"EQUITABLE COMPENSATION" AS "JUST COMPENSATION" FOR TAKINGS

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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.

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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.

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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,

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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,

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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]

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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

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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

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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]

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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]

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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

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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]

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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]

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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

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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]

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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.

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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

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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

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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,

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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'

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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

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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,

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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

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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]

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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

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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.