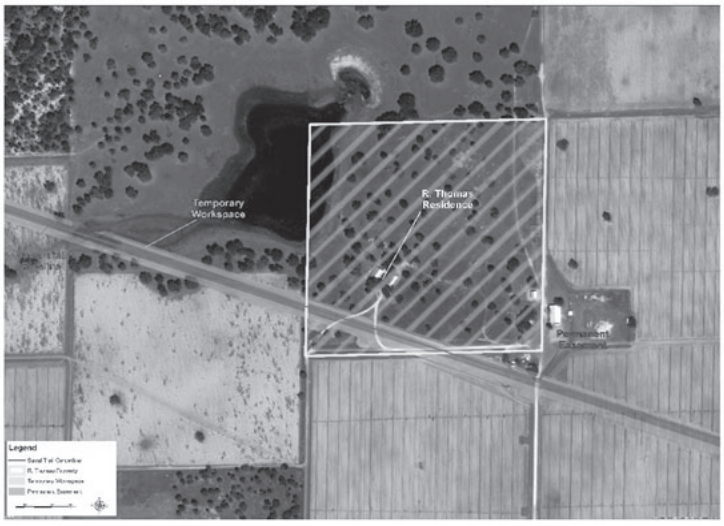


Figure 8. Lee Thomas Trust/Ryan Thomas—Before Taking

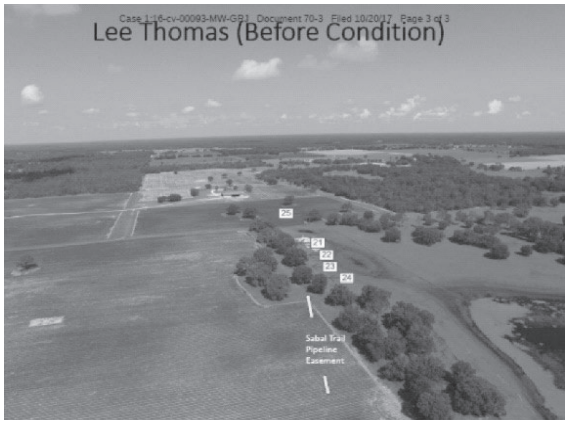


Figure 9. Lee Thomas Trust/Ryan Thomas—After Taking

Of the 263 condemnation cases filed by Sabal Trail, my law firm represented private property owners in 51 of those cases, most of whom owned rural real estate.[52] While representing property owners within the same project allows for certain economies of scale, such economies are lost when any one particular case proceeds to trial and then proceeds further on to an appeal. In such instance, although common legal arguments or theories apply to representing property owners collectively, one cannot lose sight of the specific facts and circumstances associated with the case at bar. These must be fully accounted for in the preparation of each individual owner's legal defense. For purposes of this case study, though, a more general overview of how these cases were resolved in sequence provides an understanding of the condemnation process as a whole, with a particular focus on the acquisition strategies or tactics used by the condemning authority, which, in this instance, is a private, licensee company that is authorized to use eminent domain under the NGA.

In pre-suit negotiations, Sabal Trail based all of its initial offers on the valuation opinions of three independent-fee appraisers each of whom had found there to be *"zero damages"* resulting from *proximity to the pipeline in and of itself* or based on *market fear*, *perception*, or *stigma*.[53] In so doing, Sabal Trail advocated that the measure of compensation that the company need pay include only a percentage fee payment for the land lying within its temporary and permanent easements and exclude payment of any severance damages to the owner's remaining land on either side of its taken lineal pipeline corridor. All three appraisers retained by Sabal Trail prepared damage studies using paired-sales analysis which purportedly supported their *"zero damages"* opinions.

Digging deeper, discovery in the case revealed that, although two of Sabal Trail's appraisers had more than twenty years of experience in natural gas pipeline projects, they had always prepared appraisals for the pipeline companies, always opining to *"zero damages*," never in their studies finding in the market data there to be any negative perception of pipelines which affected the price negotiated

52. *See* BRIGHAM PROPERTY RIGHTS LAW FIRM PLLC, http://www.propertyrights.com (last visited March 25, 2021) (Indeed, I am indebted to the efforts of all the attorneys in my law firm—Chris C. Bucalo, Esq., E. Scott Copeland, Esq., Trevor S. Hutson, Esq., and Brett S. Tensfeldt, Esq.).

53. Doc. 280 Declaration at 20–21, Sabal Trail Transmission, LLC v. 18.27 Acres in Levy County, Fla. (*Lee Thomas Trust*), No. 1:16-CV-093-MW-GRJ (N.D. Fla. Feb. 18, 2021).

between willing buyers and willing sellers. Indeed, it seemed that, in all of their verifications, these appraisers never found a single person who said anything negative about natural gas pipelines. Sabal Trail's third appraiser had a different story. Although having little experience with natural gas pipelines, he had past experience with petroleum pipelines. He, though, admitted that he would commence his work in these other pipeline projects on a *"first come, first served"* basis as between working for the condemnor or for property owners. Upon further investigation, his experience showed that his estimate of damages was almost negligible when retained by a condemnor pipeline company and quite substantial when retained by a condemnee private property owner.[54]

In all, Sabal Trail paid its three appraisers an extraordinary amount of over *$8.3 million* for their appraisal services for its project.[55] Notwithstanding this extraordinary expense for appraisal services, in the view of opposing counsel, all three of Sabal Trail's appraisers had one thing in common: flawed studies. Upon investigation and research, it seemed quite apparent that the quality of the data was so poor that their appraisal conclusions concerning severance damages lacked credibility—so much so that it was almost inconceivable that a jury would give such testimony any weight in determining the measure of compensation.[56]

Yet, any owner opposing the *"zero-damages"* estimate was required to run the gauntlet of litigation, starting with prolonged discovery and motion practice prior to trial. Only if the private property owner can outlast a condemning authority with unlimited resources during these stages of the litigation can the owner finally proceed to a jury trial and have a level playing field with the condemnor. This, then,

54. *Id.*

55. An opinion of *"zero damages"* allows the private licensee condemnor to start at the lowest point conceivable in each and every case. At the start of negotiations and, in most cases, continuing on to trial, these pipeline companies only offer to pay a percent of fee value for the encumbered area within their permanent and temporary easements, leaving out entirely any severance damages to the remainder. It is a pervasive and perpetual *"industry bias"* which occurs in almost every pipeline condemnation case across the nation. It is the billion-dollar private energy company using eminent domain against small and large private property owners alike and basically saying, *"just you go ahead and try to stop us."*

56. As a trial practitioner, there is a certain amount of skill and experience one needs to acquire so as to accurately size up the credibility, or believability, of the evidence supporting an expert valuation opinion. However, if the supporting predicate is deemed to be *"incredible"* or *"unbelievable,"* the next step is to ask by what means you can expose it for what it is or what it lacks.

is why the risk of *"unjust compensation"* is felt most by property owners in the peril of just *"getting there" and making it to a trial.*

Accordingly, one is able to see why the prior ruling on the controlling law issue was so significant to the property owners. Specifically, the order of Florida's district court held that "[b]ecause state substantive law governs the compensation measure in eminent domain condemnation proceedings brought by private parties against private property owners, Florida's 'full compensation' measure governs here."[57] (These district court opinions are well worth reading regarding the basis of the judicial decision on controlling law.) Consequently, as part of the constitutional measure under the state substantive law of Florida, the district courts ruled that Sabal Trail, as a private licensee condemning authority, was required to pay for the attorneys' fees and costs incurred by each of the respective private property owners.[58] As a result, the owners had both equal footing with Sabal Trail and staying power to defend their case.

Even so, it was over a little over a year after the district courts granted Sabal Trail *"immediate possession"* and following both discovery and exchange of appraisal reports that lawyers from my firm attended court-ordered mediations in each of the 51 cases. Settlements were hard to come by. Only 11 of the 51 cases were resolved in confidential mediated settlements.[59] Another 5 cases were resolved after continued negotiations in the several months which followed. The balance of 35 cases trudged along in litigation, the wheels of justice "turning slowly but grinding exceedingly fine."[60] For most owners, except those with more considerable means, there would have been no way to stay in the fight over the measure of compensation unless the condemning authority was obligated to pay the owner's attorneys' fees and costs.

Following impasse at mediation, Sabal Trail filed *Daubert* motions and a considerable array of additional motions *in limine* in

57. *See* Sabal Trail Transmission, LLC v. Real Estate, No. 1:16-CV-063-MW-GRJ, 2017 U.S. Dist. LEXIS 99370, at *20 (N.D. Fla. June 27, 2017).

58. Dade County v. Brigham, 47 So. 2d 602, 604 (Fla. 1950); Joseph B. Doerr Trust v. Cent. Fla. Expressway Auth., 177 So. 3d 1209, 1216–17 (Fla. 2015).

59. By requiring the terms of settlement to remain, the condemnor, of course, is still able to track results, but leaves a trail without any blazes for other condemnees to follow. It is only those cases that proceed to trial where the factual details are subject to later public scrutiny or examination.

60. CHARLES DICKENS, BLEAK HOUSE, Issue One (March 1852).

each of the remaining cases. Both U.S. Northern and Middle District Courts considered the parties' briefing and oral arguments on all of these motions, made rulings, and set cases for separate jury trials. Such litigation consumed an additional two years before trial. During this same time, Sabal Trail successfully completed construction of its pipeline and began operations in June 2017.

Consistent with the rulings in both the U.S. Northern and Middle District Courts, the property owners' appraiser amended previously exchanged appraisal reports in all 35 remaining cases to comply with various rulings on admissible evidence. With the completion of motion practice, the cases were, at long last, ready for trial. In 2018, 3 cases of the remaining 35 cases proceeded to two jury trials, one in the U.S. Northern District and the other in the U.S. Middle District.[61] A summary of the jury trial outcomes from the Sabal Trail Natural Gas Pipeline Project appears below:

Sabal Trail Natural Gas Pipeline: Jury Trial Outcomes

CASE	INITIAL OFFER	CONDEMNOR APPRAISAL	OWNER APPRAISAL	VERDICT	OUTCOME % OWNER APPRAISAL X INITIAL OFFER
Sabal Trail v. Lee Thomas Trust	$59,700	$34,000	$777,566	$861,264	110% 14.4 x
Sabal Trail v. Ryan B. Thomas	$6,800	$5,100	$430,582	$463,439	107% 68.0 x
Sabal Trail v. Sunderman Groves, Inc.	$56,800	$56,800	$315,039	$309,500*	98% 5.4 x

61. *See Jury Panel Rejects Sabal Trial Transmission's Zero Damages*, CISION PRWEB (Nov. 16, 2018), https://www.prweb.com/releases/jury_panel_rejects_sabal_trail_transmissions_zero_damages/prweb15924440.htm; *Jury Sides with Property Owners in Eminent Domain Suit with Sabal Trail Pipeline*, CISION PRWEB (Mar. 20, 2018), https://www.prweb.com/releases/2018/03/prweb15330348.htm.

In each of the above cases, the amount in controversy was driven by Sabal Trail's appraisers nailing the issue of severance damages to the floor by having an opinion of *"zero damages"* resulting from *proximity to the pipeline in and of itself* or based on *market fear*, *perception*, or *stigma*.[62]

Now armed with the jury verdicts in 3 cases, the parties attended court-ordered settlement conferences before U.S. Magistrate judges in each of the 32 cases waiting for trial throughout 2018 and 2019. The parties were able to resolve another 30 cases in this fashion.[63] However, these conferences also proceeded in a slow march, case by case, one at a time. Of the final 2 cases that were not resolved in settlement conferences, Sabal Trail unilaterally filed stipulations to accept the owner's appraiser's estimate of value shortly before the start of trial.[64]

Parenthetically, the controlling law issue has been the subject of 5 separate appeals taken up by Sabal Trail before the U.S. Eleventh Circuit. My law firm, together with another law firm respected for its federal appellate practice,[65] represented the private property owners in all 5 appeals.

Earlier this year, the Eleventh Circuit upheld the verdicts and final judgments entered in all 3 cases which proceeded in the two jury trials, but dismissed all 5 appeals relating to the controlling law issue concerning whether state or federal substantive law controls the determination of the measure of compensation and the *entitlement* to attorneys' fees and costs because, without the district courts determining the *amount* of attorneys' fees and costs, the circuit court lacked jurisdiction.[66]

---

62. *See* Brigham, *supra* note 50. A full description of the competing valuation theories together with a summary of the testimony and evidence presented at trial was the subject of a previous article in *Brigham-Kanner Property Rights Journal.*

63. By stipulation, the terms of settlement in each of these settled cases remain *confidential* with two of the cases being resolved without waiver of Sabal Trail's right to appeal the issues relating to *entitlement* or *amount* of attorneys' fees and costs.

64. Sabal Trail, however, retained the right to appeal the issues relating to *entitlement* or *amount* of attorneys' fees and costs in these cases as well.

65. *See* TRUE NORTH LAW, http://truenorthlawgroup.com (last visited Mar. 25, 2021) (federal appellate practitioners Mark F. ("Thor") Hearne and Stephen S. Davis).

66. *See* Sabal Trail Transmission, LLC v. 18.27 Acres of Land in Levy County, Fla. (*Thomas Trust*) and Sabal Trail Transmission, LLC v. 2.468 Acres of Land in Levy County, Fla. (*Ryan Thomas*), 2020 U.S. App. LEXIS 24348 (11th Cir. August 3, 2020); *see also* Sabal Trail Transmission, LLC v. 3.921 Acres of Land (*Sunderman Groves, Inc.*), 947 F.3d 1362 (11th Cir. 2020).

The 5 cases are yet pending on remand before Florida's district courts for a determination of the *amount* of attorneys' fees and costs incurred at both the district trial court and circuit appellate court levels. It is anticipated that Sabal Trail will file an appeal or appeals on the controlling law issue,[67] once having final orders on both the *entitlement* and *amount* of attorneys' fees and costs.

The chief point I wish to make regarding my first case study is this:

> **When determining the measure of compensation for the taking of private property for public use through an adversarial system of justice, the most practical and effective means by which to attenuate the risk of unjust compensation is to require that the condemnor pay the attorneys' fees and costs of the private property owner.**

While it is by no means perfect or without error, the adversarial system of justice—particularly in jury trial proceedings—is the most effectual *"check and balance"* on the failings in our human nature that beset all human endeavor, even the judicial system itself. Yet, if private property owners are neither represented by legal counsel nor supplied with the reasonable and necessary means to retain expert witnesses, the risk of unjust compensation is, for all practical purposes, without meaningful *"check or balance."*

Consider these questions which my first case study raises:

- *What comes of authorizing a billion-dollar private licensee company to exercise the eminent domain power where its decision-making is understandably motivated primarily by seeking its own profit as a private company which is far removed from the principal of social contract that exists between the government and those who are governed?*

- *How else could it have been that the private property owners whose property was taken for the new pipeline would have been able to obtain a just or fair measure of compensation?*

---

67. Significantly, during Sabal Trail's appeals to the Eleventh Circuit, the Third Circuit has now held that state law would supply the federal rule as to the measure of compensation under the NGA in its decision in Tennessee Gas Pipeline Co., LLC v. Permanent Easement for 7.053 Acres, 931 F.3d 237 at 241 (3d Cir. 2019).

- *What means would these property owners have to recognize the mixed questions of law and fact upon which the measure of compensation is grounded if not represented by legal counsel and reimbursed for the reasonable and necessary costs incurred in retaining expert witnesses?*

Far from hypothetical, the 51 cases I have described all concern real people owning real property. Nothing is made up. In at least three instances, cases proceeded to jury trials wherein the court had to determine what was admissible evidence prior to the parties presenting testimony and evidence for the jurors to consider and deliberate upon to reach their collective determination of the measure of compensation.

Jury verdicts were rendered. Final judgments were entered, appealed, and affirmed. Sabal Trail's initial offers of $12,000, $6,800, and $56,800, respectively, are held for comparison to corresponding jury verdicts of $861,254, $463,469, and $309,500.

Again, considering all that has been said, the real crucible was the *"getting there"* which required the private owners to run through the gauntlet of litigation before being able to finally present their valuation cases to jurors who decisively rejected Sabal Trail's contention of *"zero damages."* As indicated before, stepping into the kitchen, one is able to see exactly how the meal was made and what came of it once served at the table.

- *But what if the state substantive law of Florida had not provided these private property owners with an "equal footing" to contest the unjust estimate of compensation pressed upon them by the pipeline company?*

- *What if the federal courts had not ruled that the owners' attorneys' fees and costs would be paid by Sabal Trail?*

  (Answer: Forced taking and forced (unjust) compensation.)

In representing owners over the past five years in these Sabal Trail cases, I am once more convinced that requiring the condemning authority exercising the power of eminent domain to pay for the reasonable and necessary attorneys' fees and costs incurred by the

property owner makes all the difference. Without same being included in the measure of compensation, these owners would not have been able to stand against the private licensee condemnor and, because of that, would have been forced to accept an amount less than the full and just measure of compensation.

C. Case Study #2: Wonderwood Connector Project

The second of my case studies happened some time ago but examples a frequently occurring fact pattern when eminent domain is used in road widening projects. It involves a road expansion project which connected and widened several neighborhood local roads to create a new evacuation route between communities located on Florida's Atlantic Coast, including the Mayport Naval Station, and Interstate 95.

In 2006 and 2007, my law firm and I represented more than 20 single-family homeowners in partial takings cases for the Wonderwood Connector Project in Jacksonville, Florida. Many of the homes were located on beautifully canopied Ft. Caroline Road, a 2-lane road situated along the St. Johns River, which prior to the project was voted the third prettiest street in Jacksonville.

The Jacksonville Transportation Authority ("JTA") took the homeowners' front yards to construct a new 4-lane, major arterial roadway. The project's construction completely removed the canopy trees on either side of the roadway and resulted in a change of grade in the new road by as much as 8 feet.[68]

JTA's perception of value was driven to a large extent by JTA's mistaken legal interpretation over what is commonly known as "the general rule of severance damages." The rule is prevalent in federal and the majority of state jurisdictions. It holds that an owner is generally entitled to such damages to the remainder as are attributable to the use or activity on the land which is taken from the individual owner and not entitled to such consequential damages from activity occurring on land which is taken from others.[69] However,

---

68. *See* Order Taxing Costs at 1–6, Jacksonville Transp. Auth. v. McEldowney et al., Case No. 02-02083-CA (4th Judicial Circuit, Fla. Dec. 28, 2007).

69. Lee County v. Exchange Nat'l Bank, 417 So. 2d 268 (Fla. 2d DCA 1982), *review denied*, 426 So. 2d 25 (Fla. 1983) (applying the general rule of severance damages).

the rule is subject to a frequent exception, illustrated best by takings for road widening projects, which authorizes an award for damages to the remainder "where the use of the land taken constitutes an *integral* and *inseparable* part of a single use to which the land taken and other adjoining land is put."[70]

JTA's initial offers were only a few thousand dollars in damages for the taking each owner's front yard. The offers recognized little or no severance damages to the residential homes. After all, JTA was only seeking to purchase the front yard, and not the home, so a few thousand dollars to JTA seemed to be a fair price.[71]

The owners, however, considered the impact of expanding the road, removing the tree canopy, and elevating all road structure 8 feet above existing grade to completely change the character of the neighborhood. For the owners, the thought of going out to get the daily mail and seeing a 4-lane highway instead of the majestic oaks was devastating.[72] More than that, what would that do to the value of their entire residential property? And, worst of all, none of the owners could say, *"No, thank you!"*

Practically speaking, if applying the general rule, JTA's offers only compensated for the damages attributable to the use of the permanent drainage easement for a lineal trench in the home's front yard running parallel to the newly expanded road facility. By contrast, if applying the exception, the homeowner is entitled to damages attributable to the single use of the project, which includes all of its component parts: the expansion from two to four lanes, the substantial change in grade to 8 feet above the elevation of adjoining land, and the aesthetic loss related to the removal of the tree canopy on either side of the roadway. Instead of the appraiser solely considering the loss of use of a small portion of the front yard, the appraiser considers the entire change of character in the neighborhood, recognizing that while the home itself hasn't moved, everything about its location has changed.

---

70. *Id.* at 169–271; *see also* Taylor v. State, 701 So. 2d 610 (Fla. 2d 1997) (applying the exception to the general rule of severance damages).

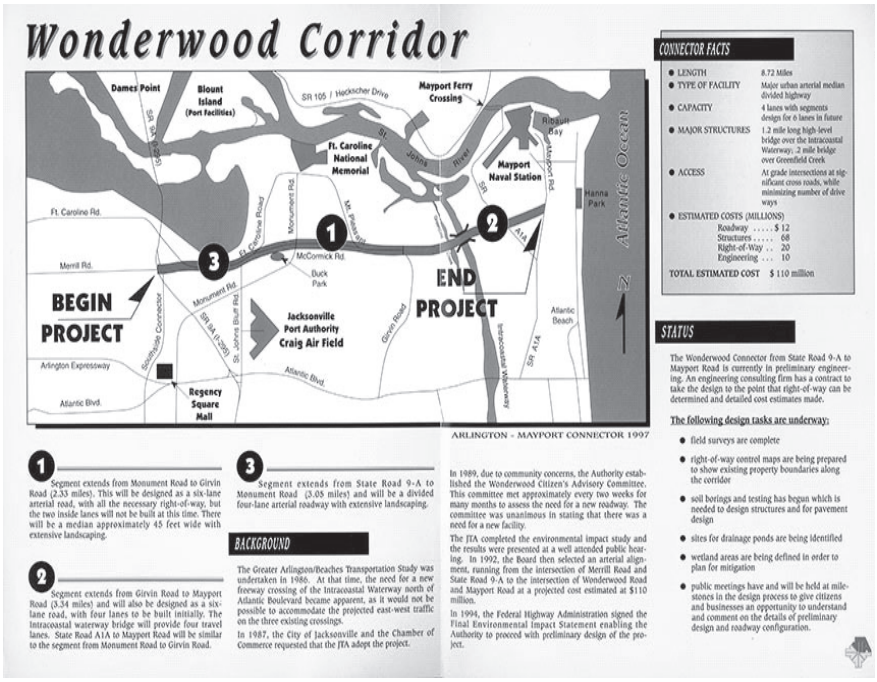
71. *See* Order Taxing Costs, *supra* note 68, at 1–6.

72. *See* Andrew P. Brigham & J. "Jack" Sperber, *Identifying the Key Differences in Your Case*, AMERICAN LAW INSTITUTE, Jan. 26–27, 2012 (PowerPoint Presentation, ALI–ABA Condemnation 101 Course of Study).

Without legal counsel advocating for the homeowners, who would know or appreciate the significant difference in compensation between the rule and the exception when receiving the government's initial offer?

Once again, as part of my second case study, I am including some of the trial exhibits depicting the subject property, the area of taking, as well as photographs of the *"before"* and *"after"* conditions. Photographs, such as these, often provide the fact-finder the most clear understanding of what is going on with respect to the exercise of eminent domain.

Figure 10. Wonderwood Connector[73]



73. Wonderwood Corridor Project Map/Images attributed to the Jacksonville Transportation Authority ("JTA"); *see also* JACKSONVILLE TRANSP. AUTH. (2007), http://www.jtafla.com.

Figure 11. Fort Caroline Road—Before Taking

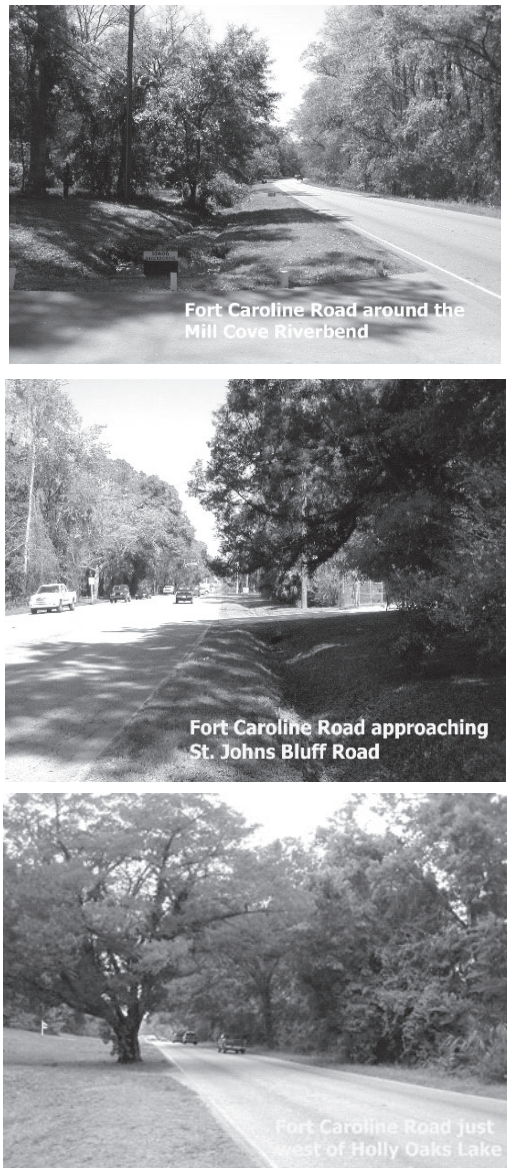


Figure 12. Wonderwood Connector—After Taking

Figure 13. Glaser—Before Taking

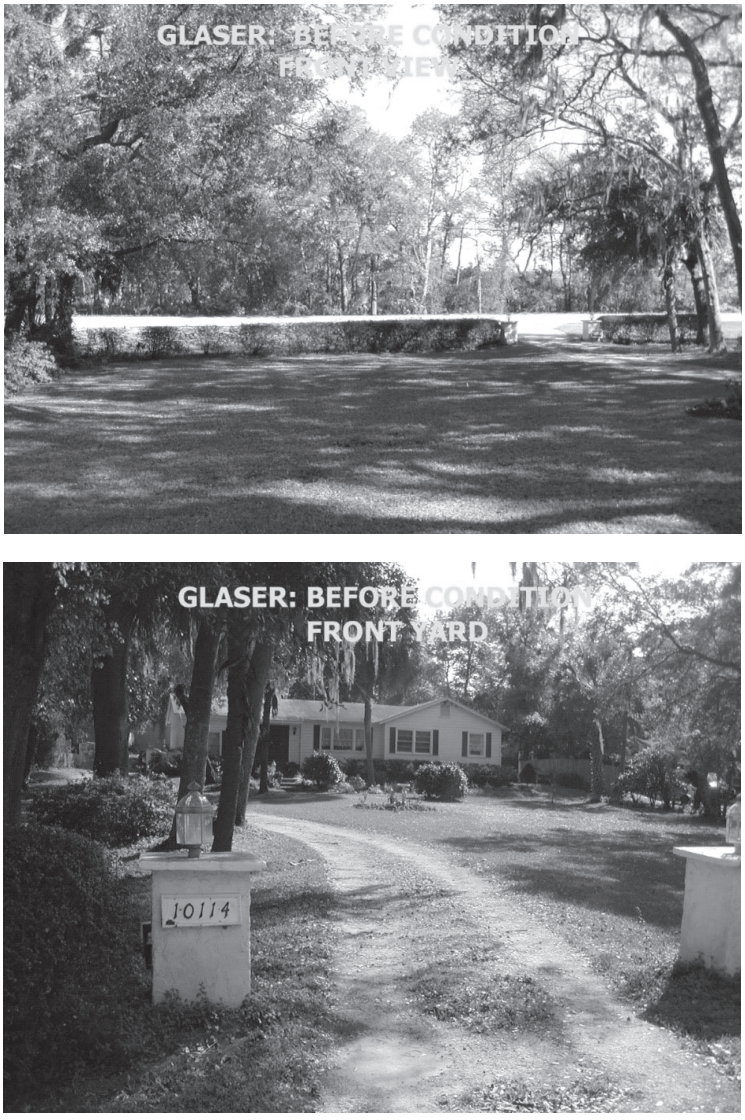
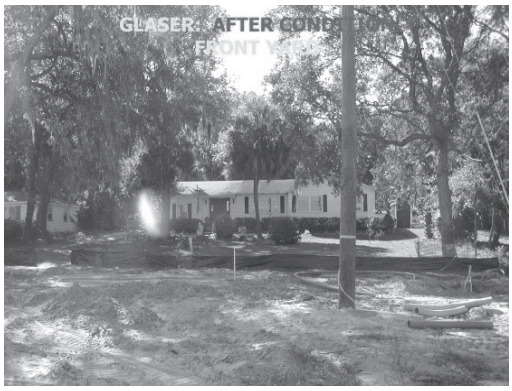


Figure 14. Glaser—After Taking



Because homeowners were not able to successfully settle with JTA, the dispute over fair market value *"before"* and *"after"* the taking had to be decided by jury trials so the storyline continues.

Before trial, JTA retained a second appraiser and updated its appraisal estimate so as to value the measure of compensation applying the exception instead of the general rule. While nearly tripling its initial offers, JTA's appraisals were still flawed in their analysis of the market data. JTA's appraiser used a paired-sales analysis of impacted and non-impacted sale comparisons from which he estimated severance damages. In some instances, the appraiser utilized pairings with impacted properties which he considered to be *"after"* sales because the transaction occurred subsequent to the seller receiving compensation from JTA and where the seller and buyer had some knowledge of the project and the taking because of receiving JTA's plans. However, such knowledge was limited, because the sale occurred before construction actually commenced and before the project was actually completed to see the removal of the tree-canopy and the increased elevation of the road grade.

It was only in the context of a jury trial where the homeowners' appraiser could explain that he, too, utilized a paired-sales analysis, but that his impacted properties were true *"after"* sales, located upon earlier phases of the project, where construction was already completed at the time of transaction and the new road infrastructure was in place. He characterized JTA's impacted properties as neither being true *"before"* nor *"after"* sales, but just kind of somewhere *"in between."* While construction plans may have been available, true knowledge of the impacts of the project awaited its actual completed construction. The jury was persuaded that such was the case and awarded damages recognizing a loss in both the residential land and improvements reflecting severance damages between 25% to 50% of homes value which ranged in value between $180,000 to $280,000 before the taking. After the project was completed, most of the homes along the new road transitioned from owner-occupied to rentals.

A summary of the jury trial outcomes from the Wonderwood Connector Project appears on the following page.

JTA Wonderwood Connector Project: Jury Trial Outcomes

CASE	INITIAL OFFER	CONDEMNOR APPRAISAL	OWNER APPRAISAL	VERDICT	OUTCOME % OWNER APPRAISAL X INITIAL OFFER
JTA v. Glaser Steve & Sheila Glaser	$14,600	$55,500	$101,600	$107,040 + $32,776 statutory interest	105% 7.3 x
JTA v. Newton Jack & Beverly Newton	$10,175	$43,800	$93,150	$98,070 + $31,165 statutory interest	105% 9.6 x
JTA v. Portwood Lonnie & Johnnie Portwood	$9,225	$54,950	$107,240	$107,240 + 34,573 statutory interest	100% 11.6 x
JTA v. Santoni Joe Santoni	$1,900	$1,400	$49,000	$40,000 + $9,763 statutory interest	100% 25.8 x
JTA v. Brizendine Glenn Brizendine	$12,200	$33,100	$138,600	$70,000 + 16,431 statutory interest	50% 5.7 x
JTA v. Jenkins Thelma Jenkins	$14,500	$47,050	$76,700	$76,700 + $15,937 statutory interest	100% 5.3 x

Considering all of the foregoing, my case study concludes with the following questions:

- *Again, without legal counsel advocating for the homeowners, who would know or appreciate the significant difference in compensation when receiving the government's updated appraisals?*

- *If the takings for this project had occurred in a jurisdiction outside of Florida, one in which attorneys' fees and costs were not included in the measure of compensation, would these homeowners have retained legal counsel upon the initial offer of the government?*

- *Indeed, in jurisdictions that do not include the award of attorneys' fees and costs as part of the measure of compensation, is it more likely that such private property owners are undercompensated, perhaps, even without their ever knowing it?*

IV. CONSIDERING COUNTEREXAMPLES: COMMENT ON JONATHAN BRIGHTBILL'S PRESENTATION

Jonathan D. Brightbill completed our panel discussion in fine fashion. If my presentation was at all compelling, his presentation counterpunched with a more cautionary narrative. In response to our topic of the potential *"unjust compensation,"* he brought to the forefront two examples of cases involving the U.S. Department of Justice that show, in some instances, it is the government that needs protection against, perhaps, an overreaching party.

As a practitioner of some tenure, I readily affirm that the scales of *"relational justice"* require both condemnor and condemnee to strike the balance in their opposing contentions over the measure of compensation. There is evil in either extreme, whether of the government lowballing or the property owner overreaching. The barometric pressure that corresponds to whether the exercise of the eminent domain power is, indeed, legitimate may crush an extreme position taken by either party. I can tell you that the weight of such air increases all the more if such positions are brought into the courtroom.

Notwithstanding the above, I believe Mr. Brightbill's two examples continue to afford me the opportunity to emphasize what I have said about including the owner's attorneys' fees and costs in the measure of compensation as a means to resolve concern over potential *"undercompensation"* or the risk of *"unjust compensation."*

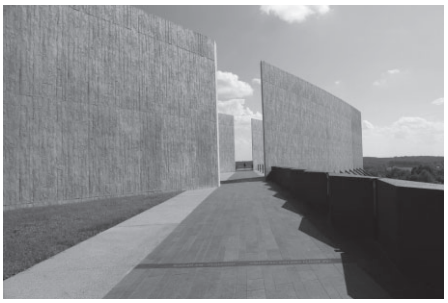
A. Case Study #1: Flight 93 National Memorial

Mr. Brightbill presented on the United States' taking of a reclaimed strip mine in Pennsylvania to be part of the Flight 93 National Memorial following the terrorist attacks of September 11, 2001.[74]

74. United States v. 275.81 Acres of Land, 2013 U.S. Dist. LEXIS 34416, at *2 (Order on Evidentiary Motions) and 2014 U.S. Dist. LEXIS 40307, at *22 (Order Adopting Report of Commission).

The Flight 93 National Memorial is a stirring memorial to ordinary citizens who bravely fought against terrorist hijackers who overtook United Airlines Flight 93.

Figure 15. Flight 93 National Memorial[75]



The memorial itself is a 400-acre bowl-shaped area with 1,800 acres surrounding it as a buffer.[76] The original six acres that included the crash site were privately donated.[77] Much of the land thereafter was acquired privately through the Families of Flight 93 organization

75. Photographs below are attributed in the order in which they appear as follows: *Photo Gallery*, FRIENDS OF FLIGHT 93 NAT'L MEM'L, https://www.flight93friends.org/#/gallery/flight-93-national-memorial (last visited Sept. 10, 2021); *Flight 93 National Memorial: Flight Path Walkway and Main Walls of the Visitor Center*, NAT'L PARK SERV., https://www.nps.gov/media/photo/gallery-item.htm?pg=4001156&id=D220FC95-155D-451F-67B560669C072F36&gid=9BFED77A-155D-451F-67F13F033F550534 (last visited Sept. 20, 2021).

76. *See Flight 93 National Memorial: Design Competition*, WIKIPEDIA, https://en.wikipedia.org/wiki/Flight_93_National_Memorial#cite_ref-phl-20060910_13-0 (last visited Sept. 10, 2021).

77. *See* Amy Worden, *Flight 93 memorial gets momentum; The purchase of land near Shanksville, Pa., began with "a first small step" of three acres*, PHILA. INQUIRER, Sept.10, 2006.

from 2006 to 2008.[78] Approximately 1,000 acres of the 2,200 is held by others but protected through private partnership agreements.[79]

The United States filed a complaint in 2009 for the condemnation of the fee simple estate in the one remaining 275.81-acre parcel owned by Svonavec, Inc., whose principals included the family's spokesman Michael Svonavec.[80]

Local and national news media reported on the acquisition process from its beginning.[81] Apparently, Mr. Svonavec, who operated a coal mining and rock quarry operation on a larger parcel of which the 275.82 acres was a part, felt pressure from the court of public opinion with respect to the acquisition of the property, which had been owned by his family since 1961 and upon which he operated the family's business.[82] His brother, Patrick Svonavec, represented the family as one of its lawyers.[83] From the beginning, it was reported that the Svonavecs informed the Families of Flight 93 that they would only negotiate with the National Park Service.[84]

The reported decisions of the Pennsylvania District Court provides insight into how the measure of compensation paid to the Svonavec family was determined.[85] The appraiser retained by the United States determined the highest and best use of the property to be for a variety of uses, such as open space for cropland, grazing, hunting and recreation, farmettes, and large-tract home sites.[86] While considering a private memorial among the uses to which the property

---

78. *See Flight 93 National Memorial: Design Competition*, *supra* note 76.

79. *See* NAT'L PARK SERV., U.S. DEP'T OF INTERIOR, FLIGHT 93 MEMORIAL FINAL GENERAL MANAGEMENT PLAN/ENVIRONMENTAL IMPACT STATEMENT (June 2007); *see also* FRIENDS OF FLIGHT 93 NAT'L MEM'L, https://www.flight93friends.org (last visited Sept. 10, 2021); *see also State Game Lands 93*, THE CONSERVATION FUND, https://www.conservationfund.org/projects/state-game-lands-93 (last visited Sept. 10, 2021).

80. United States v. 275.81 Acres of Land, 2014 U.S. Dist. LEXIS 40307, at *1–2 (Order Adopting Report of Commission).

81. *See, e.g.*, Kirk Swauger, *'Difficult' week for Flight 93 landowner*, THE TRIBUNE-DEMOCRAT (June 9, 2007), https://www.tribdem.com/news/local_news/difficult-week-for-flight-93-land =owner/article_7810e2a3-02eb-5707-a7cf-6fef996e8d77.html.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. United States v. 275.81 Acres of Land, 2013 U.S. Dist. LEXIS 34416, at *9–10 (Order on Evidentiary Motions).

could be put, he concluded that there was no support for such use being financially feasible.[87] His estimate of value was $600,000.[88]

The valuation expert retained by the Svonavec family, a nationally renowned real estate appraiser and expert witness, determined the highest and best use to be a private memorial and related visitor center.[89] To support his conclusion, he studied revenues generated at 20 locations around the world, including Gettysburg, the Johnstown Flood Museum, and the site of the 1995 domestic-terrorist bombing at an Oklahoma City federal building.[90] Other sites included Memphis's Graceland; and the National Civil Rights Museum, the site of Martin Luther King Jr.'s assassination; the Dallas Book Depository, from where the shot that killed President Kennedy in 1963 is said to have been fired; the USS Arizona at Pearl Harbor, Hawaii; and Hiroshima Peace Memorial Museum in Japan.[91] Apparently to tie value back to the local real estate market, the appraiser also considered sales of a number of large parcels of land across Pennsylvania intended to house shopping centers, a hospital, green space, and a landfill.[92] All sold for amounts comparable to $1.94 per square foot.[93] His estimate of value was $23 million.[94]

In pretrial rulings, the district court found that the opposing *Daubert* criticisms against the appraisal opinions of both experts went to the weight, not the admissibility, of their testimony.[95] The highest and best uses considered by the United States' appraiser were not found to be speculative simply because he did not agree with the Svonavec family's appraiser or considered use as a private memorial to not be financially feasible.[96] Likewise, the highest and best use as a private memorial and visitors' center opined by the Svonavec family's appraiser was found not to be speculative as well.[97] Essentially,

87. *Id.*

88. *Id.*

89. *Id.* at *15–*122 (Order on Evidentiary Motions).

90. *See* Jason Cato, *Owner of property where Flight 93 crashed sues government over land value*, THE TRIBUNE-DEMOCRAT (Oct. 8, 2013), https://archive.triblive.com/news/owner-of-property-where-flight-93-crashed-sues-government-over-land-value/.

91. *Id.*

92. *Id.*

93. *Id.*

94. *See* United States v. 275.81 Acres of Land, 2013 U.S. Dist. LEXIS 34416, at *9–10 (Order on Evidentiary Motions).

95. *Id.* at *14–15, *19–20.

96. *Id.*

97. *Id.*

the district court allowed both the government and the property owner to have their day and make their respective case to the fact-finder.

The case was tried before an appointed three-member commission as the fact-finder but was administered over by the district judge with respect to all evidentiary rulings.[98] The commission determined that just compensation for the fee simple estate of the 275.81 acres, including oil and gas rights and eight acres of coal, to be $1,535,000. In addressing the objections of the parties following publication of the commission's report, the district court found that the commission had considered a museum/visitor's center as a potential use, but rejected it because, unlike a private memorial only, there was not sufficient evidence presented to conclude the use of a museum/visitor's center was financially feasible.[99] The commission found that credible evidence was lacking to show and evaluate the costs, expenses, and risks associated with constructing and operating a private museum/visitor's center on the site.[100]

The district judge affirmed rulings made during the proceedings with respect to excluding admission of the National Park Service's projected annual visitation number of 230,000 under application of the *"scope of the project rule."*[101] Such a projection was not generic to the market but was projected solely for a fully developed public museum and visitor's center to be operated by the National Park Service.[102] The district judge also found the owner's reliance on *United States v. 6.45 Acres of Land* ("*the Gettysburg Tower case*"),[103] to be misplaced because the private memorial in that case was already developed with a privately owned and operated 307-foot observation tower, gift shop, restaurant and parking lot.[104]

In determining the measure of compensation, the commission did, in fact, base its valuation of the property considering its highest and best use to be a private, not public, memorial applying a scaled-down income approach.[105] In this sense, the commission rejected the

98. United States v. 275.81 Acres of Land, 2014 U.S. Dist. LEXIS 40307, n.2 at *17 (Order Adopting Report of Commission).

99. *Id.* at *7–15.

100. *Id.*

101. *Id.*

102. *Id.*

103. 409 F.3d 139 (3d Cir. 2005).

104. United States v. 275.81 Acres of Land, 2014 U.S. Dist. LEXIS 40307 at *7–15, 17 (Order Adopting Report of Commission).

105. *Id.*

valuation theories of both parties in their original form.[106] The commission did not limit its consideration to only the highest and best uses testified to by the United States' appraiser nor exclude consideration of an income-approach tied to a private museum yet to be developed.[107] The commission, however, was in no way prepared to go the distance suggested by the Svonavec family's appraiser, finding that his opinion lacked credible support for the design of the museum, the suitability of the site and market, and the contents of the museum.[108] The district court further commented that the commission simply could not find the appraiser's projected numbers to be plausible.[109]

In light of the foregoing, the district court fully adopted the commission's report and determined the just compensation measure to be $1,535,000.[110]

Now, the pivotal question to be asked is this:

> *"Could anyone disagree with the judicial system's determination of the measure of compensation in this matter?"*

B. Case Study #2: Groom Mine: Area 51 Overlook

Mr. Brightbill likewise presented on the United States' taking of patented mining claims totaling 87.49 acres known as the Groom Mine for the expansion of the Nevada Test and Training Range ("NTTR") at Nellis Air Force Base.[111]

The takings saga associated with the Groom Mine has also been the subject of local and national media reports.[112] It is difficult to

---

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. United States v. 275.81 Acres of Land, 2014 U.S. Dist. LEXIS 40307 at *7–15, 17 (Order Adopting Report of Commission); *see also* David Hurst, *Judge agrees with appraised value of Flight 93 crash site*, THE TRIBUNE-DEMOCRAT (Aug. 7, 2014), https://www.times-news.com/news/local_news/judge-agrees-with-appraised-value-of-flight-93-crash-site/article_42cac809-1f92-522c-b316-531d0646ba6f.html.

111. United States v. 400 Acres of Land, 2017 U.S. Dist. LEXIS 161894 (Order on Plaintiff's Motions to Exclude and Defendants' Motions to Preserve Issues for Jury); 2019 U.S. Dist. LEXIS 148130 (Order on Evidentiary Motions); and 2020 U.S. Dist. LEXIS 156193 (Order Adopting Commissioners' Report).

112. *See, e.g.*, Tyler Rogoway, *The Unlikely Struggle of the Family Whose Neighbor Is Area 51*, JALOPNIK (Nov. 9, 2015), https://foxtrotalpha.jalopnik.com/the-unlikely-struggle-of-the-fam

even imagine a case with a more colorful background. The test range is undoubtably better known in modern folklore as *"The Box," "The Ranch," "Dreamland,"* or, by the name of its world-famous atomic test site, *"Area 51."*[113]

For much of the first half of the twentieth century, the Sheahan family operated the Groom Mine as a successful mining operation. At the start of World War II, however, the federal government surveyed the entire area and began military training operations which, by 1950, including atomic testing.[114] Since mining operations were all but impossible to continue, the Groom Mine turned into a part-time retreat for the Sheahan family.[115]

In 1984, the U.S. Air Force ("USAF") restricted public access to all lands surrounding Area 51.[116] At that time, a stipulation was made to the Sheahan family that the USAF "would have no authority to deny access to any employees or business visitors of the Sheahans," and "could only terminate the Sheahans' rights to Groom Mine by initiating condemnation proceedings or purchasing the property."[117]

Since that time, the Groom Mine has achieved notoriety for its unobstructed mountain-top view of the dried-up lake-bed of Area 51 that is six miles away.[118] After USAF's acquisition in the 1990s of Freedom Ridge, twelve miles away, the nearest overlook of the base is Tikaboo Peak, some twenty-six miles away.[119] The Groom Mine is now virtually an enclave of private property, an intruding island, deep within the boundaries of the military installation. In the intervening years, popular interest in Area 51 has ebbed and flowed based upon both made-up myth and actual history associated with the base.[120]

---

ily-whose-neighbor-is-a-1741346156; *see also* Glen Meek, *How the Storm Area 51 phenomenon could be an alien benefit to family that once owned the land*, THE NEV. INDEP. (Aug. 18, 2019), https://thenevadaindependent.com/article/storm-area-51-how-this-internet-phenomenon-could-bolster-the-case-of-a-nevada-family-fighting-the-government-over-land-adjacent-to-the-secret-base.

113. While it is obvious that Mr. Brightbill put the case forward as another exemplar in which the owner's valuation contention was overreaching, he should receive some credit for his restraint in not characterizing the owner's estimate for being *"out of this world."*

114. Rogoway, *supra* note 112.

115. *Id.*

116. *Id.*

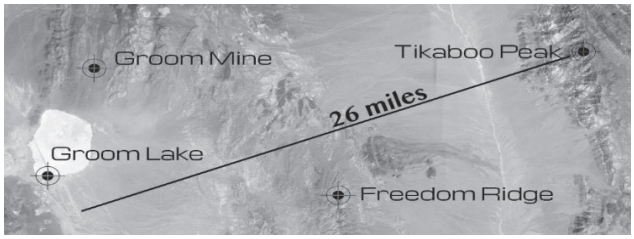
117. *Id.*

118. *Id.*

119. *Id.*

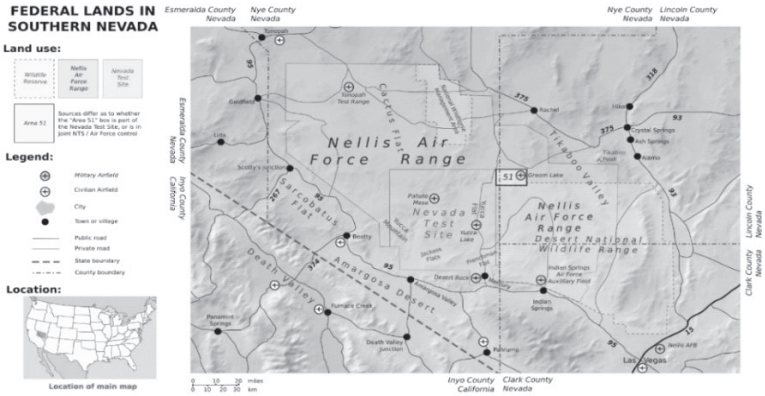
120. Although the mystique behind Area 51 is most often associated with rumors of the

Figure 16. Groom Mine Area 51 Overlook[121]



government secretly storing extraterrestrial artifacts, the base's long history of testing exotic military and aerospace technologies is highly regarded by military aircraft enthusiasts. The base has an impressive line-up of past aircraft testing including the U-2, A-12 Oxcart and SR -71 Blackbird, Tacit Blue, the F-117 Nighthawk, Boeing's Bird of Prey, and Stealth Black Hawk helicopters.

121. Photographs appearing below are attributed to the following sources: Rogoway, *supra* note 112, crediting the Sheehan family for various photographs; "Groom Lake" aerial photograph, *Groom Lake (salt flat)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Groom_Lake_(salt_flat) (last



In 2015, the United States initially offered $1.2 million to the Sheahan family and its twenty-two claimants. At some point, a final offer of $5.2 million followed. Without acceptance, the United States filed its complaint to condemn the patented mining claims totaling 87.49 acres owned by the Sheahan family on September 10, 2015.[122] When filing the action, as reflected in its declaration of taking, the United States lowered its valuation back to the appraised amount of $1.2 million.[123]

---

visited Sept. 10, 2021); *Federal Lands in Southern Nevada*, MAPSOF.NET, https://www.mapsof.net/nevada/federal-lands-in-southern-nevada (last visited Sept. 10, 2021); "Restricted Area No Trespassing" sign, *Area 51 Groom Lake*, ATLAS OBSCURA, https://www.atlasobscura.com/places/area-51 (last visited June 27, 2021).

122. United States v. 400 Acres of Land, 2017 U.S. Dist. LEXIS 161894, at *5–6 (Order on Plaintiff's Motions to Exclude and Defendants' Motions to Preserve Issues for Jury).

123. *Id.*

Anticipating that the Sheahans would contend their property to be of extraordinary value, in evidentiary motions before the Nevada District Court, the United States argued that the family should be precluded from valuing the property based upon a premium above the private marketplace because of either (a) the burden (or savings) the United States would be relieved of by taking the landowner's property or (b) because of its being adjacent to military facilities.[124]

The Nevada District Court ruled that, in the case of the former, a premium based upon the value to the government cannot be considered in determining the market value of the property; however, in the case of the latter, so long as demand is not driven by the need of the property by the government to complete its project, evidence in the marketplace that drives a premium may be properly considered, if independent of the government's project and instead premised upon the property's adjacency to a military facility.[125]

Stated otherwise, the Sheahan family was not foreclosed from showing value based upon a market premium due to property's accessibility and commanding vantage point of Area 51. Thus, as in the case before, the district court allowed both the government and the property owner to have their day and make their respective case to the fact-finder.

After nearly three additional years of litigation, it was apparent that the parties had completely divergent opinions of value. The case was tried in 2019 before an appointed three-member commission.[126] On one hand, the government presented appraisal testimony that was only a quarter of its initial appraisal in the case. On the other hand, the property owner presented appraisal testimony that pushed *"the outer limits."* The United States contended that the highest and best use of the Groom Mine was its existing use at the time of taking as rural residential, and that just compensation for the taking was $254,000.[127] The United States' appraiser opined that comparable substitute sales of rural recreational property in the area of the Groom Mine sold for between $1,668 per acre and

124. *Id.* at *17–23.

125. *Id.*

126. United States of America v. 400 Acres of Land, 2020 U.S. Dist. LEXIS 156193 (Order Adopting Commissioners' Report).

127. *Id.* at *40–41.

$10,000 per acre.[128] He concluded the market value on the date of value was $2,900/acre or $254,000 ($2900/acre x 87.49 = $253,721 rounded to $254,000).[129]

The Sheahan family contended that the highest and best use of the Groom Mine was tourist commercial—"a use where 250 people a day visit the property for a fee, with no capital improvements, drawing on the established market interest in, and demand to see Area 51 and drawing on the regional tourism hub of Las Vegas."[130] Based on his determination of highest and best use the Sheahan family contended the just compensation owed by the United States was $49,870,000.[131] The family's appraiser testified the Groom Mine had the potential for generating $41,062,500 in annual tourist revenue because it is the only private property in the world with a clear and unobstructed view of the Air Force operating base commonly referred to in popular culture as Area 51.[132] Because there were no other large acreage properties with tourist commercial highest and best use in Lincoln County or surrounding rural counties, the appraiser selected sales of tourist commercial properties in the Las Vegas metropolitan area to find sales with a similar highest and best use and potential to draw visitors similar in number to the Groom Mine.[133] He testified comparable tourist commercial properties in the Las Vegas metropolitan area would sell for between $125,320 per acre and $1,187,931 per acre.[134] After making adjustments to his selected comparable sales, he concluded the fair market value on date of taking was $570,000/acre for the patented acres or $49,870,000 ($570,000/acre x 87.49 = $49,870,000).[135]

The findings of the commission confirmed its view of the evidence. While finding that the Groom Mine was "the only private and legally accessible property in the world with a clear and unobstructed view of Area 51," the commission also found, from the directions given, that the Groom Mine was somewhat off the beaten path:

---

128. *Id.*
129. *Id.*
130. *Id.* at *41–43.
131. *Id.*
132. United States of America v. 400 Acres of Land, 2020 U.S. Dist. LEXIS 156193, at *41–43 (Order Adopting Commissioners' Report).
133. *Id.*
134. *Id.*
135. *Id.* at *40–41.

> approximately 150 road miles from Las Vegas, a drive of about 2.5 hours, with the last 27 miles off State Highway 375, 15 miles thereafter on a gravel road, one mile then to the NTTR checkpoint, eight miles on a paved road inside the NTTR, until, finally, a three-mile ascent on a narrow dirt road.[136]

The commission further noted that "the nearest town, Rachel, is about 52 miles away, with a population of 60, and no school, gas station, grocery store, or post office."[137] The only commercial establishment in Rachel, the commission noted, is "the Little A'Le'Inn, which was a small alien-themed restaurant and gift shop."[138]

Additionally, the commission found that for the sixty years preceding the taking, the Sheahan family had used the property for an occasional recreational retreat and had never developed any business plans for tourist use or charged anyone to visit the property.[139] Notwithstanding, the commission found that "Area 51 is a secret military base located on Groom Lake that had become the location widely believed in a segment of popular culture to be where UFOs or alien technology have been stored by the government and where alien technology is tested."[140] Moreover, the commission found that "it is believed in a segment of popular culture that in the 1950's a UFO crashed in Roswell, New Mexico, and those remains were transported to Area 51 for testing."[141]

Given all of the above findings, as it related to value, the commission found that the highest and best on the date of value was its existing rural residential use.[142] The commission found that "the owners did not present sufficient evidence to overcome the presumption that the property's existing use on the date of value was its highest and best use."[143] Although the Sheahan family did present evidence to the contrary, the commission determined that they did not meet their burden of showing by a preponderance of the evidence that there was market demand or the prospect of market demand

136. *Id.* at *49–54.
137. *Id.*
138. United States of America v. 400 Acres of Land, 2020 U.S. Dist. LEXIS 156193, at *49–54 (Order Adopting Commissioners' Report).
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at *105–08.
143. *Id.* at *60–83.

for their proposed large-scale tourist commercial use in the reasonably foreseeable future.[144] The commission particularly noted that the Sheahan family had not, in all of the years owning the property, applied to Lincoln County for a special use permit for any type of tourist operation.[145] The commission did not find the assumption that 91,250 people a year would come to the Groom Mine every year paying an entrance fee of $400 and an additional $50 for "knick-knacks," generating a revenue of $41.1 million (91,250 x $450 = $41,062,500) to be credible.[146]

To the contrary, the commission found that the United States' appraiser correctly concluded that the highest and best use of the Groom Mine on the date of value was rural recreational.[147] However, because the commission found that the United States' appraiser failed to give sufficient consideration to the unique one-of-a-kind nature of the Groom Mine, which would command a premium in the real estate market to account for its view of Area 51 and its historic use as a family-owned mining operation, the commission determined that such a premium would be above the highest price ($10,000/acre) shown in the comparable sales considered by the United States' appraiser.[148] Thus, the commission concluded just compensation for the taking was $12,500 per acre or $1,100,000 (87.49 x $12,500/acre = $1,093,625, rounded to $1,100,000).[149]

In light of the foregoing, the district court fully adopted the commission's report and determined the just compensation measure to be $1,100,000 for the patented mining claims totaling 87.49 acres and $104,000 for mineral rights (as separately agreed between the parties), for a total of $1,204,000.[150]

As before, the pivotal question remains:

> *"Could anyone disagree with the judicial system's determination of the measure of compensation in this matter?"*

144. United States of America v. 400 Acres of Land, 2020 U.S. Dist. LEXIS 156193, at *60–83 (Order Adopting Commissioners' Report).

145. *Id.*

146. *Id.*

147. *Id.* at *105–08.

148. *Id.*

149. *Id.*

150. United States of America v. 400 Acres of Land, 2020 U.S. Dist. LEXIS 156193, at *36 (Order Adopting Commissioners' Report).

C. Concluding Remarks

My own response to the pivotal questions asked after each of the two preceding case studies is that there would be near-universal agreement that the measure of compensation determined in each of the judicial proceedings presented was just or fair. So it is that our judicial system really does protect against the risk of *"unjust compensation,"* both for the condemnee and for the condemnor. Justice and fairness operate on two-way streets.

In regards to the Flight 93 National Memorial, apparently, no warning lights flashed concerning whether such an extraordinary value ($23 million) invites additional consideration as to whether too direct a line is being drawn between profit and national tragedy. And, in regards to the Groom Mine: Area 51 Overlook, even having the most intriguing fact pattern in the world (or even beyond it) is not enough to excuse having a credible predicate for value. The more extraordinary value ($41.1 million) requires the more extraordinary credible proof. As they say, comparable sales must truly be comparable.

> *And how is it then that Mr. Brightbill's two examples would detract from my contention that, as a means to address concerns over unfairness in compensation, an owner's attorneys' fees and costs be included in the measure of compensation?*

Overreaching rarely ever pays, not even for the lawyers. The attorneys representing the private property owners in both cases were most likely retained on a contingency or result-oriented basis, which is typical in jurisdictions where the condemnor is not obligated to pay the owner's attorneys' fees and costs. If the attorneys lose on an overreaching valuation theory advanced on behalf of their clients, then they, too, get the *"just compensation"* they have earned—or, to employ one last kitchen analogy, receive their *"just desserts."*

From my own experience, I would attest that overreaching by an owner is not commonplace. It is ill-advised for a practitioner representing a property owner to build up false expectations. If the house of cards falls over, the lawyer, of course, is to blame. Suffice it to say, it is not a solid foundation upon which to build a law practice. It is more typically the case that the owner is having to respond to an extremely low offer made by the condemning authority and is without

sufficient means to risk the time and the expense necessary to *"check and balance"* the use of the eminent domain power. In most instances, it is likely that owners are not knowledgeable about the mixed questions of law and fact that shape the measure of compensation or seek legal counsel unless the case is substantial and they have the means to engage in litigation against a party that quintessentially has both the time and resources to engage in tactics of delay or attrition ("the act of wearing or grinding down by friction").

In light of this, it is the small property or business owner that is more at risk of receiving *"unjust compensation"*—but they rarely realize it is happening to them, and we likely will never hear about it. It is only those that have the knowledge and experience in these matters that see this for what it is: it is unjust.

V. INCLUDING AN OWNER'S ATTORNEYS' FEES AND COSTS IN THE MEASURE OF COMPENSATION: AN OVERVIEW OF FLORIDA'S FULL COMPENSATION MEASURE

If the foregoing serves as a clarion call for property rights reform, some may be left wondering: What does the landscape look like when the owner's attorneys' fees and costs are included in the measure of compensation as a means to address concerns over unfairness in compensation? Again, I will turn to Florida which includes the owner's attorneys' fees and costs as part of the measure of compensation for the condemnor to pay under the state's substantive law.[151]

Note, at the same time that the measure of compensation has included payment of the owner's attorneys' fees and costs when defending eminent domain proceedings, public infrastructure projects have not been impeded in a state that has been among the largest demographic giants in the country. Florida has ranked in the

151. Although within a minority of jurisdictions that include payment of the owner's attorneys' fees and costs as part of the measure of compensation, the state of Florida is not alone. Shortly before the publication of this Article, the Supreme Court of Louisiana decided *Bayou Bridge Pipeline, LLC v. 38.00 Acres, More or Less, Located in St Martin Parish et al.*, 2021 La. LEXIS 1140* (La. May 13, 2021) in which the court awarded attorneys' fees and costs to landowners in a pipeline company's condemnation action pursuant to Const. Art. I, § IV of the Louisiana Constitution. The Court reasoned that, because the Louisiana Constitution requires that landowners be compensated "to the full extent" of their loss, which "shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation," attorneys' fees and litigation costs may be awarded separate from any statutory authority explicitly authorizing such an award by virtue of the constitutional compensation requirement.

top 10 since 1960, holding better than a fourth-place ranking since the 1990 U.S. Census, and recently overtaking New York in 2014 for its current third-place ranking, which it still holds today.[152]

In Florida, the condemnor's obligation to pay for the owner's attorneys' fees and costs is said to spring forth from the state's constitutional guarantee of *"full compensation."* What follows below is a brief overview of the state's constitution, statutes, and relevant case law regarding the *entitlement* and *amount* of attorneys' fees and costs.

Article X, Section 6(a) of the Florida Constitution provides:

> No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.[153]

In 1950, the Florida Supreme Court in *Dade County v. Brigham*,[154] held that payment of the owner's attorneys' fees and costs is part of the constitutional measure of Florida's *"full compensation."* The high court of the state reasoned that

> [s]ince the owner of private property sought to be condemned is forced into court by one to whom he owes no obligation, it cannot be said that he has received "just compensation" for his property if he is compelled to pay out of his own pocket the expenses of establishing the fair value of the property, which expenses in some cases could conceivably exceed such value.[155]

The Court further discerned that the private property owners should be compensated for the reasonable and necessary costs that had *"use value"* in meeting the condemning authority with an *"equal footing."*[156]

To explain its reasoning, the state's high court quoted the trial judge in the case that had included the following in his ruling below:

> Freedom to own and hold property is a valued and guarded right under our government. Full compensation is guaranteed by the

152. *See* Kelvin Pollard, *Florida Poised to Pass New York as Nation's 3rd Most-Populous State*, PRB (Dec. 5, 2014), https://www.prb.org/resources/florida-poised-to-pass-new-york-as-nations-3rd-most-populous-state/; *U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ (last visited Sept. 28, 2021).

153. Fla. Const. art. X, § 6(a).

154. 47 So. 2d 602 (Fla. 1950).

155. *Id.* at 604–05.

156. *Id.*

> Constitution to those whose property is divested from them by eminent domain. The theory and purpose of that guaranty is that the owner shall be made whole so far as possible and practicable.
>
> The courts should not be blind to the realities of the condemnation process. Any excuse which the Court might have for disclaiming knowledge of just what goes on, is entirely removed by the fact that the Court itself views the trial and proceedings and has personal knowledge of all such matters. The Court sees that the County is armed with engineering testimony, engineering data, charts and drawings prepared by expert draftsmen.
>
> The court sees that the County produces appraisers, expert witnesses relating to value, usually more than one in number, whose elaborate statement of their qualifications, training, experience and clientele indicate a painstaking and elaborate appraisal by them calling for an expenditure by the County of fees to such experts and appraisers which are commensurate therewith, and customary for like services of such persons. A lay defendant whose property is to be taken is called upon to defend against such preparation and expert testimony of the County. It is unreasonable to say that such a defendant must suffer a disadvantage of being unable to meet this array of able, expert evidence, unless he shall pay for the same out of his own pocket.[157]

Capturing the ethos of a taking, the Florida Supreme Court further cited to a case from New York, *In re Water Supply in City of New York*,[158] within its opinion in *Dade County v. Brigham* that aptly described the plight of a private property owner who falls subject to the exercise of eminent domain:

> He does not want to sell. The property is taken from him through the exertion of the high powers of the statute, and the spirit of the Constitution clearly requires that he shall not be thus compelled to part with what belongs to him without the payment, not alone of the abstract value of the property, but of all the necessary expenses incurred in fixing that value. This would seem to be dictated by sound morals, as well as by the spirit of the Constitution; and it will not be presumed that the Legislature has intended to deprive the owner of the property of the full protection which belongs to him as a matter of right.[159]

157. *Id.* at 604.
158. *Id.* at 605 (citing 125 App. Div. 219, 109 N.Y.S. 652, 654 (1908)).
159. *Id.*

In extending its concern over constitutional private property rights, eight years after deciding *Dade County v. Brigham*, the Florida Supreme Court again addressed the state's constitutional measure of "full compensation" in the case styled *Jacksonville Expressway Authority v. Henry J. Dupree Company*. In an oft-cited special concurrence by Justice Drew, the Florida jurist wrote:

> The fact that the sovereign is now engaged in great public enterprises necessitating the acquisition of large amounts of private property at greatly increasing costs is no reason to depart from the firmly established principle that under our system the rights of the individual are matters of the greatest concern to the courts. The powerful government can usually take care of itself; when the courts cease to protect the individual—within, of course, constitution and statutory limitations—such individual rights will be rapidly swallowed up and disappear in the maw of the sovereign. If these immense acquisitions of lands point to anything, it is to the continuing necessity in the courts of seeing to it that, in the process of improving the general welfare, individual rights are not completely destroyed.[160]

The opinions in *Dade County v. Brigham* and *Jacksonville Expressway Authority v. Henry J. Dupree Company* are still regarded as the bedrock cases in which Florida Supreme Court has interpreted the constitutional standard for its state's measure of compensation.

When considering the inclusion of attorneys' fees and costs as part of the measure of compensation, it is important to consider not only the owner's *entitlement* to attorneys' fees and costs, but also how is it that a reasonable *amount* of attorneys' fees and costs is determined under the substantive law of a jurisdiction. Although maintaining that it is judicial function to ultimately determine whether the amount of attorneys' fees and costs is reasonable, the Florida Supreme Court has upheld the Florida Legislature's adoption of reasonable parameters for the determination of attorneys' fees and costs as codified in Chapter 73 & 74, *Florida Statutes*, also referred to as Florida's Eminent Domain Code.[161]

As to reasonableness, Florida law has a base fee that is result-oriented, awarding attorneys' fees based upon a *"benefits-achieved*

160. Jacksonville Expressway Auth. v. Henry J. Dupree Co., 108 So. 2d 289, 293 (Fla. 1958).

161. *See, e.g.*, Joseph B. Doerr Trust v. Cent. Fla. Expressway Auth. (*Doerr Trust*), 177 So. 3d 1209, 1216–17 (Fla. 2015).

formula" that uses a sliding percentage scale applied to the *"benefits"* meaning the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. It may include both the monetary and non-monetary benefits achieved on the owner's behalf. This baseline attorney's fee based upon *"benefits-achieved formula"* is set forth in § 73.092(1).[162] Florida law also provides for additional attorneys' fees to be awarded for supplemental proceedings and, more recently, for attorneys' fees relating to defense counsel being required to contend with any excessive litigation tactics employed by the condemnor's attorneys.[163] This additional attorney's fee is set forth in section 73.092(2).[164] Once again, keep in mind that these attorneys' fees do not come out of the condemnation award paid to the private property owner, but are *"paid on top"* of such award to the private property owner.

As model legislation, I am citing below to Chapter 73 & 74, *Florida Statutes*. The payment of an owner's attorneys' fees is, again, set forth in section 73.092.[165]

> In pertinent part, the provisions are as follows:
>
> 73.092 Attorneys' fees.—
>
> (1)Except as otherwise provided in this section and s. 73.015, the court, in eminent domain proceedings, shall award attorneys' fees based solely on the benefits achieved for the client.
>
> (a) As used in this section, the term "benefits" means the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. If no written offer is made by the condemning authority before the defendant hires an attorney, benefits must be measured from the first written offer after the attorney is hired.
>
> 1. In determining attorneys' fees, if business records as defined in s. 73.015(2)(c)2. and kept by the owner in

162. FLA. STAT. § 73.092(1) (2020).
163. *See, e.g.*, *Doerr Trust*, 177 So. 3d at 1216–17.
164. FLA. STAT. § 73.092(2) (2020).
165. FLA. STAT. § 73.092 (2020).

the ordinary course of business were provided to the condemning authority to substantiate the business damage offer in s. 73.015(2)(c), benefits for amounts awarded for business damages must be based on the difference between the final judgment or settlement and the written counteroffer made by the condemning authority provided in s. 73.015(2)(d).

2. In determining attorneys' fees, if existing business records as defined in s. 73.015(2)(c)2. and kept by the owner in the ordinary course of business were not provided to the condemning authority to substantiate the business damage offer in s. 73.015(2)(c) and those records which were not provided are later deemed material to the determination of business damages, benefits for amounts awarded for business damages must be based upon the difference between the final judgment or settlement and the first written counteroffer made by the condemning authority within 90 days from the condemning authority's receipt of the business records previously not provided.

(b) The court may also consider nonmonetary benefits obtained for the client through the efforts of the attorney, to the extent such nonmonetary benefits are specifically identified by the court and can, within a reasonable degree of certainty, be quantified.

(c) Attorneys' fees based on benefits achieved shall be awarded in accordance with the following schedule:

1. Thirty-three percent of any benefit up to $250,000; plus

2. Twenty-five percent of any portion of the benefit between $250,000 and $1 million; plus

3. Twenty percent of any portion of the benefit exceeding $1 million.

(2) In assessing attorneys' fees incurred in defeating an order of taking, or for apportionment, or other supplemental proceedings, when not otherwise provided for, the court shall consider:

(a) The novelty, difficulty, and importance of the questions involved.

(b) The skill employed by the attorney in conducting the cause.

(c) The amount of money involved.

(d) The responsibility incurred and fulfilled by the attorney.

(e) The attorney's time and labor reasonably required adequately to represent the client in relation to the benefits resulting to the client.

(f) The fee, or rate of fee, customarily charged for legal services of a comparable or similar nature.

(g) Any attorney's fee award made under subsection (1).

(3) In determining the amount of attorneys' fees to be paid by the petitioner under subsection (2), the court shall be guided by the fees the defendant would ordinarily be expected to pay for these services if the petitioner were not responsible for the payment of those fees.

(4) At least 30 days prior to a hearing to assess attorneys' fees under subsection (2), the condemnee's attorney shall submit to the condemning authority and to the court complete time records and a detailed statement of services rendered by date, nature of services performed, time spent performing such services, and costs incurred.

(5) The defendant shall provide to the court a copy of any fee agreement that may exist between the defendant and his or her attorney, and the court must reduce the amount of attorneys' fees to be paid by the defendant by the amount of any attorneys' fees awarded by the court.

History.—s. 1, ch. 76-158; s. 37, ch. 85-180; s. 3, ch. 87-148; s. 54, ch. 90-136; s. 3, ch. 90-303; s. 3, ch. 94-162; s. 1370, ch. 95-147; s. 61, ch. 99-385.[166]

Insofar as the payment of costs, Florida law establishes that the condemnor is responsible to pay for *"all necessary and reasonable*

166. FLA. STAT. § 73.091 (2020).

costs" of the owner in the defense of eminent domain proceedings. This includes the payment of any expert fees and costs incurred in preparing the owner's valuation estimate. This payment of an owner's costs is set forth in section 73.091.[167]

In pertinent part, the provisions are as follows:

73.091 Costs of the proceedings.—

(1) The petitioner shall pay attorneys' fees as provided in s. 73.092 as well as all reasonable costs incurred in the defense of the proceedings in the circuit court, including, but not limited to, reasonable appraisal fees and, when business damages are compensable, a reasonable accountant's fee, to be assessed by that court. No prejudgment interest shall be paid on costs or attorneys' fees.

(2) At least 30 days prior to a hearing to assess costs under this section, the condemnee's attorney shall submit to the condemning authority for each expert witness complete time records and a detailed statement of services rendered by date, nature of services performed, time spent performing such services, and costs incurred, and a copy of any fee agreement which may exist between the expert and the condemnee or the condemnee's attorney.

(3) In assessing costs, the court shall consider all factors relevant to the reasonableness of the costs, including, but not limited to, the fees paid to similar experts retained in the case by the condemning authority or other parties and the reasonable costs of similar services by similarly qualified persons.

(4) In assessing costs to be paid by the petitioner, the court shall be guided by the amount the defendant would ordinarily have been expected to pay for the services rendered if the petitioner were not responsible for the costs.

(5) The court shall make specific findings that justify each sum awarded as an expert witness fee.

History.—s. 1, ch. 65-369; s. 2, ch. 87-148; s. 52, ch. 90-136; s. 1, ch. 90-303; s. 2, ch. 94-162; s. 60, ch. 99-385.[168]

167. *Id.* § 73.092(1).
168. FLA. STAT. § 73.091 (2013).

The Florida Supreme Court recently addressed the circumstance wherein the Court did not find it just to limit the amount of the owner's attorneys' fees to the "benefits-achieved" formula when the condemnor's attorneys engaged in what was referred to as over-litigation or excessive litigation tactics, not necessarily equating with bad faith or illegal motive. The opinion also provided opportunity for the Florida Supreme Court to "renew its vows" with respect to the principles set forth in earlier decisions such as *Dade County v. Brigham* and *Jacksonville Expressway Authority v. Henry J. Dupree Company*.

In the case styled, *Joseph B. Doerr Trust v. Central Florida Expressway Authority*,[169] the Florida Supreme Court held that, in such instance, additional attorneys' fees should be paid along with the baseline attorneys' fees measured under the *"benefits-achieved formula."* In its reasoning, the state's high court cited one of its earlier decisions in *Shell v. State Road Department*[170] to show that the Court is, once again, not blind to the realities of what may be at stake when private property is taken without consent of an owner and made its decision to encourage *"fair play"* in litigation to determine the measure of compensation.

The opinion reads as follows:

> We have previously emphasized the importance of fair play in eminent domain proceedings because of the inherent disadvantage to the property owner:
>
> It must be borne in mind that in a condemnation proceeding the property of the landowner is subject to taking by the condemnor without the owner's consent. The condemnee is a party through no fault or volition of his own. Our Declaration of Rights, Section 12, Constitution of the State of Florida, F.S.A., makes it incumbent upon the condemnor to award "just" compensation for the taking. In view of this constitutional mandate, the awarding of compensation which is "just" should be the care of the condemning authority as well as that of the party whose land is being taken.
>
> Unlike litigation between private parties condemnation by any governmental authority should not be a matter of "dog eat dog" or "win at any cost." Such attitude and procedure would be decidedly

169. 177 So. 3d 1209 (Fla. 2015).
170. 135 So. 2d 857 (Fla. 1961).

> unfair to the property owner. He would be at a disadvantage in every instance for the reason that the government has unlimited resources created by its inexhaustible power of taxation. Moreover it should be remembered that the condemnee is himself a taxpayer and as such contributes to the government's "unlimited resources."[171]

Under Florida's full compensation measure, it is evident that its underpinnings are deeply rooted in the concept of *"relational justice."* So too, in order to preserve the community's regard as to the legitimacy of the use of eminent domain, the payment of a measure of compensation that is just or fair is of a fundamental concern. And therefore, I believe there is no more efficacious way to resolve concern over potential "undercompensation" or the risk of "unjust compensation" than to require that the condemnor pay an owner's attorneys' fees and costs as part of the measure of compensation.

Practically speaking, under such a framework, condemnors have incentive to refrain from lowballing initial pre-suit offers and to resolve cases early on to avoid costs which, if remaining in dispute, are incurred on both sides of the case. By using a *"benefits-achieved formula,"* the condemnor is also not subject to paying hourly rate attorneys' fees for projects with small, lineal takings where acquisition costs soar if having to pay attorneys who may otherwise expend inordinate or unreasonable time on matters of minimal controversy.

Once again, Florida, the third most populous state in the nation, has not been slowed in its growth or development with respect to either its private or public sectors by requiring condemning authorities under state law to pay for an owner's attorneys' fees and costs in condemnation cases. Everyone pays his or her fair share; those who have private property taken for public benefit or purpose are not made to incur a greater cost than all others who benefit from public infrastructure by having to pay the attorneys' fees and costs for their defense against eminent domain.

CONCLUSION

In conclusion, if advocating for an appropriate baseline target for property rights reform, one that addresses concerns over *"undercompensation"* or the risk of *"unjust compensation,"* I suggest the inclusion

171. Joseph B. Doerr Trust v. Cent. Fla. Expressway Auth., 177 So. 3d at 1216 (citing Shell v. State Rd. Dep't, 135 So. 2d 857, 861 (Fla. 1961)).

of the owner's attorneys' fees and costs as part of the measure of compensation in those state jurisdictions that presently lack such provision in their constitutional jurisprudence or eminent domain statutory codes.

Beyond this, I also advocate for reform to the enabling legislation found at either the state or federal level wherein a private licensee is authorized to exercise the eminent domain power. As a condition of the authorization to exercise eminent domain, the private licensee condemnor should be made to pay the reasonable and necessary attorneys' fees and costs incurred by the owner as part of the measure of compensation. This, for example, would resolve tremendous inequities in community redevelopment takings that do not yet place the responsibility upon the private developer to pay for the owner's reasonable and necessary attorneys' fees and costs. So too, Congress is fully capable of providing that an owner's attorneys' fees and costs be included in the measure of compensation as a condition of a private licensee company exercising the eminent domain power under either the FPA or NGA. If amending the statutory framework for condemnation in both the FPA and NGA, there would be no reason for the federal courts to decide controlling law because Congress would no longer remain silent on the matter.

In so far as the specific changes to be made or provisions to be added, Florida's "full compensation" measure and correlating statutory framework certainly provide a tried and true model.

So, having *"stirred the pot"*† a little, I will now take my leave from the kitchen, hoping that others may apply their culinary skills in cooking up the next jurisprudential dish regarding this topic.

† Boiling pot icon created by Alexandr Cherkinsky, NOUN PROJECT, https://thenounproject.com.

SUPPORT GROUNDED IN LITIGATION EXPERIENCE FOR USING THE FAIR MARKET VALUE MEASURE OF JUST COMPENSATION IN CASES INVOLVING THE UNITED STATES

JONATHAN BRIGHTBILL & PETER MCVEIGH*

INTRODUCTION

The Environment and Natural Resources Division of the U.S. Department of Justice ("ENRD") files condemnation actions on behalf of the United States. It also defends the United States in inverse condemnation cases. The United States Constitution requires the United States to pay "just compensation" when it acquires (or "takes") real property from its owners.[1] The United States has this obligation, both when exercising the prospective power of eminent domain and when a "taking" is adjudicated to have occurred by an inverse condemnation.

Under Supreme Court precedent, the measure of just compensation is the "fair market value" of the taken property on the date of the taking.[2] "Fair market value" means the amount that a willing buyer would have paid on the date of taking to purchase the property from a willing seller on the open market.[3] In its litigation, ENRD's attorneys are committed to seeing the United States meet its constitutional obligation to pay just compensation. The Division's experience is that the fair market value is the most objective of possible measures of just compensation for a number of reasons. Other possible measures would be more difficult, time-consuming, and expensive to apply.[4] Subjective measures are more susceptible to manipulation and can result in excessive, and thus unjust, compensation. While ENRD is often successful in defeating such claims, even litigation

---

* From July 2017 to January 2021, Jonathan Brightbill served at the Environment and Natural Resources Division, U.S. Department of Justice, initially as Deputy Assistant Attorney General and then as Acting Assistant Attorney General. Peter McVeigh is an attorney advisor in the Law and Policy Section of the Division.

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

2. Kirby Forest Indus. v. United States, 467 U.S. 1, 10 (1984).

3. *Id.*

4. *See Kirby Forest Indus.*, 467 U.S. at 10, n.15; United States v. 564.54 Acres of Land, 441 U.S. 506, 511–12 (1979).

under the well-established fair market value measure can result in excessive theories and claims of compensation. Some are discussed further below. Departure from the venerable fair market value standard is likely to increase the risk of overcompensation and may result in less overall social welfare.

I. THE ENVIRONMENT DIVISION

ENRD has a broad mission, employing approximately 425 attorneys who handle approximately 6,500 cases and matters.[5] Two areas of the Division's work are relevant to this Essay. First, ENRD's Land Acquisition Section files condemnation actions in federal district courts to acquire real property for important public needs, such as for military installations.[6] In the past several years, for example, this work has included acquiring property for the border wall. ENRD's condemnations are governed by Rule 71.1 of the Federal Rules of Civil Procedure and laws enacted by Congress, such as the Declaration of Takings Act, codified at 40 U.S.C. § 3114.

In addition, ENRD's Natural Resources Section defends "takings cases" in which plaintiffs (or "landowners"[7]) allege that the United States has taken real property without providing just compensation.[8] Landowners file these cases in either the Court of Federal Claims or federal district courts.[9] The cases may involve, for example, alleged water rights takings, alleged takings related to so-called "rails-to-trails" conversions, alleged overflight-related takings, and hurricane and other flood-related litigation.[10] There can be many disputed issues in these cases, including whether there was a compensable taking

5. *See About the Division*, ENV'T & NAT. RES. DIV., U.S. DEP'T OF JUST. (Jan. 20, 2021), https://www.justice.gov/enrd/about-division; *Jonathan D. Brightbill*, WINSTON & STRAWN LLP, https://www.winston.com/en/who-we-are/professionals/brightbill-jonathan-d.html (last visited Sept. 20, 2021).

6. *Land Acquisition Section*, ENV'T & NAT. RES. DIV., U.S. DEP'T OF JUST. (Aug. 31, 2021), https://www.justice.gov/enrd/land-acquisition-section.

7. For convenience, this Essay refers to the persons who receive, or at least seek, compensation from the United States in ENRD's cases as "landowners," even though that term does not accurately describe all of the individuals and entities involved in the cases.

8. *The World of Inverse Condemnation,* ENV'T & NAT. RES. DIV., U.S. DEP'T OF JUST. (May 12, 2015), https://www.justice.gov/enrd/world-inverse-condemnation.

9. *Id.*

10. *See Significant Cases,* ENV'T & NAT. RES. DIV., U.S. DEP'T OF JUST. (May 12, 2015), https://www.justice.gov/enrd/significant-cases.

and, if so, what property interest was taken, as well as the measure of just compensation owed for a taking.

II. Policies, Practices, and Requirements that Serve to Protect the Interests of Landowners

When discussing the fair market value measure of just compensation, it is appropriate to consider the context in which the measure is applied. Importantly, in ENRD's condemnation actions and takings cases, numerous applicable policies, practices, and requirements serve in part to protect the interests of landowners.

As an initial matter, ENRD does not approach its condemnation actions and takings cases like ordinary litigants. The United States does not "game" its valuations. For example, the United States does not present the lowest plausible valuation arguments for determining the fair market value of the property on the date of taking. Nor does it submit expert reports reflecting half the value of a property—hoping a jury or land commission will split the difference out of empathy for a landowner and still get the ultimate judgment correct. Rather, ENRD's and the federal government's policy is to be open, transparent, objective, and uniform in the approach used to determine fair market value. Attorneys of the Department of Justice take an oath to preserve, protect, and defend the Constitution of the United States. They take seriously all of these responsibilities, including the United States' constitutional responsibility to pay just compensation for taken real property. However, while ENRD attorneys must respect and address the United States' constitutional obligation, they also must be mindful of their obligation to the taxpayer to ensure landowners are not overcompensated.

To this end, in developing appraisals of fair market value and litigating positions in their cases, ENRD's Land Acquisition and Natural Resources Sections adhere to the Uniform Appraisal Standards for Federal Land Acquisitions.[11] This is known as the "*Yellow Book*," because the paper copy historically has had a yellow cover. The *Yellow Book*, which is frequently cited in legislation and court rulings, has

11. *See* Interagency Land Acquisition Conference, Uniform Appraisal Standards for Federal Land Acquisitions (2016), https://www.justice.gov/file/408306/download [hereinafter Yellow Book].

guided appraisals of land being acquired by the United States since its original publication in 1971. The *Yellow Book* is written by the Interagency Land Acquisition Conference under the leadership of ENRD's Land Acquisition Section. ENRD makes an electronic version available on the Department of Justice's website. ENRD's reliance on the *Yellow Book* is consistent with and furthers ENRD's and the federal government's policy of being open, transparent, objective, and uniform in the approach used to determine fair market value.

There are also laws enacted by Congress that serve in part to ensure fair treatment of landowners. For example, under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, federal agencies generally seek to acquire land by direct purchase before ENRD files a condemnation action.[12] Also, under the Equal Access to Justice Act ("EAJA"), when a court awards just compensation to a landowner in a condemnation action, the United States may be obligated to pay attorneys' fees and costs. The award to the landowner must be closer to the landowner's trial testimony on value than the United States' testimony, provided the United States' position cannot be considered "substantially justified."[13] To be sure, landowners are rarely awarded attorneys' fees and costs under EAJA. ENRD believes that is because its attorneys attempt to get valuations right in the first place.

III. Excessive Claims for Compensation by Landowners

The above policies, practices, and requirements serve in part to protect landowners. They do not, however, discourage landowners from challenging government valuations if they question the compensation. In fact, ENRD must defend many cases each year based on speculative and excessive theories of valuation. This is one of the primary reasons why ENRD supports the use of the fair market value measure of just compensation. ENRD attorneys expend considerable resources responding to theories of excessive compensation made against the United States. It is also common that when ENRD's cases are actually litigated, landowners are awarded more than an order of magnitude—and often several orders of magnitude—less

12. *See* 42 U.S.C. § 4651.
13. *See* 28 U.S.C. § 2412(d)(2)(H).

compensation than they argued for before the court. Absent new facts or information coming to light during discovery, final judgments tend to be far closer to the United States' initial offers of compensation without litigation than what litigants who pursue claims in court tend to recover.

Described in the remaining sections of this Essay are several examples of approaches ENRD has seen used to attempt recovery of excessive compensation. Two specific cases are described where the approaches and/or similar ones were unsuccessfully deployed. The fact that ENRD must address these kinds of efforts under the fair market value measure of just compensation, which is recognized as limiting the potential for subjectivity and inefficiencies, strongly suggests that other potential measures of just compensation could open the door to more excessive compensation. In other words, these examples raise concern that other possible measures of just compensation may be unjust to the United States and its taxpayers.

A. Landowner Approaches

ENRD regularly addresses varied approaches used by landowners seeking to recover excessive compensation from the United States. One such approach is manipulation of the highest and best use of property. Under federal law, before fair market value can be determined, an appraiser must first evaluate the uses to which the property feasibly, reasonably, and legally can be put.[14] The appraiser then determines fair market value based on the "highest and best use."[15] ENRD frequently is called upon in its cases to address inflated valuations that are based on speculative, impracticable, impossible and/or illegal uses.

Another approach ENRD expends considerable resources addressing is reliance on irrelevant sales of property. The preferred method for determining fair market value involves analysis of open market sales of properties that are comparable to the taken property.[16] ENRD frequently responds to inflated valuations that rely improperly on sales of property that are not at all "comparable" to the

14. YELLOW BOOK, *supra* note 11, §§ 1.4.3–1.4.7.
15. *See id.*
16. *Id.* §§ 1.5, 4.4.

taken property. ENRD also is sometimes forced to address reliance on sales that are not "open market" sales. Such sales are often not representative of what a willing buyer would offer a willing seller in a free and open transaction.

A third approach regularly addressed by ENRD involves the derivation of opinions of value largely or entirely from projections of future income. This attempts to value property based on the profitable cash flow the taken properties purportedly would have generated in the future, rather than on "comparable sales."[17] ENRD often must respond to such valuation approaches even when there is no such business operating on the property when taken. Contrary to the age-old real estate adage of "location, location, location," landowners may seek to inflate such valuations, for example, by inappropriately incorporating elements of value from a business located on other property better suited for such commerce. Landowners may use such approaches even where the value of the business located on other property substantially reflects a superior location, as compared with the taken property. If successful, these varied kinds of approaches by landowners would result in inflated awards of compensation and impacts on the taxpayer.

B. Case Examples

ENRD has a strong track record of success in defeating these types of efforts in litigating cases under the fair market value measure of compensation. One example is *United States v. 275.81 Acres of Land* (W.D. Pa.), a condemnation action filed by ENRD to acquire land for the Flight 93 National Memorial.[18] On September 11, 2001, United Airlines Flight 93 was carrying passengers from Newark to San Francisco, when it was hijacked by four al-Qaeda terrorists. The plane crashed into a field in rural Somerset County, Pennsylvania, during an attempt by passengers to regain control of the cockpit. This killed all forty-four people aboard.

At the time of this tragedy, the area where Flight 93 crashed was a vacant field. There were three dilapidated metal panel buildings in

17. *See id.* § 4.4.4.

18. United States v. 275.81 Acres of Land, No. 09-233, 2014 WL 1248205, at *1 (W.D. Pa. Mar. 26, 2014).

the area. The landowners nonetheless sought $30 million for the taken property in the condemnation action based on a claimed potential for future development of a private memorial. The landowners assumed minimal construction and operational costs. Further, in developing estimates of revenue and income, they relied on comparisons to public memorials, such as those at Pearl Harbor, Oklahoma City, and Gettysburg. However, those sites are located in heavily trafficked areas and were otherwise not comparable to the taken property. The landowners' valuation thus relied upon, among other things, inappropriate comparisons to public memorials and unsupported speculation concerning the income the memorial purportedly would have generated. After a weeklong trial, the landowners were awarded $1.5 million, much less than the $30 million they had sought.[19]

A second example is *United States v. 400 Acres of Land* (D. Nev.). ENRD filed this condemnation action to acquire land located in a remote desert area within the borders of the Nevada Test and Training Range.[20] The property is a two-and-a-half-hour drive through the desert from Las Vegas, Nevada. Many years ago, the area had been used for mining. The surrounding training range's operations are often key to developing capabilities of war fighters engaged in current conflicts. Nevertheless, the federal government must cancel all missions when private parties are present on the property to avoid the risk of exposing classified military activity and for safety reasons. This condemnation was important for national security purposes.

The landowners asserted a range of excessive valuations, seeking as much as $2 billion. The landowners assumed, among other things, that as of the date of the taking, the property's highest and best use would have been conversion of the desert scrub into a "tourism mecca." They hypothesized that alien enthusiasts would be eager to vacation in view of the purported "Area 51" hangers located six to seven miles in the distance.

The landowners' income approach to valuation speculated that—but for the government condemnation of the land, which then merely had several decrepit miners' cabins on it—*tens of thousands* of people per month would have traveled hours through the hot desert

19. *Id.* at *1, *7–8.

20. United States v. 400 Acres of Land, No. 15-1743, 2020 WL 5074255, at *1 (D. Nev. Aug. 29, 2019).

from Las Vegas to view these buildings and pay anywhere from $200 per person to as much as $1,000 per person for this opportunity. The court excluded most of the landowners' valuations in connection with motion practice, including the aggressive and easily manipulated income-based approach.

The court nevertheless allowed the landowners to advance a $50 million valuation based on a more traditional comparable sales technique. Because the court still allowed theoretical "tourism" as highest and best use, the valuation nevertheless relied upon five purportedly "comparable" sales of "commercial tourism" land in the Las Vegas metro area. These comparable sales included one just off the Las Vegas Strip, on Tropicana Boulevard next to the MGM Grand.

The landowners pursued this valuation even though the nearest town to the landowners' cabins, the town of Rachel (with a population of fifty-four), is located forty miles away from their desert site—and forty miles closer to Las Vegas. The property is also located fifteen miles from the nearest roadway, and gravel and dirt roads must be traversed to reach it. Further, the landowners had done nothing to pursue the potential use of their property for tourism during their many years of ownership. Nor had any interest been expressed by others in putting the property to such use. Indeed, anyone attempting to do so would have faced a broad range of impediments.

After a lengthy trial, the landowners were awarded $1.1 million for their non-mineral interests and recovered an additional agreed-to $100,000 for their mineral interests.[21] This was close to the amount the United States was prepared to pay without the time, expense, and burden of litigation.

CONCLUSION

ENRD and other Department of Justice attorneys take seriously their oath to preserve, protect, and defend the Constitution of the United States. That includes their recognition of the United States' responsibility to pay just compensation for taken property. Through the application of the *Yellow Book*'s standards and hundreds of years of case law, ENRD and the federal government work diligently to satisfy the United States' constitutional responsibility to pay fair

21. *See id.* at *1, *10.

market value in a manner that is open, transparent, objective, and uniform. By doing so, they promote what is "just" to landowners, the taxpayer, and the government. Considerable resources are nevertheless expended addressing certain landowner attempts to recover excessive compensation even under the relatively objective fair market value measure of just compensation. While ENRD has a strong track record of rebuffing such efforts and resolves many cases through mutual resolution, the continuing need for this work suggests that other, potentially more subjective measures of just compensation could open the door to more aggressive claims and potential abuse. While the fair market value standard has its critics, other standards may lead to less consistent, more expensive, and more arbitrary outcomes with less overall societal benefit.