4-2013

Just Undercompensation: The Idiosyncratic Premium n Eminent Domain

Brian A. Lee
Brooklyn Law School, brian.lee@brooklaw.edu

Recommended Citation
113 Colum. L. Rev. 593 (2013)

COLUMBIA LAW REVIEW

VOL. 113 APRIL 2013 NO. 3

ARTICLES

JUST UNDERCOMPENSATION: THE IDIOSYNCRATIC PREMIUM IN EMINENT DOMAIN

*Brian Angelo Lee**

When the government exercises its power of eminent domain to take private property, the Fifth Amendment to the U.S. Constitution requires that the property's owners receive "just compensation," which the Supreme Court has defined as equal to the property's fair market value. Today, a well-established consensus exists on three basic propositions about this fair market value standard. First, the standard systematically undercompensates owners of taken property, because market prices do not reflect owners' personal valuations of particular pieces of property. Second, this undercompensation is unfair to those owners. And third, an appropriate way to rectify this problem is to add fixed-percentage bonuses to the amount of compensation paid. Several states have recently enacted laws requiring such bonuses, and prominent academics have endorsed their adoption. This Article, however, argues that all three of these widely accepted propositions are false. First, examining the economics of market price formation reveals that fair market value includes compensation for more subjective value than previously recognized. Second, much of what market value leaves uncompensated should not, in fairness, receive compensation. Third, although justice may require paying compensation above fair market value in certain situations, this Article argues that the solution favored by academics and recent state legislation is itself unjust, undermining the civic and moral equality of rich and poor property owners by relatively overcompensating the rich while undercompensating the poor for losses which have equal value to rich and poor alike. The Article concludes by showing how an alternative approach can avoid these fairness problems.

* Associate Professor of Law, Brooklyn Law School. The author wishes to thank Henry E. Smith, Christopher Serkin, Thomas W. Merrill, Michael Cahill, Robin Effron, Stephan Landsman, Irina Manta, Minor Myers, Jane Yakowitz, and participants in the Private Law Workshop at Harvard Law School, the Association for Law, Property, and Society annual meeting, and a faculty workshop at Brooklyn Law School for their comments on drafts of this paper. Any errors are the author's own. The Brooklyn Law School Dean's Summer Research Stipend provided financial support for this project.

INTRODUCTION

The government's power of eminent domain is subject to two familiar constitutional constraints. First, the government's taking of property must be for "public use."[1] Second, the government must pay the owner of the condemned property "just compensation."[2] The Supreme Court

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

2. Id. The Fifth Amendment's just compensation requirement was "incorporated" into the Fourteenth Amendment in 1897 and thus made binding on individual state governments as well as the federal government. See Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897) ("[A] judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is . . . wanting in the due process of law required by the Fourteenth Amendment . . . ."). In addition, state constitutions typically contain similar language. See, e.g., Cal. Const. art. 1, § 19, cl. a ("Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."); Conn. Const. art. 1, § 11 ("The property of no person shall be taken for public use, without just compensation therefor."); N.Y. Const. art. 1, § 7, cl. a ("Private property shall not be taken for public use without just compensation.").

has elaborated on this second requirement, defining "just compensation" as the taken property's "fair market value,"[3] and in turn defining "fair market value" as the price that would be agreed to by a willing seller and a willing buyer.[4]

Today, there is a well-established consensus concerning three basic propositions about this just compensation requirement. First, the fair market value standard systematically undercompensates condemnees—owners of taken property—because individual owners value particular pieces of property for many personal reasons not shared by the market as a whole.[5] For example, the owner of a house may have great sentimental attachment to the property because of happy memories of watching her children grow up there, but the market neither knows nor cares about her memories, so their value to her is not reflected in the property's market price. As a result, there is a substantial gap—a "subjective premium"—between the compensation that owners receive when they are paid the market value of their property and the substantially higher value that the owners themselves actually place on that property.

Second, it is generally assumed that this undercompensation is unfair.[6] Although the fair market value standard may be necessary in light of practical concerns about how to measure or determine the subjective values that owners place on taken property, if those practical concerns were not present, the proper amount of compensation would be full compensation for all of the value that the property's owners themselves place on that property.[7] Even the Supreme Court, which originally established the fair market value standard, has recently acknowledged the importance of "questions about the fairness of the [fair market value] measure of just compensation."[8]

Third, it is assumed that an appropriate way to address this problem is by adding fixed-percentage bonuses to the amount of compensation paid—for example, by requiring payment of compensation equal to

---

3. See, e.g., Olson v. United States, 292 U.S. 246, 255 (1934) (defining just compensation as "the market value of the property at the time of the taking contemporaneously paid in money").

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

5. See infra Part I.A (discussing alleged failure of fair market value to account for subjective value individual owners place on private property).

6. See infra Part II (discussing assumption that undercompensation of "subjective premium" is unfair and examining whether full compensation would be fair).

7. A second common reason for worrying about undercompensation springs from concerns that governments do not fully internalize the costs of takings, and therefore will engage in an inefficiently large number of takings. This concern is already well explored in the literature, and it is not the focus of this Article. Instead, this Article concentrates on the fairness concern, which is at least as common as the efficiency concern, but which has attracted far less critical analysis.

8. Kelo v. City of New London, 545 U.S. 469, 489 n.21 (2005).

125%, rather than 100%, of the taken property's fair market value. Several states have recently enacted laws requiring such enhanced compensation,[9] and prominent academics have endorsed its general adoption.[10]

This Article argues that all three of these fundamental, widely accepted propositions are false.

First, this Article explains how careful attention to the economics of market price formation reveals a widespread misunderstanding about the types and amount of value encompassed in fair market value compensation. Surprisingly, existing literature lacks any systematic treatment of the different types of value that property owners have in their property. This Article fills that gap by developing a comprehensive taxonomy of landowners' value and then builds upon that taxonomy to show that although the fair market value standard provides no compensation for some types of "subjective" value, it provides full or partial compensation for other types and thus compensates for much more value than has been assumed. The Article shows that compensation is omitted only for idiosyncratically large amounts of subjective value—and thus that what existing scholarship has assumed is a "subjective premium" is in fact only an "idiosyncratic premium."

Second, this Article shows that the presence of an idiosyncratic premium between the personal value that an owner places on taken property and the market value compensation that the owner receives for that property is not inherently unfair. For most types of value, this "undercompensation" is in fact wholly consistent with the demands of justice. When eminent domain is used to take property for public use, the owners of the taken property have, in fairness, a claim to compensation for a reasonable amount of subjective value in the taken property, but not necessarily for idiosyncratically large amounts of subjective value. The Article develops this argument in part by identifying an illuminating and previously unrecognized connection between the logical structures of eminent domain and the law of nuisance and further by showing how both of these areas of law relate to citizens' social duties not to impose unreasonably on others.

---

9. Michigan has added a requirement of this sort to its state constitution. See infra note 127 and accompanying text (quoting provision). Indiana and Missouri have enacted similar requirements via statute. See infra notes 128–129 and accompanying text (discussing statutes). Iowa, Connecticut, and Rhode Island have enacted provisions that are similar but more narrowly focused. See infra notes 130–132 and accompanying text (discussing specific statutory provisions for allowing fixed-percentage bonuses). Several foreign jurisdictions, including certain territories in Canada and certain states in Australia, also have bonus requirements of this sort. See infra note 133 (surveying foreign jurisdictions).

10. Examples include Richard Epstein and Thomas Merrill. Robert Ellickson earlier made a similar proposal in the context of nuisance law. See infra notes 156, 158 and accompanying text (discussing Epstein's, Merrill's, and Ellickson's support for fixed-percentage bonuses).

Third, this Article identifies two specific types of value—the values of autonomy and sentimental attachment—for which undercompensation by the fair market value standard can raise genuine concerns about potential injustice. The Article then shows that the approach favored by both legislators and academic commentators for remedying this undercompensation, namely paying owners fixed-percentage bonuses above the taken property's fair market value, is itself markedly unjust. Awarding such bonuses perniciously treats rich people's sentiments and autonomy—their personhood—as more valuable than poor people's personhood, thereby failing to respect the moral equality of the rich and poor and their equal value as persons.

Nevertheless, there is an alternative approach that can avoid this fundamental fairness problem. Through an analysis of the often overlooked dignitary dimension of monetary compensation, this Article shows that monetary compensation for lost autonomy and sentimental value is in fact possible but that any such compensation should be set at a fixed dollar amount that is the same for each affected owner, rather than a percentage bonus. Moreover, since homes taken through eminent domain often have multiple residents who all suffer losses of sentimental value and autonomy when such a home is taken, the size of the payment should be scaled to the number of people affected, not the market value of the property.

The implications of this Article's analysis are broad. The issues and assumptions that surround fair market value compensation in the eminent domain context arise also in other areas of property law, ranging from the partition of cotenancies to the use of condemnation to create private easements for access to otherwise inaccessible property.[11] Moreover, the basic connection that this Article develops between eminent domain and nuisance law helps illuminate the fundamental relationship between the rights of property owners and the responsibilities of those owners toward the broader community, an issue to which the emerging literature on "the social obligation norm" in property is increasingly drawing attention.[12] Nor are the Article's implications limited to property

11. See Thomas W. Merrill & Henry E. Smith, Property: Principles and Policies 644, 986 (2007) (noting approximately half of U.S. states have statutes permitting owners of "landlocked" property to condemn easement of access across neighboring parcels but requiring that those owners "pay just compensation (fair market value) for the rights so obtained").

12. See, e.g., Gregory S. Alexander et al., A Statement of Progressive Property, 94 Cornell L. Rev. 743, 743 (2009) [hereinafter Alexander, Progressive Property] ("[R]esolving property conflicts . . . [and] designing property institutions . . . [requires] look[ing] to the underlying human values that property serves and the social relationships it shapes and reflects."); Sheila R. Foster & Daniel Bonilla, Symposium, The Social Function of Property: A Comparative Perspective, Introduction, 80 Fordham L. Rev. 1003, 1004, 1008–11 (2011) ("Critics indicate . . . that classical liberal property obscures the obligations and connections that the subject has with the community, or they emphasize the

law. The issues that this Article addresses may arise wherever the law uses fair market value as a standard for compensating a loss.[13]

The Article proceeds as follows. Part I introduces the fair market value standard and the established concerns about its scope. The Part then provides a taxonomy of landowners' value and develops the argument that the existing literature has fundamentally misunderstood the types and amount of value encompassed in fair market value compensation. Part II turns to the question of which of those types of value should receive more compensation than the fair market value standard provides. This Part argues that significantly fewer elements fall into that category than the literature has assumed and that much of the remaining "undercompensation" is in fact just. Part III then addresses the question of how properly to compensate those specific types of value for which fairness does require extra compensation.

I. THE CONTENT OF FAIR MARKET VALUE

The United States Supreme Court has long interpreted the Fifth Amendment's "just compensation" provision as requiring that condemnees be paid a sum equivalent to the value of the properties that they have lost to governmental takings.[14] For example, in *Monongahela Navigation Co. v. United States*, the Court read the Fifth Amendment as requiring that "no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner."[15] Subsequent cases made clear the Court's belief that the proper measure of that compensation is the condemned property's fair market value.[16] Thus, in *Olson v. United States*, the Court quoted the above passage from *Monongahela* and then added that the required "full and exact" equiva-

---

negative consequences that this right has on the distribution of wealth." (footnote omitted)). For a collection of contemporary scholarship on the intersection between property law and social obligation, see generally Special Issue, Property and Obligation, 94 Cornell L. Rev. 743 (2009) [hereinafter Special Issue]; Symposium, The Social Function of Property: A Comparative Perspective, 80 Fordham L. Rev. 1003 (2011) [hereinafter Symposium].

13. Although these wider implications are fruitful areas for further study, in the interest of efficiency, this Article's argument is limited to the central case of fair market value compensation in eminent domain.

14. See, e.g., Brown v. Legal Found. of Wash., 538 U.S. 216, 236 (2003) (collecting prior Supreme Court cases holding that condemnee must receive compensation equal in value to what was taken); Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 748 (1997) (Scalia, J., concurring) (same).

15. 148 U.S. 312, 326 (1893).

16. State courts have reached similar conclusions about their state constitutions' takings provisions. See, e.g., City of Santa Clarita v. NTS Technical Sys., 40 Cal. Rptr. 3d 244, 247 (Ct. App. 2006) (citing both Fifth Amendment to U.S. Constitution and article I, section 19 of California Constitution); In re Bd. of Water Supply, 14 N.E.2d 789, 791 (N.Y. 1938) (citing article I, section 6 of New York Constitution).

lent "is the market value of the property at the time of the taking contemporaneously paid in money. . . . Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined."[17] In subsequent cases, the Court has also made clear its understanding of what the term "fair market value" itself means, noting in *United States v. Miller* that "[i]t is usually said that market value is what a willing buyer would pay in cash to a willing seller."[18] The idea that fair market value, at least in the eminent domain context, is the price that a willing buyer would pay a willing seller has now become canonical.

Although fair market value is now well established as the proper measure of compensation, it has also been widely viewed as only a second-best solution, an accommodation required by the practical impossibility of reliably determining condemned property's full value to the condemnee. The basic concern is that fair market value compensation is fundamentally incomplete.

A. *Fair Market Value as Incomplete Compensation*

Both courts and commentators have observed that at any given time the owner of some specific piece of property may personally place a higher value on that property than the market does. In Judge Richard Posner's words, "[m]any owners are 'intramarginal,' meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, they value their property at more than its market value (i.e., it is not 'for sale')."[19] The intuition underlying this observation is that the market price for any given owner's lot has been set by other people—the buyers and sellers who have created the market price by engaging in transactions—and thus may not reflect the value that nonparticipating owners put on their property.

A common way of putting this point is that if those owners did not in fact place a higher value on their property than the market did, they would already have sold in order to reap the profit from selling to someone who valued the property more.[20] Thus, a gap potentially exists be-

---

17. 292 U.S. 246, 255 (1934).

18. 317 U.S. 369, 374 (1943) (discussing taking of land for tracks for Central Pacific Railroad). This basic formulation is not peculiar to the takings context. For example, in an estate tax matter, the Court stated that "'fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.'" United States v. Cartwright, 411 U.S. 546, 551 (1973) (quoting Treas. Reg. § 20.2031-1(b) (1966)).

19. Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988).

20. See, e.g., Lee Anne Fennell, Taking Eminent Domain Apart, 2004 Mich. St. L. Rev. 957, 963 ("Most property owners value their property above fair market value; if they

tween the value that a condemnee places upon his or her property and the fair market value of the property.[21] This gap goes by various names. Thomas Merrill has referred to the difference as the "subjective premium."[22] Lee Anne Fennell has termed an analogous concept the "uncompensated increment."[23]

It is important to disentangle two different, but typically conflated, possible understandings of the content of the "subjective premium." One understanding is purely formal: The "subjective premium" simply refers to the difference between the value a landowner places on a piece of property and the market value of that property.[24] (The standard tacit assumption is that the former is larger than the latter.) On this understanding of the "subjective premium," an assertion that fair market value compensation does not compensate owners for their subjective premiums would be tautologically true. Because the assertion follows directly from the definition of "subjective premium," its truth would be guaranteed, but, like tautologies in general, it would not be particularly illuminating.

A second understanding of the "subjective premium" has more substantive content, picking out certain *types* of value that critics say fair market value compensation does not include. This use of "subjective premium" (and related terms) is common in the compensation literature.[25] For example, a recent prominent property casebook by Thomas Merrill and Henry Smith asserts,

---

did not, they likely would have sold it already."); see also David A. Dana & Thomas W. Merrill, Property: Takings 174 (2002) ("[If] an owner values the property at less than its fair market value, the owner will generally sell it."); Joseph William Singer, Property 116 (3d ed. 2010) ("The fact that [property owners] choose to keep their property rather than sell it means that their asking price is likely to be higher . . . than the amount they could obtain on the open market."); James E. Krier & Christopher Serkin, Public Ruses, 2004 Mich. St. L. Rev. 859, 866 (asserting that in eminent domain cases condemnees' "consumer surplus—which is to say the amount by which an owner values property over and above its fair market value . . . has to be positive, for otherwise owners would already have sold their holdings on the market").

21. See, e.g., *Vill. of Hoffman Estates*, 844 F.2d at 464 ("Such owners are hurt when the government takes their property and gives them just its market value in return.").

22. Thomas W. Merrill, The Economics of Public Use, 72 Cornell L. Rev. 61, 83 (1986).

23. Fennell, supra note 20, at 958. Other terms have been used as well. For example, Judge Posner's opinion in *Village of Hoffman Estates* referred to it as "personal" value. 844 F.2d at 464. Irrespective of the term used, the basic idea remains the same.

24. See, e.g., Charles E. Cohen, The Abstruse Science: *Kelo*, *Lochner*, and Representation Reinforcement in the Public Use Debate, 46 Duq. L. Rev. 375, 403 (2008) (referring to "the so-called 'subjective premium,' also known as 'consumer surplus,' which consists of the difference between the value an owner places on his property and what the market is willing to pay for it").

25. See, e.g., Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 183 (1985) ("The central difficulty of the market value formula for explicit com-

> [T]he fair-market-value formula . . . provides no recovery for the subjective value that owners attach to their property. . . . The premium may be based on the fact that they are psychologically attached to the property, or they like the neighborhood, or they have made special modifications to the property to suit their particular needs, or simply because they want to avoid the inconvenience of moving.[26]

On this substantive understanding, assertions that fair market value compensation fails to compensate for the "subjective premium" are not mere tautologies. But as will soon be evident, they also are not entirely true.

1. *Two Concerns About Undercompensation.* — The existence of an "uncompensated increment" or "subjective premium" between the value that a condemnee places on the taken property and the amount of compensation provided for that taking potentially gives rise to two lines of criticism of the fair market value standard. One line focuses on the amount of compensation awarded, the other on the types of value which are uncompensated.

Concerns based on the *amount* of uncompensated value lost by condemnees come in two basic forms.[27] One form arises primarily from economic concerns about public actors' incentives to engage in socially inefficient behavior. To the extent that the government is not required to compensate property owners fully for all of their value in the property taken through eminent domain, the government does not internalize all of the costs of the taking.[28] Thus, because the cost to the government of

---

pensation, therefore, is that it denies any compensation for real but subjective values."); Gregory S. Alexander, The Social-Obligation Norm in American Property Law, 94 Cornell L. Rev. 745, 776–77 (2009) [hereinafter Alexander, Social-Obligation] ("'[J]ust compensation' is . . . fair market value compensation—which does not reflect the owner's subjective valuation and might be inadequate even if 'just compensation' were defined to include subjective value . . . ." (footnote omitted)); Nestor M. Davidson, Property and Relative Status, 107 Mich. L. Rev. 757, 810 (2009) (asserting fair market value standard "ignores the subjective value of the property, not to mention the value of the property as part of an assembled block of parcels, or the value of autonomy over decisions about property"); Merrill, supra note 22, at 83 (asserting condemnee might have uncompensated "subjective premium" arising from "sentimental attachment" to condemned property, "improvements or modifications to accommodate his unique needs," or preference to avoid burdens of relocating).

26. Merrill & Smith, supra note 11, at 1254.

27. See, e.g., Fennell, supra note 20, at 961 (distinguishing between "distributive" concern about providing less-than-full compensation and concern that "incomplete compensation distorts the incentives of those who stand to benefit from takings").

28. See, e.g., Robert Cooter & Thomas Ulen, Law and Economics 183–84 (5th ed. 2007) (explaining how the state can receive a "unilateral gain" from takings); Abraham Bell & Gideon Parchomovsky, Taking Compensation Private, 59 Stan. L. Rev. 871, 881–84 (2007) [hereinafter Bell & Parchomovsky, Taking Compensation] (noting "[t]akings without compensation enhance the government coffers by adding property holdings without significant cost" and that "when compensation is not paid, most costs are borne by the

the taking is less than the taking's full cost to society, there is a risk that public officials will make takings decisions under a "fiscal illusion" about the real costs of their actions and therefore will exercise the state's power of eminent domain more often than is socially efficient.[29]

The second form of concern about the amount of uncompensated value is distributional—a worry that not compensating condemnees for the full amount of the loss that they personally experience is unfair to those unfortunate people who happened to own property which was particularly valuable to the public at large. Fairness concerns can focus primarily on the losses that only a few are forced to bear while others remain immune or on unjust enrichment concerns about the gains that the public enjoys at the condemnees' expense.[30] In either case, the basic distributional intuition is, in the oft-quoted words of Justice Black in *Armstrong v. United States*, that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone

---

private property owners"); Lawrence Blume & Daniel L. Rubinfeld, Compensation for Takings: An Economic Analysis, 72 Calif. L. Rev. 569, 620–22 (1984) (asserting that "the costs of governmental actions are generally discounted by the decisionmaking body unless they explicitly appear as a budgetary expense"); Barton H. Thompson, Jr., Judicial Takings, 76 Va. L. Rev. 1449, 1489–92 (1990) (noting law and economics scholars argue that governments "may undervalue the property they 'take' for government projects or programs unless forced to pay for that property").

29. See, e.g., Bell & Parchomovsky, Taking Compensation, supra note 28, at 881–84 (describing "fiscal illusion" as "presumed habit of government decisionmakers of ignoring costs that do not directly affect government inflows and outflows"); Blume & Rubinfeld, supra note 28, at 620–23 (noting public choice theory argument that "a governmental regulatory body will over- or under-regulate if it does not consider all budgetary and social costs"); Thompson, supra note 28, at 1489–92 (arguing courts, legislatures, and administrative agencies are susceptible to fiscal illusion).

30. For examples of fairness concerns about allocating to condemnors the entire surplus value generated by an exercise of eminent domain, see Lawrence Berger, The Public Use Requirement in Eminent Domain, 57 Or. L. Rev. 203, 232–33 (1978) (asserting that "in fairness, someone should not be allowed to reap windfall gains through the seizure by legal process of another's property"); Michael Heller & Rick Hills, Land Assembly Districts, 121 Harv. L. Rev. 1465, 1477–78 (2008) (discussing "whether landowners ought to receive any share of the increased value resulting from the land assembly" created by exercise of eminent domain). Concerns about allocation of the surplus are not limited to considerations of fairness. For example, Thomas Merrill has suggested the following:

> [A]llocating the condemnation's entire surplus to the condemnor . . . may produce a kind of secondary rent seeking of its own, as competing interest groups attempt to acquire or defeat a legislative grant of the power of eminent domain. In this way, eminent domain, an instrument designed to overcome rent-seeking behavior associated with thin markets, may inadvertently produce the very type of socially inefficient resource allocation it was designed to avoid.

Merrill, supra note 22, at 86; see also Daniel B. Kelly, Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism, 17 Supreme Ct. Econ. Rev. 173, 180 (2009) ("Rent seeking is . . . a distinct possibility whenever a private party expects to obtain all or a significant portion of a taking's surplus.").

to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[31]

Complementary to these concerns about the amounts of uncompensated value that condemnees lose is a distinct set of concerns about the *types* of value that are uncompensated. As with concerns about amounts of value, concerns about types of value also can take multiple forms. In one guise, the worry is about systematic neglect of important types of value that are capable of compensation, at least in theory, but that in fact do not receive compensation.[32] A distinct but related worry is about types of value for which no monetary equivalent is even possible.[33] A typical example of the former concern is the thought that fair market value compensation completely fails to compensate condemnees for their sentimental attachment to the property they are losing, especially if that property has been their home.[34] The worry is that the cold and impersonal calculus of the market has little care for the emotional ties ripped asunder when condemnees are driven from their homes. As Lee Anne Fennell has noted, the value of such ties is inherently incapable of transfer to others—a stranger cannot have your memories of growing up in your childhood home.[35] Since it is impossible for one person to acquire

---

31. 364 U.S. 40, 49 (1960). William Treanor notes that Black's language in *Armstrong* has "received a remarkable degree of assent across the spectrum of opinion." William Michael Treanor, The *Armstrong* Principle, the Narratives of Takings, and Compensation Statutes, 38 Wm. & Mary L. Rev. 1151, 1153–54 & nn.17–22 (1997). The language itself has a long pedigree. See, e.g., Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310, 28 F. Cas. 1012, 1015 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 16,857) ("[N]o one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompence in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large.").

32. See, e.g., Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988) ("[B]ecause of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, [many owners] value their property at more than its market value . . . . Such owners are hurt when the government takes their property and gives them just its market value in return."); John Fee, Eminent Domain and the Sanctity of Home, 81 Notre Dame L. Rev. 783, 791 (2006) (discussing difference between home's market value and its personal value to owner).

33. See, e.g., Fennell, supra note 20, at 994 (asserting that "simply increasing monetary payments to owners of condemned land . . . does not adequately address the confiscation of autonomy that attends exercises of eminent domain"). Part III.A, infra, discusses Fennell's concerns about compensation for lost autonomy.

34. See, e.g., Fee, supra note 32, at 790–91 (asserting market value compensation deprives owners, inter alia, of compensation for "a home's connection to memories"); Merrill, supra note 22, at 83 (asserting "sentimental attachment to the property" is one element in uncompensated "subjective premium").

35. Fennell, supra note 20, at 964 ("Because [the subjective premium] is personal to the individual landowner, its confiscation in the course of eminent domain necessarily means its outright destruction rather than its transfer to someone else.").

another's sentimental attachments,[36] the intuition seems to be, no one will be willing to pay extra for property with high levels of sentimental attachment, and the property's resulting market price will therefore not reflect the value of those attachments to the property's current owner.

A systematic failure to compensate eminent domain condemnees for the loss of their sentimental attachments would be particularly worrisome to commentators who place great importance on such attachments. Margaret Radin's influential work emphasizing the importance of "personal" property is a natural starting point for such concerns.[37] Radin distinguishes between "personal property" and "fungible property," and argues that the former should receive special solicitude.[38] Radin describes "fungible" property as objects held "for purely instrumental reasons."[39] Such objects are "perfectly replaceable with other goods of equal market value."[40] The paradigmatic example of fungible property is money. However, Radin also includes "the wedding ring in the hands of the jeweler" and "the apartment in the hands of the commercial landlord."[41] Radin describes "personal" property, by contrast, as objects that "are part of the way we constitute ourselves as continuing personal entities in the world."[42] More specifically, property is personal to a specific owner if the loss of that property "causes pain that cannot be relieved by the object's replacement."[43] Two examples of personal property are a home and a wedding ring when owned by a spouse. The pain of losing either is not eliminated by receiving an equally expensive ring or apartment elsewhere. Someone who shares Radin's view of personal property and who also thinks that such personal aspects of ownership, including sentimental attachments, are capable of monetary compensation might as a result be especially perturbed if condemnees were categorically denied compensation for the important human values inherent in ownership of personal property.

Moreover, to the extent that certain values in property ownership are inherently incompensable by monetary payments, there is additional reason to be concerned about eminent domain's imposing involuntary

---

36. Whether technological advancements will someday allow the transfer or creation of "memories" is a question that, for the present, remains safely within the realm of science fiction. See, e.g., Philip K. Dick, We Can Remember It for You Wholesale (1966), reprinted in 2 The Collected Stories of Philip K. Dick 35, 37 (1995) (describing futuristic method of "extra-factual memory implant").

37. Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957 (1982) [hereinafter Radin, Property and Personhood].

38. Id. at 986.

39. Id. at 959–60.

40. Id.

41. Id. at 960.

42. Id. at 959.

43. Id.

property transfers. Radin's own view may fall in this category.[44] So does Nicole Garnett's concern about uses of eminent domain that eliminate entire close-knit communities.[45] Garnett worries that such a community's whole is greater than the sum of its parts.[46] Since compensation in eminent domain is given only for the parcels of property taken individually, the value of the community itself is lost. To the extent that such a loss is a loss to society as a whole, that loss is inherently impossible to compensate, since it is society itself that is doing the taking. Because society cannot compensate itself, just as I cannot compensate myself for an injury that I have suffered, the community's elimination is pure loss.

If such inherently incompensable values are at stake in a specific exercise of eminent domain, questions of how or whether to compensate for the loss of those specific values become moot. The proper context for concerns about such losses is the decision whether to take a given piece of property in the first place and the relevance of the Constitution's "public use" requirement to that decision. Such issues have been explored in depth elsewhere, and there is no need to belabor them here.[47] This Article's focus is on values that monetary compensation can address and the resulting questions of what sorts of things actually do receive compensation under the fair market value standard, to what extent they receive such compensation, to what extent they should receive such compensation, and what form that compensation should take when it is in fact appropriate.

---

44. See, e.g., Margaret Jane Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1667, 1691 (1988) [hereinafter Radin, Liberal Property] ("[F]rom the points of view of interests of personhood and community, decisions that change the entitlement of personal property into a 'liability rule' should be . . . deeply suspect . . . because their implicit assumption that forced transfer at the market price justly compensates owners treats personal property as fungible.").

45. See generally Nicole Stelle Garnett, The Neglected Political Economy of Eminent Domain, 105 Mich. L. Rev. 101 (2006) [hereinafter Garnett, Neglected Political Economy].

46. Id. at 108.

47. See generally, e.g., Fee, supra note 32, at 796–800 (describing proposals that would bar governments from using eminent domain to benefit private projects); Nicole Stelle Garnett, The Public-Use Question as a Takings Problem, 71 Geo. Wash. L. Rev. 934 (2003) (advocating "[r]equiring a relatively tight connection between an exercise of eminent domain and the public policy justifying it"); Krier & Serkin, supra note 20, at 874 (arguing that "to avoid the clumsy all-or-nothing property rule approaches to public use . . . together with their high error costs, [the law should] shift to liability rules, with compensation increasing as skepticism about the public nature and benefits of government action grows"); Radin, Liberal Property, supra note 44, at 1690–91 ("Even if [transferring property under eminent domain to a user adjudged to benefit the community] satisfies the insubstantial hurdle of 'public use,' in the case of personal property there should be some constitutional mechanism for keeping it in the hands of its holders except in dire cases." (footnote omitted)).

2. *Taxonomy of Property Owners' Value.* — No canonical taxonomy exists of the sorts of value that each landowner places upon his or her property and for which condemnees would have to receive compensation in order to be made whole. Commentators offer varying taxonomies, typically without much attempt at systematic rigor.[48] There is considerable overlap, however, among these accounts, each of which is broadly plausible. A rough sketch of the various types of value involved is sufficient for present purposes.

What may be the single largest contributor to a given piece of property's total value receives so little explicit attention in the literature that it has no agreed-upon name. This is the non-"subjective" value that everyone tacitly agrees is included within the property's fair market value.[49] The label "objective" value might be tempting, but it is potentially misleading because the extent to which property has any value completely independent of people's preferences is at best uncertain.[50] Whatever its label, the most prominent components of this type of value are clear. It straightforwardly includes at least some of the "economic" value of the property—that is, the property's ability to generate income, perhaps through the fertility of its soil or the minerals buried beneath its surface. And it plausibly also includes the property's ability to sustain profitable commercial enterprises, such as factories, shops, or residences.[51]

A second component is typically referred to as "subjective" value, a grab-bag category with no precise boundaries, described through examples.[52] Thomas Merrill and Henry Smith mention the landowner's psychological attachment to the property, affinity for the neighborhood, "special modifications to the property to suit [his or her] particular needs," and desire to avoid "the inconvenience of moving."[53] Lee Anne Fennell emphasizes that "subjective" value can include "hard" components that are not "befogged by sentimentality or emotion," components such as moving expenses, "search costs of finding shops and services in

48. See, e.g., Fee, supra note 32, at 790–91 (discussing elements of personal value lost to property owners, particularly homeowners, in takings); see also infra text accompanying notes 52–53 (describing subjective value of property).

49. The Supreme Court once referred to it as "a general demand which gives [most things] a value transferable from one owner to another." Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949).

50. The Supreme Court alluded to this fact in *Kimball Laundry*, noting that "[t]he value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker." Id.

51. The effect of such common economic considerations on a property's value is sufficiently obvious that it has attracted little scholarly comment in the takings literature.

52. See, e.g., Dana & Merrill, supra note 20, at 173–74 (listing examples).

53. Merrill & Smith, supra note 11, at 1254.

the new location," and "site-specific improvements that are well-suited to the owner's uses but do not enhance fair market value."[54]

Following these suggestions, "subjective value" can be divided into several distinct types of value. These include *sentimental value*—the emotional attachments that owners may develop to the property that they own or the neighborhood in which they live; *alterations* to the property to make it more suitable for the owner's use; *location* benefits derived from the property's proximity to places to which the owner wishes to travel frequently; the ability to avoid *out-of-pocket expenses*, such as the costs of hiring movers to relocate the owner's personal property; the ability to avoid *information costs* of learning about a new neighborhood and the people in it; and perhaps miscellaneous other costs or repositories of value.

Fennell asserts that the "uncompensated increment"—that portion of a property owner's total value that is not reflected in the property's fair market value—contains two other elements as well. The first is "the chance of reaping a surplus from trade."[55] This refers to the possibility of engaging in hard-nosed negotiation to capture some of the surplus hoped to be enjoyed by an eager buyer who places a much higher value on the property than the current owner does. The second element is "the autonomy of choosing for oneself when to sell," rather than being subject to a government-dictated time of sale.[56] One can denote these elements as *potential gains from trade* and *autonomy*, respectively.

The following section considers the extent to which fair market value compensation does or does not encompass each of these types of value.

B. *The Content of Fair Market Value*

As noted earlier, a basic assumption underlying standard treatments of fair market value compensation is that such compensation ignores substantial amounts or categories of value that condemnees have in property taken from them by eminent domain. This assumption is, however, at the very least, overstated. A property's fair market value includes much more than the standard account has recognized.

To understand why, a first step is to note the difference between two types of markets. Ideal markets are highly liquid, filled at any given time with large numbers of buyers and sellers who wish to trade similar goods.[57] Modern financial markets for shares of stock in America's

---

54. Fennell, supra note 20, at 963.

55. Id. at 958–59.

56. Id.

57. See, e.g., Tarun Chordia, Richard Roll & Avanidhar Subrahmanyam, Liquidity and Market Efficiency, 87 J. Fin. Econ. 249, 267 (2008) (detailing direct relationship be-

largest publicly traded corporations usually approach such an ideal reasonably closely. Common shares in Ford Motor Company are highly similar—in fact, they are completely interchangeable—and on an average trading day more than sixty-one million shares of Ford stock change hands.[58] Many markets fall short of this ideal, however, either because the items traded are quite dissimilar or there is little trading volume. The high-end art market is a paradigm of this latter sort of market. Many artworks are unique—there is only one *Nymphéas, 1906* by Monet—and at any given time it is quite likely that few or no people will be interested in selling or buying the work, except at an unrealistically high or low price.[59] Terming the former sort of markets "thick" and the latter sort "thin," Thomas Merrill has pointed out that in practice most real estate markets are relatively thin.[60]

Nevertheless, just as analyzing physics problems in a world without friction can be helpful for understanding the underlying physical principles at work, so too thinking about fair market value in the idealized context of thick markets can be useful for identifying the boundaries of what that value includes. So, the first task is to consider the content of fair market value in thick markets, draw the insights that are available there, and then consider what adjustments are necessary when in thin real estate markets.

1. *Fair Market Value in "Thick" Markets.* — Suppose that Pleasantville Acres is a residential subdivision consisting of twenty identically configured lots, each having equal access to a grid of streets that conveniently connects to the local road network. On each lot stands a house that is, for all practical purposes, identical in size and quality to every other house in Pleasantville. When the subdivision's properties first became available for purchase, they sold out immediately, and the purchasers promptly moved into their new homes. Over the years, various homes have changed owners through voluntary transactions, as previous owners moved out and new owners moved in. A few lots, however, remain with their original owners.

---

tween high liquidity and market efficiency); Li Gan & Qi Li, Efficiency of Thin and Thick Markets 21 (Nat'l Bureau of Econ. Research, Working Paper No. 10815, 2004), available at http://www.nber.org/papers/w10815 (on file with the *Columbia Law Review*) (concluding thicker, highly liquid markets are more efficient than thinner markets).

58. Ford Motor Co (F), Reuters, http://www.reuters.com/finance/stocks/overview?symbol=F (on file with the *Columbia Law Review*) (last visited Mar. 4, 2013).

59. Monet's *Nymphéas, 1906* was withdrawn from a 2010 auction at Christie's in London, despite having been estimated to sell for between thirty million and forty million British pounds, because no bidder exceeded the item's reserve price. Elizabeth Renzetti, Gasp. You Won't Pay £30-Million for the Monet?, Globe & Mail (Toronto), June 26, 2010, at R3.

60. Merrill, supra note 22, at 97–102.

One of those lots is Lot 20, owned by Fillmore. Although Fillmore would prefer to remain in Pleasantville Acres, the government now wishes to take his property for a public works project. It must, of course, compensate him for the value of his lot, which amounts to paying him the fair market value of his lot. But what is the fair market value of Fillmore's lot? By definition, it is the price at which a willing seller and willing buyer would agree to transfer ownership of the property.[61] Since the local housing market is liquid (or "thick"), there have been several voluntary transactions involving neighboring properties, which all have effectively the same location and basic physical properties as Fillmore's. Thus, those transaction prices straightforwardly establish a market price—fair market value—for Fillmore's property.

Now let us consider what is included in that price. Suppose that Lot 8 recently changed hands, when Polk sold to Taylor. Because this was a voluntary transaction—Polk was a willing seller and Taylor a willing buyer—the final price that Taylor offered to Polk would have to match or exceed the value of the property to Polk, as Polk saw it. Assuming Polk is rational, she would be unwilling to sell for less than the property was worth to her.[62] In technical terms, her reservation price—the price below which she would be unwilling to sell—would fully include the property's utility to her.

What then makes up the value of Polk's property to her? Part of the value, of course, is its income-earning potential, perhaps as rental property or as a speculative investment in the real estate market. But since the property is Polk's home, many other things are likely to be included as well. The convenience of the property's location, the prestige of its neighborhood, the fond memories and psychological associations that Polk has with it, and its suitability for Polk's uses may all affect the value that Polk sets on that property. And to the extent that the price that a buyer offers to Polk does not at least compensate Polk for all of these value components, Polk will be unwilling to sell. She will not agree to a deal that will leave her less happy than she would have been had she refused the deal. If there is to be a transaction between a willing seller and

61. United States v. Miller, 317 U.S. 369, 374 (1943) ("It is usually said that market value is what a willing buyer would pay in cash to a willing seller.").

62. The assumption of rational agents is implicit in the willing buyer, willing seller definition of fair market value. Although behavioral economics literature and recent history call that assumption into question, loosening it in this context is unlikely to be helpful. If the market is systematically undervalued, then fair market value compensation will, to that extent, "undercompensate" condemnees. By the same token, however, if the market is systematically overvalued, fair market value compensation will "overcompensate" condemnees. Courts are unlikely to be better than market participants, many of whom are professionals, at determining whether a given market is fundamentally overvalued or undervalued. Were it otherwise, the government could easily fund operation of the court system merely by having judges trade real estate futures.

a willing buyer for Polk's property, the sale price will have to reflect all of Polk's value in the property.

There is, of course, nothing special about Polk. Every lot owner in Pleasantville Acres would behave similarly. Thus, over time, the aggregate effect of the various transactions for Pleasantville lots would be to set a market price which reflects the *typical* value that Pleasantville Acres residents placed upon their properties. This would include the (identical) underlying non-"subjective" value of each lot and house but would not be limited to that value. It would also reflect, inter alia, the typical amount of sentimental value that residents had acquired in their property, the typical amount of value that residents received from improvements that they made to their property, and the relative convenience or inconvenience of access to Pleasantville Acres residents' typical places of employment, schools, houses of worship, and other amenities. In short, each resident who engaged in a voluntary sale transaction entered into that transaction only after the transaction price met or exceeded a reservation price that included compensation for all of his or her subjective value in the individual property.[63] Therefore, the market price formed by multiple iterations of those transactions does not in fact fail to account for the properties' "subjective" value. Because that price has been formed by transactions that included each seller's entire "subjective" value, it fully reflects the property's *typical* subjective value.

The taxonomy, developed earlier, of the various components of condemned property's "subjective value" can make this implication even more precise by enabling one to consider the extent to which fair market value incorporates each of those components.[64]

One set of components is the value of avoiding both out-of-pocket expenses, which the condemnee incurs by having to move, and the post-

---

63. Fennell recognizes this fact in passing but appears to have overlooked its implications. See Fennell, supra note 20, at 966 (illustrating an argument with an example in which a homeowner "subjectively values" a home at $250,000 and thus "[i]n the ordinary course of events . . . would refuse to sell for any amount less than $250,000"); cf. 1 Julius L. Sackman et al., Nichols on Eminent Domain § 1A.03[3][d] (3d ed. 2012) [hereinafter Nichols] (suggesting there is "some merit" to idea that "market value at which others have actually sold similar properties already incorporates the consumer surplus which they attached to their property: i.e., market value is not a surplus-less measure but one that already includes some (perhaps an objective average of) consumer surplus"). The treatise authors' brief discussion of this point relies upon a simple definition of "consumer surplus" as merely the amount by which a parcel's value to its owner exceeds the parcel's market value. Id. Such a definition is an awkward logical fit with the assertion that market value incorporates "consumer surplus." Id. The treatise authors subsequently endorse the standard view that "[p]erhaps the most significant criticism of the market value measure is that it fails to indemnify the condemnee's loss." Id. § 1A.03[4][d].

64. See supra Part I.A.2 (describing various types of value that landowners place upon their property and for which condemnees must receive compensation in order to be made whole).

moving information costs of learning about a new neighborhood and the people in it. Since selling one's property necessarily involves vacating it and relocating elsewhere, both of these types of expenses are among the forecasted expenses that a willing seller would have incorporated into his or her reservation price. No rational seller would voluntarily lose money in a final tally as a result of a trade. To the extent that out-of-pocket relocation and information costs are fairly similar across owners of similarly sized property in a given locality, the fair market value standard might fully compensate for a condemnee's relocation and information costs.[65] Although it seems unlikely that there would be much variance in these costs, it is conceivable that some condemnee might have unusually large costs of this type. The fair market value standard would then *partially* compensate the condemnee for these sorts of costs and would omit compensation only for the *idiosyncratically large* portion of those costs.

The second set of components derives from the condemned property's particular suitability to the condemnee's use. One of these components is the convenience of the property's nearness to places where the owner frequently must travel and the distance of the property from places that the owner would like to avoid. Here again, any rational property owner would willingly sell the property only if the transaction price included compensation for any significant "location premium" that the sold property had relative to the property which would replace it.[66] Since the desirability of a parcel's location is widely recognized as a primary component of any parcel's overall desirability, it is likely that the great majority of willing sellers would include the personal value of the parcel's location in their reservation price.[67] Thus, since every willing seller is likely to place some positive value on the property's location, the fair market value standard would give any condemnee at least partial compensation for his or her location-based personal value in the condemned property.

---

65. The relevant comparison class would have to be property of the same size, because relocating a family of six from a large home is typically substantially more expensive than relocating a bachelor from a studio apartment. There simply is more to relocate. Information costs will depend in part on how far away the condemnee would be required to move after vacating the taken property. The farther away a condemnee has to move, the less familiar the new neighborhood is likely to be, and the higher the resulting information costs are likely to be.

66. The value of the parcel's location, like other values, cannot be calculated in isolation but must be determined by the relative desirability of available alternatives. If the supply of lots in a convenient location is plentiful, no single lot in that area will command much of a premium for its location, relative to lots in convenient locations where available lots are scarce.

67. It seems scarcely necessary to repeat the old realty adage that the three most important characteristics of any piece of property on the market are "location, location, and location."

How close that compensation would come to fully compensating the condemnee for this particular element of "subjective value" would depend on how much variance exists among owners' location-based preferences for their property. In general, the proximity to full compensation is likely to be considerable. People typically like to live near where they work, so property willingly sold in a given locality will likely tend to be close to where the owner works, or at least close to a transit link to where the owner works.[68] The same holds true for convenient access to cultural resources, useful commercial establishments (such as grocery stores or shopping centers), houses of worship, places of amusement, and the like.

Nevertheless, the variance could be large in individual cases. For example, in an area with few businesses, someone who worked in one of those businesses and owned a home across the street would enjoy a substantially greater location premium than most market participants would. In such cases, fair market value compensation would fall noticeably short of full compensation for the personal value of the condemned property's location to the condemnee. Again, however, the uncompensated amount would not equal the property's entire location-based value to the condemnee but only the idiosyncratically large portion of that value.

A second component of subjective value derived from the property's particular suitability to the owner consists of any costly alterations that the owner has made to the property to make it more useful or appealing to him. The value of ordinary alterations that are appealing to a wide range of people is, of course, likely to be fully incorporated in the property's market price. Addition of another room to a house, or replacement of asphalt with a nicely landscaped lawn, straightforwardly makes the property more desirable. Alterations with less widespread popularity are a different matter. More so than the other components of subjective value that have been examined so far, the alterations component introduces the possibility of very large expenditures that are of interest to few people other than the landowner. An avid astronomer, for example, might construct an observatory on her property, while a devotee of ancient religions might construct an elaborate temple to Artemis, and a person with an acute sensitivity to sunlight might alter a house to shield its interior from almost all natural light. Many alterations of this sort would be of zero value to other potential owners, and some—such as alterations to a house to prevent sunlight from reaching the interior—could well be seen as having negative value.[69] Such alterations are likely

68. Short commutes routinely appear as elements in indexes of regions' "livability." See, e.g., Venessa Wong, Which Is America's Best Affordable Suburb?, Bloomberg Businessweek (Mar. 2, 2010), http://www.businessweek.com/lifestyle/content/mar2010/bw2010032_951103.htm (on file with the *Columbia Law Review*) (specifying "short commutes" as one criterion for assessing towns' "livability").

69. Judging the alteration to have negative value should not, however, be done too hastily. At first glance, the "Winchester Mystery House" in San Jose, California, might seem

to be quite rare, and thus fair market value is likely to compensate the typical condemnee for a significant fraction of the value of that condemnee's alterations to his or her property. But when those alterations do exist, the uncompensated amount of value—that is, the amount of value that is idiosyncratically large—could be quite large indeed.

A third general type of value, and one which perhaps is most frequently associated with the notion of a "subjective premium," is the sentimental value which an owner has in his or her property, especially his or her home. By now, the proper analysis of how fair market value relates to this sort of value will likely be evident. It is an ordinary natural consequence of human psychology for property to acquire sentimental value for its owners (or, perhaps more accurately, for its possessors).[70] As a result, one would expect the existence of sentimental value to be widespread among the property owners who participate in the real estate market, at least for residential real estate.[71] Thus, willing sellers' reservation prices will include the value of their sentimental attachments, and that value will be reflected in the resulting market price for their prop-

---

to be a paradigmatic example of such value-destroying alterations. Its wealthy owner, morbidly afraid of ghosts and determined to protect herself from them, had the house constructed with false doors, stairways to nowhere, and other "traps" to confuse and distract any malignant spirits that might visit. The Winchester Mystery House: Beautiful but Bizarre!, Winchester Mystery House, http://winchestermysteryhouse.com/thehouse.cfm (on file with the *Columbia Law Review*) (last visited Feb. 5, 2013). The result was a house that would be infuriating for an ordinary person to live in. In the long run, however, those alterations were not necessarily destructive of market value, because the house now does a thriving business as a tourist attraction. See Shannon Barry & Berryessa Sun, House of Mystery: Historical Landmark Comes to Life for Halloween, San Jose Mercury News (Oct. 11, 2012, 10:58 AM), http://www.mercurynews.com/san-jose-neighborhoods/ci_21750052/historical-landmark-comes-life-halloween (on file with the *Columbia Law Review*) (describing how Winchester Mystery House has been open to public since 1923 and its 2012 "Fright Nights" Halloween event was expected to draw between 40,000 and 45,000 visitors during twenty-two-night run).

70. For a recent discussion of the psychological foundations of this phenomenon, see David L. Markell, Tom Tyler & Sarah F. Brosnan, What Has Love Got to Do with It?: Sentimental Attachments and Legal Decision-Making, 57 Vill. L. Rev. 209, 217–21 (2012) (describing factors influencing individuals' development of attachment to items, including through ascriptions of sentimental value).

71. Business owners might also develop sentimental value in their business locations, especially those which were the businesses' original locations or those where the business owner had achieved some significant career milestone. On average, however, one suspects that the incidence of sentimental value among owners is less for commercial real estate than for residential real estate. Sentimental value among customers of the business is a different matter. The existence of the latter sort of value may be an element which the government should consider before deciding to take the property, but it is obviously not something for which the business's owner should receive compensation. The question of compensating the community for any negative externalities from an exercise of eminent domain does not frequently arise, presumably because the justification for the use of eminent domain in the first place is that the public will benefit from the project for which the property is taken.

erty. Hence, just as for the other elements of subjective value which have been discussed, fair market value compensation will include full compensation for the typical amount of sentimental value in a locality and will partially compensate condemnees who have more than that typical amount. Those condemnees will not receive compensation only for the idiosyncratically large portion of their sentimental value.[72]

Fennell suggests that another element of the "uncompensated increment" is the condemnee's loss of potential gains from trade; that is, eminent domain deprives a condemnee of the opportunity to drive an advantageous bargain in a voluntary transaction with the beneficiary of the exercise of eminent domain.[73] The underlying thought is that if the state had not taken the property, then the condemnee might have been able to bargain for a higher selling price in order to capture some of the surplus that the acquirer expects to enjoy as a result of the project that will use the condemned land.[74]

There are actually two sorts of value that might be included here. One is ordinary speculative investment value, based on expectations about how desirable the property will be to buyers in the future. For example, one might buy a lot in a distressed part of town, gambling that gentrification will make the lot more valuable in the future. In a market that is at least moderately efficient, the expected value of future contingencies will be included in the property's market price at any given time.[75] Therefore, to the extent that this value is derived from the potential ability to sell at a higher price to future buyers *in general*, that value is

---

72. Note that just as some condemnees may have unusually large amounts of sentimental value in their property, so too some might have unusually small amounts of sentimental value. Fair market value compensation actually overcompensates the latter for their loss of sentimental value.

73. Fennell, supra note 20, at 965–66. The beneficiary may be the government or, as in *Kelo*, a private entity. Kelo v. City of New London, 545 U.S. 469, 473 (2005) (noting that disputed condemnation's intended beneficiary was "New London Development Corporation (NLDC), a private nonprofit entity").

74. Fennell, supra note 20, at 965–66.

75. For a discussion of efficient markets theory by one of its pioneers, see generally Eugene Fama, Efficient Capital Markets: A Review of Theory and Empirical Work, 25 J. Fin. 383 (1970). For a description and rebuttal of criticisms of the theory, see Burton G. Malkiel, A Random Walk Down Wall Street: The Time-Tested Strategy for Successful Investing 267–300 (10th ed. 2011). How efficient the real estate market actually is cannot be determined with certainty. The real estate bubble and crash of the first decade of the 2000s clearly demonstrate that the market is far from perfectly efficient. See, e.g., Efficiency and Beyond, Economist, July 18, 2009, at 68, 68–69 (describing academic critiques of market efficiency assumptions and explaining how they relate to 2007 financial crisis). Ultimately, however, the "fair market value" standard seems to rest on an assumption of at least moderately efficient markets. And even if those markets are not efficient, it is unlikely that legislatures or judges could do a better job than the market of determining what a property's "true" value is.

already included in the property's fair market value.[76] Thus, the condemnee receives full compensation for this sort of value.

However, the loss of the potential ability to sell to *this particular* buyer—that is, to the beneficiary of the exercise of eminent domain—is another matter. This second sort of value is, in effect, the value of being able to hold out in negotiations in order to acquire more of the aspiring purchaser's surplus.[77] This holdout value is an especially pure form of idiosyncratically large "subjective value." Lots which are situated next door to the condemnee's lot and are otherwise identical to that lot, but which are not of interest for this particular project, have no holdout potential. Because only the condemnee's lot has this particular value for the project, previous market transactions for otherwise similar lots would not have reflected this value, and the fair market value standard consequently would not include any compensation for it. Indeed, this sort of value is precisely what eminent domain is designed to allow acquirers to avoid having to pay.[78]

One final type of value to consider is the value of the condemnee's autonomy, lost by being compelled to transfer the property at a price that the condemnee would not have accepted in a voluntary transaction. Since, by definition, the property's fair market value is determined by what a willing buyer would have to pay to a willing seller, fair market value does not include the special costs of an unwilling sale. Thus, the value of the condemnee's autonomy, although shared in common with market participants and not idiosyncratically large, is entirely left out of fair market value compensation.

A general picture has now emerged. With the exception of compensation for lost autonomy, fair market value compensation will fail to provide full compensation for a property owner's value in the taken property only to the extent that the owner has idiosyncratically large amounts of

---

76. Included among those contingencies is the possibility that if a highly valuable alternative use arose, the government might take the property instead of requiring its purchase in a voluntary transaction. To the extent that this taking decreases the value of the property to the owner, the risk of that was already incorporated into the property's price when the condemnee originally bought it. Thus, in a moderately efficient market, the condemnee has already received a discount for the possibility that the property would be taken and that its owner would receive only fair market value compensation. Therefore, paying extra compensation to the condemnee for the loss of his or her opportunity to capture some of this surplus would actually provide that condemnee with a windfall.

77. Steven Shavell, Foundations of Economic Analysis of Law 124 (2004).

78. See id. at 124–27 (citing ability to avoid "bargaining problems" created by landowners holding out for additional value as one of several advantages of eminent domain); see also Bell & Parchomovsky, Taking Compensation, supra note 28, at 904 (stating eminent domain's value lies in enabling the state to overcome "information asymmetries and strategic holdouts"); Fennell, supra note 20, at 971 (noting "importance of overcoming strategic holdouts in order to achieve important objectives constitutes a primary justification for eminent domain").

"subjective value." And even if a property owner is atypical in this way, fair market value compensation will still provide *partial* compensation for a diverse range of types of subjective value in the property—for sentimental attachment, for the value of improvements, for convenience to places of interest, and so forth. One can therefore more precisely describe the "uncompensated increment," the difference between each condemnee's personal valuation of the taken property and the fair market value of that property, not as a "subjective premium" but rather as an *idiosyncratic premium.* What fair market value does not compensate is only the value of autonomy and the condemnee's *idiosyncratically large amount* of subjective value.

2. *"Thin" Markets and the Theory-Dependence of "Fair Market Value."* — The discussion so far has examined fair market value in the context of "thick" markets. This context provides a valuable conceptual understanding of the nature of fair market value compensation, but it is also likely to be a noticeable departure from everyday reality. Most real estate markets are likely to be "thin" in practice and thus offer no ready "market price" to consult when determining the "fair market value" of condemned property.[79]

Courts have addressed this problem by using various proxies for fair market value. Three basic approaches are most common,[80] and although the choice of which approach to use in any given case is often left to the judge's discretion,[81] a fairly clear hierarchy has evolved.[82]

The most straightforward approach is to use the actual sales prices of comparable properties—prices derived either from previous transactions involving the condemned property itself or from transactions involving other property that the court considers to be comparable to the condemned property. Courts generally prefer this method, deeming it the most reliable.[83] When a lack of adequate comparable price data makes

---

79. United States v. Miller, 317 U.S. 369, 374 (1943) ("[E]ven in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety."); 4 Nichols, supra note 63, § 12B.03[2][a] ("The market value of real estate is not ordinarily the subject of ready computation[,] . . . due in part to the unique nature of land . . . ." (footnote omitted)).

80. 4 Nichols, supra note 63, § 13.01[10]; cf. Dana & Merrill, supra note 20, at 170–71 (listing "most common techniques" for determining fair market value and organizing them slightly differently than this Article).

81. Dana & Merrill, supra note 20, at 171.

82. See 4 Nichols, supra note 63, § 13.01[10] ("[The] three methods have been ranked in order of preference with comparable sales being placed first as providing the best evidence of market value. The income capitalization approach is preferred when comparable sales are unavailable. It appears that the least preferred method is the cost approach." (footnotes omitted)).

83. Id. § 13.01[11]. This preference, however, is not universal. For example, a 1999 amendment to Kansas's eminent domain statute specified that thenceforth all three methods of determining fair market value should be treated equally. 1999 Kan. Sess. Laws

the first approach infeasible (or when commercial property is involved), courts commonly will employ a second approach, calculating the present value of the total income that an owner could derive by renting the property, based either on actual rental income data or forecasted data.[84] A third approach is to calculate replacement value for condemned structures, adjusted downward to account for the extent to which the existing structures have depreciated from the effects of wear and time. This approach is generally the least favored, used only when the other two options are unavailable.[85]

The "thick" market analysis developed above straightforwardly applies to the first of these approaches. The market price of properties comparable to the taken property will reflect the typical level of subjective and nonsubjective value held by owners of such properties.

How the other two approaches relate to owners' subjective value is not so clear. The method of forecasting rental value will likely continue to include such elements of subjective value as the desirability of the property's location and its adaptation to specific needs. Other elements, such as sentimental value, would likely drop out. To the extent that courts use this approach only for property which either is commercial property or is in fact used as rental property—basically, for any situation other than a private home—the above analysis would likely apply directly to this approach without modification.

Calculation of the cost of rebuilding places a twist on the ordinary understanding of fair market value as what a willing buyer would pay a willing seller. Typically, the understanding is that the current owner (the condemnee) corresponds to the role of the "willing seller," while other market participants stand in the role of the "willing buyer."[86] In the costs-of-reconstruction approach, by contrast, the property owner who is hypothetically purchasing the reconstruction stands in the role of the "willing buyer," while the "willing seller" becomes the hypothetical construction company that is contracted to undertake the building project. Thus, the above analysis does not straightforwardly apply to this third proxy for fair

---

551–52 (codified at Kan. Stat. Ann. § 26-513(e)) ("The fair market value shall be determined by use of the comparable sales, cost or capitalization of income appraisal methods or any combination of such methods."); Creason v. Unified Gov't of Wyandotte Cnty., 33 P.3d 850, 853 (Kan. 2001) ("By virtue of the 1999 amendment, the three generally recognized methods of valuing real estate [stand] on equal footing . . . ." (citing City of Wichita v. Eisenring, 7 P.3d 1248 (Kan. 2000))).

84. 4 Nichols, supra note 63, § 13.01[10], [12].

85. Id. § 13.01[10], [13].

86. See United States v. Cors, 337 U.S. 325, 333–34 (1949) (placing property owner in role corresponding to "willing seller" and government in role corresponding to "willing buyer"); United States v. Miller, 317 U.S. 369, 374 (1943) (explaining that measure of fair market value as compensation for condemnation was "what a willing buyer would pay in cash to a willing seller").

market value. To the extent that the condemned property's value is tied up largely in the costs of rebuilding the structures which exist on that property, however, the other elements of "subjective value" drop out anyway, and "fair market value" compensation is likely to approach full compensation.

The existence of these quite distinct methods for calculating a property's "fair market value" highlights the important fact that "fair market value" is itself not an objective, observable quantity, but rather a theory-laden concept whose content is determined by a set of prior assumptions about what determines a property's compensable value.[87] Thus, the assertion that a given sum is the "fair market value" of an object is not a neutral starting point from which to begin further analysis, but rather is the conclusion of a (tacit) line of reasoning dependent on premises about what aspects of an object are salient for determining which other objects are similar enough that their transaction prices can indicate the fair market value of the object in question.

Recognizing the inescapably normative dimension of "fair market value" calls our attention to a further fundamental question when property is taken by eminent domain: When the taken property's fair market value is less than the total value that the owner places on the property, to what extent *should* the public be required to pay compensation for that idiosyncratic premium? That is the question to which this Article now turns.

II. WHAT SHOULD WE COMPENSATE?

To what extent should one expect the law to provide full compensation for idiosyncratically large amounts of subjective value in property that is taken for public use?

The typical academic and judicial analysis takes the answer to be obvious: In an idealized world of perfect information, all subjective value would be fully compensated; allowing compensation to equal merely the taken property's fair market value is a concession to the practical difficulties of determining exactly what amount of subjective value the taken property truly has for a condemnee.[88] In part, this reaction is motivated

87. See, e.g., *Miller*, 317 U.S. at 375 ("[S]trict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must in fairness be eliminated in a condemnation case . . . . These elements must be disregarded by the fact finding body in arriving at 'fair' market value.").

88. See United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) ("Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule. The Court therefore has employed the concept of fair market value to determine the condemnee's loss." (citations omitted)); Bell & Parchomovsky, Taking Compensation, supra note 28, at 874 (observing that law "has adopted fair market value as the compensation

by a tendency to focus on political economy concerns raised by the "fiscal illusion" problem. However, even if one sets aside arguments that the compensation requirement does not in practice effectively limit inefficient takings, in part because public officials are swayed more by political incentives than secondhand economic incentives,[89] this political economy concern reaches at most half of the issue at stake in determining compensation. What it omits is the "justice" element of "just compensation." This omission is especially important since, as the Supreme Court has noted, "[t]he 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."[90] It is this justice element that is of interest to the present inquiry.

Unsurprisingly, judicial discussion of the compensation issue is replete with broad assertions about what compensation justice requires that condemnees receive. In *Monongahela Navigation Co.*, the Supreme Court asserted that both the "universal law" and "natural equity" required that condemnees receive "a full and just equivalent" for property that was taken from them but not others.[91] This requirement "prevents the public from loading upon one individual more than his just share of the burdens of government."[92] The *Armstrong* Court famously asserted that the just compensation requirement is designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[93] This

benchmark despite its tension with the goal of full compensation for purely practical reasons").

89. See, e.g., Shavell, supra note 77, at 129–30 (enumerating political actors' noneconomic motivations); Garnett, Neglected Political Economy, supra note 45, at 140 ("The difficulty is . . . that Takers tend to respond to political incentives rather than economic ones."). Such concerns can be particularly acute when the political decisionmakers' constituents will not ultimately bear the costs of providing compensation for the taken property. See, e.g., William A. Fischel, The Political Economy of Public Use in *Poletown*: How Federal Grants Encourage Excessive Use of Eminent Domain, 2004 Mich. St. L. Rev. 929, 953 (asserting that "[a]bove-market compensation . . . did not address the essential problem of the *Poletown* takings," which was "that Detroit did not have to put up much of its own money (either from its own taxes or from fungible grant money) to do the Poletown project").

90. United States v. Fuller, 409 U.S. 488, 490 (1973) (citation omitted).

91. Monongahela Navigation Co. v. United States, 148 U.S. 312, 324–25 (1893) (quoting Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 178 (1871)).

92. Id. at 325. This language has become a staple of prominent Supreme Court takings opinions by both majorities and dissents, and by both those arguing for more restrictions on the takings power and those arguing for fewer. It is specifically repeated in Kelo v. City of New London, 545 U.S. 469, 497 (2005) (O'Connor, J., dissenting), Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1071 (1992) (Stevens, J., dissenting), Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 n.7 (1980), and Penn Central Transportation Co. v. New York City, 438 U.S. 104, 147–48 (1978) (Rehnquist, J., dissenting).

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

formulation of course raises the question of which burdens, in fact, fairness and justice require that the public bear. Ten years before *Armstrong*, the Supreme Court had noted the central importance of that question: "Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?"[94]

So the question which must be addressed is this: To the extent that condemned property's fair market value does not fully include the condemnee's subjective value in the property, is the loss of that value (or various parts of that value) something which fairness requires the public as a whole to bear? In other words, setting aside concerns about administrability and public choice incentives, does fairness require compensating condemnees for the loss of idiosyncratic premiums?

A. *Just Compensation, Reasonableness, and Nuisance*

The taxonomy of elements that make up the idiosyncratic premium can once again structure this Article's analysis.

To begin with the obvious, when the state's taking property through eminent domain eliminates the idiosyncratically large value which the opportunity for strategic "holdouts" gives a condemnee who is allowed to set his or her own selling price, that loss is not something for which the public should have to compensate the condemnee. Indeed, on the standard understanding of eminent domain, the entire purpose of governments' having that power is to enable the state to overcome holdouts—that is, to avoid having to pay that inflated selling price to the condemnee in exchange for the property.[95]

The conclusion that "fairness" does not require compensation for such idiosyncratically large value is obvious. Considering *why* "fairness" does not require such compensation, however, can help explain what society's judgments of fairness, as expressed through the general scheme of property law, have concluded should and should not merit compensation.

---

94. United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950). Later opinions drawing on this specific language include United States v. 564.54 Acres of Land, 441 U.S. 506, 512 (1979), Carson Harbor Village, Ltd. v. City of Carson, 353 F.3d 824, 832 (9th Cir. 2004) (O'Scannlain, J., concurring), United States v. 125.07 Acres of Land, 667 F.2d 243, 249 (1st Cir. 1981), and United States v. 320.0 Acres of Land, 605 F.2d 762, 781 (5th Cir. 1979).

95. See, e.g., Dana & Merrill, supra note 20, at 28–29 ("By giving . . . government the power to compel transfers of property, [it] can compel any seller with monopoly power to convey the resource . . . at a price stripped of any monopoly pricing component associated with the government project. The project can thus go forward without undue delay or burden on taxpayers."); see also supra notes 77–78 and accompanying text (describing subjective "holdout value").

One way to approach this issue is by noting that the holdout problem shares the same fundamental logical structure as ordinary nuisance. Suppose that Ann, Bill, Carla, and Dwayne are neighboring landowners, all of whose property Xavier wishes to acquire for some project which involves a substantial public use. The project cannot proceed unless Xavier is able to acquire all four parcels. After negotiations, Bill, Carla, and Dwayne all agree to sell their property to Xavier. However, recognizing that the feasibility of the entire project rests on Xavier's ability to acquire her property, Ann decides to act strategically and holds out, refusing to sell at anything close to the ordinary market price for that sort of property or even at an amount close to what Bill, Carla, and Dwayne received.

It is common to think of Ann's behavior here as "unreasonable," though rationally self-interested. She is hoping to profit from the unique need that the public has for her property and thus demanding much more compensation than everyone else in order to sell.

As a result, the situation which results from Ann's insisting on a hugely inflated selling price is akin to nuisance in the following way: Her insistence is "unreasonably" interfering with the use of the other three parcels. Under ordinary nuisance law, nuisances can be abated, and when they are, no compensation is owed to the perpetrator of the nuisance.[96] So, if one were to look at this situation through a nuisance lens, the owners of the property whose use has been unreasonably interfered with can "abate" the unreasonable demands of the landowner who holds out, and compensation is not owed for abating those unreasonable demands.

This is basically what eminent domain does: It "abates" the *unreasonable* demands by requiring that the holdout (Ann) sell in exchange for full compensation for the *reasonable portion* of her demands—that is, sell for the ordinary market price, not the holdout price.

Once one recognizes this parallel between the logical structure of the problem that motivates eminent domain's very existence and the

96. 1 Am. Jur. 2d Adjoining Landowners § 11 (2005) ("An adjoining landowner is owed restraint from nuisances which might affect the property, and liability to an adjoining landowner for injuries resulting from the improper use of one's property has been founded upon nuisance." (footnotes omitted)); 58 Am. Jur. 2d Nuisances § 362 (2012) ("A city that has the power to summarily abate a public nuisance generally may compel the owners of the property involved to bear the cost of the abatement." (footnotes omitted)). Joseph Singer notes a current trend of courts awarding damages rather than injunctions in nuisance cases, that is, permitting the nuisance to continue but requiring monetary payments as compensation to injured parties. Singer, supra note 20, at 113–14. For purposes of understanding takings law, that shift is immaterial, because the eminent domain behavior that is analogous to a nuisance consists of holding out for more monetary compensation. As a result, requiring a cessation of that particular activity—that is, a cessation of demanding more money—would be indistinguishable from permitting its continuation but requiring a compensating payment of money.

logic of nuisance law, one may recall another relevant feature of nuisance law: Under ordinary circumstances, plaintiffs cannot prevail in a nuisance action if the interference with the plaintiff's use or enjoyment of his land is a consequence of the plaintiff's own hypersensitivity.[97] Such interference gives rise neither to injunctive relief nor damages. In other words, landowners cannot receive compensation for losses suffered as a result of their idiosyncratically large sensitivity to the rest of the public's reasonable activities.[98]

Therefore, it would be consistent with a formally analogous, and closely related, area of the law to decline to give compensation to idiosyncratically large amounts of subjective value in eminent domain—that is, to not pay compensation for condemnees' idiosyncratic premiums above fair market value. And the underlying intuition in both cases would be the same: Each member of the community has a social duty, in his or her relationship with property, not to impose too much upon the well-being of other members of the community, and a ready criterion for what is "too much" in the property context is what appreciably exceeds the ordinary community member's level of imposition.

The existence of a background set of social duties, one of which includes not standing too much in the way of the public good, is pivotal for

---

97. Restatement (Second) of Torts § 821F (1979) ("There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose."); Merrill & Smith, supra note 11, at 953 ("Nuisance law denies recovery to hypersensitive plaintiffs for irritations that would not disturb an ordinary landowner."). This doctrine was, from its origins, imbued with an implicit moral dimension. The hypersensitivity rule entered English law in 1851 in the case of *Walter v. Selfe*, where Vice-Chancellor Knight Bruce stated that the availability of a nuisance remedy depended upon whether the interference in uses created "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people." (1851) 64 Eng. Rep. 849 (Ch.) 852; see also J.E. Penner, Nuisance and the Character of the Neighbourhood, 5 J. Envtl. L. 1, 4–5 (1993) (discussing *Walter v. Selfe* and other early cases).

98. This argument is compatible with, but distinct from, purely economic arguments that hypersensitive plaintiffs ought not to be able to recover in nuisance actions because they are likely to be the cheapest cost avoiders of any harm. See Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. Chi. L. Rev. 681, 736 (1973) ("If a person feels that the market undervalues his damage, he may be unusually sensitive and the best cost avoider of the losses resulting from that hypersensitivity."). A parallel economic argument in the eminent domain context is that providing (any) compensation for takings is problematic because it gives landowners incentives to make inefficiently large investments in improving property that might someday be taken by the government. See, e.g., Shavell, supra note 77, at 131–33 (explaining and criticizing that economic argument); Bell & Parchomovsky, Taking Compensation, supra note 28, at 882 (noting arguments that "payment of full compensation" creates "a moral hazard problem" since "full recompense distorts property owners' incentives").

making this conclusion plausible.[99] Some commentators analyze compensation in eminent domain as compensation for a wrong that the state has done to the condemnee by taking his or her property without

99. Recent years have seen a flowering of scholarship around the "social-obligation norm" in property law. See generally, e.g., Special Issue, supra note 12; Symposium, supra note 12. This literature has called welcome attention to the issue of citizens' duties and the roles that they may play in a system of property law regulation, and the roots of the questions that they address stretch back to the earliest days of the American constitutional order. See, e.g., Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310, 28 F. Cas. 1012, 1015 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 16,857) (asserting in analysis of takings issue that "[e]very person ought to contribute his proportion for public purposes and public exigencies"). Some of the most prominent exponents of this view tie their analysis of property law to "virtue ethics" schools of moral philosophy, which have deep historical roots in classical antiquity (most notably Aristotelian philosophy). These views fell out of favor in mainstream Anglo-American philosophy until a revival in the late 1950s, sparked by publication of G.E.M. Anscombe, Modern Moral Philosophy, 33 Phil. 1 (1958). For prominent examples of property theories based on virtue ethics, see, e.g., Alexander, Social-Obligation, supra note 25, at 748 (arguing property law has social-obligation norm); Eduardo M. Peñalver, Land Virtues, 94 Cornell L. Rev. 821, 864–76 (2009) (detailing virtue-based theory of land use as alternative to law and economics approaches). The plausibility of virtue ethics theories remains controversial among philosophers, and their present-day applicability to property law is also contested. See, e.g., Eric R. Claeys, Virtue and Rights in American Property Law, 94 Cornell L. Rev. 889, 947 (2009) (asking skeptically "whether the prescriptions of virtue ethics can be transplanted seamlessly from the field of ethics back to the field of politics"); Katrina M. Wyman, Should Property Scholars Embrace Virtue Ethics? A Skeptical Comment, 94 Cornell L. Rev. 991, 992 (2009) (expressing some appreciation for virtue ethics approach but ultimately answering question posed by her title in the negative); see also Gilbert Harman, Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error, 99 Proc. Aristotelian Soc'y 315, 327–28 (1999) (offering social psychology-based critique of virtue ethics theories).

Resolving the centuries-old debate about the merits of virtue-theoretic approaches to ethics is not possible here. Whatever those merits may be, recognizing a dimension of social duty in property law does not necessarily require subscribing to virtue ethics as a moral philosophy. Nor does it inherently require subscribing to any particular set of political commitments. Some prominent social duty theorists explicitly endorse a "progressive" approach to property law. See Alexander, Progressive Property, supra note 12, at 744 (asserting property laws should "promote the ability of each person to obtain the material resources necessary for full social and political participation" and "establish the framework for a kind of social life appropriate to a free and democratic society"). However, whether any specific political commitments are required by social duty theories, and, if so, what those commitments are, presumably will depend upon the content of the specific social duty theory under discussion when those important questions are raised. Deciding among possible alternative social duty theories is a grand project of its own, necessarily far beyond the scope of this Article. For purposes of answering the more specific question of what compensation is "just" for property taken through eminent domain, one need not go far beyond the basic and fairly inescapable observation that nuisance law (and arguably other areas of property law, such as various necessity doctrines) reflects a longstanding recognition of a basic social duty of property owners not to impose too much on other members of the community.

permission.[100] If viewed through a tort lens of this sort, the natural conclusion would be that just compensation for the taking would have to be full compensation, even for idiosyncratically large losses caused by idiosyncratic sensitivities. As every first-year law student knows, intentional tortfeasors must take their victims as they come.[101]

However, the assumption that takings of property through eminent domain are a form of wrong for which the government must make amends is at best debatable.[102] On its face, the assumption seems unlikely for two reasons. First, because eminent domain has a long history and has been commonly understood as a necessary incident of government sovereignty,[103] it is more likely that the exercise of eminent domain is an integral part of the social compact. Second, if such exercise really were a wrong, the most obvious course of action would be to ban it altogether (except, perhaps, in situations of dire necessity). If, then, exercises of eminent domain do not wrong the condemnee, the corresponding compensation is not compensation for a wrong but only for a loss. And mere

---

100. See, e.g., Katrina Miriam Wyman, The Measure of Just Compensation, 41 U.C. Davis L. Rev. 239, 249 (2007) [hereinafter Wyman, Just Compensation] ("Takings compensation can be readily viewed as a form of corrective justice. A taking can be regarded as a governmental interference with a property right, and compensation as an attempt to make the victim of the interference whole . . . .").

101. See, e.g., Vosburg v. Putney, 50 N.W. 403, 404 (Wis. 1891) (concluding, in classic case of schoolchild whose leg required amputation after receiving slight kick from classmate, that "wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him"); Restatement (Second) of Torts § 461 (1965) (stating that negligent actor is subject to liability even where actor neither knew nor should have known of victim's weakened physical condition).

102. Analyzing the structure of tort law, Gregory Keating has recently explored some fundamental differences between fault liability and strict liability. Gregory C. Keating, The Priority of Respect over Repair, 18 Legal Theory 293 (2012). In this analysis, Keating makes an intriguing suggestion that strict liability should best be understood as akin to a private form of eminent domain. Id. at 324. Keating's primary interest is tort law, but in the property context one might reverse the proposed parallel and ask whether eminent domain should be analyzed as akin to strict liability. The idea is provocative, but its implications are unclear. Keating himself explicitly declines to address the question of whether compensation in strict liability cases is properly understood as "rectify[ing] a wrong" or instead merely "align[ing] burden and benefit." Id. at 315 n.55. Elsewhere, however, he notes that "[e]minent domain law holds that it is permissible for the government to take property for public use only if the government pays just compensation to those whose property it takes." Id. at 324. This latter, quite plausible, contention seems straightforwardly to imply that if compensation is in fact paid, then the taking is legitimate. Thus, the role of "compensation" in eminent domain is not to correct a wrong but rather to ensure that a wrong does not occur in the first place.

103. 1 Nichols, supra note 63, § 1.14 (describing how two separate schools of legal thought arrived at "principle that the power of eminent domain is an attribute of sovereignty").

losses, in the absence of a wrong, do not automatically command full compensation.[104]

Hence, it is at least plausible that the fair market value rule reflects a judgment that among the social duties which property owners possess is a duty not to impose too much on the public treasury in eminent domain situations, either by "holding out" or by demanding compensation for idiosyncratically large subjective value.

B. *Finding the Right Baseline*

This conclusion, however, raises the question of what baseline is appropriate for determining how much of a given owner's subjective value is idiosyncratically large—that is, for determining how much is "too much." Because idiosyncratically large subjective value is, by definition, the amount of subjective value greater than is typical of owners of property comparable to the property that has been taken, this question becomes one of identifying the appropriate group to serve as the comparison class. There are three obvious candidates—the complete group of relatively recent property owners in the same general locality as the condemned property, the smaller group of those recent property owners who have sold their property, and the group of those owners who have not sold.[105] (The first group is, of course, a combination of the latter two groups.)

1. *The "Would Already Have Sold" Argument.* — Existing treatments of the subjective premium commonly assume that the subjective values of sellers and nonsellers must have substantially different sizes. The argument is simple: Voluntary sellers must have placed a value on their property that was less than or equal to the property's market value, since otherwise they would not have chosen to sell. By the same token, nonsellers must have placed a higher value on their property than the market does, since otherwise they would already have sold at the market price.[106] For

---

104. Indeed, perhaps the majority of losses inflicted in the world give rise to no plausible claim for compensation at all. For example, competition—whether economic, political, social, or romantic—inevitably inflicts losses on losing competitors without giving rise to justified demands for compensation.

105. The restriction to recent owners of local property follows straightforwardly from the fact that market prices vary by location and over time. The fair market value standard gives compensation to the condemnees for their property—that is, for property of that sort located where the condemned property is, valued at the time of the condemnation. See 4 Nichols, supra note 63, §§ 12A.01[1], 13.01[3], 13.01[9] (describing factors used to calculate fair market value of property).

106. See supra note 20 (citing works offering "would have already sold" arguments). It shall soon be evident why that common assumption is, in fact, not quite accurate. Cf. 1 Nichols, supra note 63, § 1A.03[3][d] (asserting that "even though market value may already include the consumer surplus of a notional *willing* seller, it does not fully reflect the subjective consumer surplus of an *unwilling* seller").

example, if Fillmore values his property at $100,000, and the market price for that property is $120,000, then Fillmore would be a fool not to sell. It would be irrational to disregard the opportunity to pocket $20,000 in extra profit. Hence, if one observes that Fillmore has not sold, one may safely conclude that the value which he places on his property is greater than $120,000.

So, the argument goes, a given parcel's market price reflects the subjective values only of people with relatively low subjective premiums, and that class of people is by definition not "typical." If this argument is sound, then the proper baseline for measuring the idiosyncrasy of the size of condemnees' subjective values is not the baseline corresponding to fair market value but rather some higher baseline that incorporates the typical size of nonsellers' subjective values as well.[107] However, there are compelling reasons, both empirical and theoretical, for rejecting that argument.

First, note that this argument rests on strong tacit empirical assumptions. It assumes that the costs of transacting are low. It also assumes that owners of real estate are continuously well-informed about the market prices of their property.[108] Both assumptions are empirically questionable.

The actual monetary costs of selling a home are not negligible. For example, sellers of residential property will commonly pay a substantial sales commission and may incur various mortgage costs.[109] (These expenses are sometimes mitigated by favorable federal tax treatment.[110])

---

107. Note that this view, even if true, would not change the answer to the question of whether fairness requires compensation for idiosyncratically large subjective premiums. Even on this view, such compensation would not be required. What is at issue is how much of a given condemnee's subjective value counts as idiosyncratically large. If this view were correct, a smaller fraction of nonsellers' subjective value would count as idiosyncratically large, and therefore a larger fraction would have a compelling claim to compensation. The ultimate implication would be that, although current assumptions about the extent to which fair market value compensation treats condemnees unfairly are incorrect, the size of the error is less than it would be otherwise.

108. The argument also assumes that owners are not fools. The now voluminous behavioral economics literature has documented many common pathologies in reasoning, perhaps enough to call this assumption into question. For an accessible survey of some of this literature, coauthored by one of the leading figures in behavioral finance, see generally Richard H. Thaler & Sendhil Mullainathan, Behavioral Economics, *in* The Concise Encyclopedia of Economics 34 (David R. Henderson ed., 2008); see also Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471, 1477–78 (1998) (describing how humans' cognitive abilities produce merely "bounded rationality"). Although such studies might provide some additional grounds of support for this Article's argument, space considerations do not permit exploring this large question here.

109. See, e.g., Mark Obrinsky, Research Notes: The High Cost of Short-Term Homeownership, Nat'l Multi Housing Council (Dec. 1, 1997), http://www.nmhc.org/Newsletter.cfm?ItemNumber=54687 (on file with the *Columbia Law Review*) (describing

Moreover, property owners are not necessarily aware of the market value of their property. This problem is inherently present whenever the market for the property in question is thin, since accurately determining such property's market price requires enlisting an appraiser. Typical owners are unlikely to choose to continually incur that expense simply in order to find out if the current market price happens to make selling the property worth considering.

However, even owners of property that is more easily valued are not always aware of their property's current market price. A 2011 survey by the Federal National Mortgage Association (Fannie Mae) found that 38% of homeowners "never or almost never" check the value of their homes.[111] Another 26% check their homes' value "once every few years."[112] Thus, nearly two-thirds of homeowners reported going years between reviews of their homes' value, and many never checked that value at all.[113] The fact that such owners have not "already sold" therefore may not indicate that the value they personally place on their property is necessarily higher than the property's fair market value, since even property owners who value their property less than the market does would routinely be unaware of that fact.[114]

These empirical facts are admittedly contingent. They may have been different at some point in the past, and they may differ again someday in the future. However, there is an independent theoretical reason to reject the assumption that market prices do not reflect the value that nonsellers place on their properties. Once again, this reason springs from the nature of market price formation.

The discussion so far has demonstrated how the fair market value standard incorporates the subjective value that sellers put on their prop-

---

costs associated with selling homes); Kevin Quealy & Archie Tse, Is It Better To Buy or Rent?, N.Y. Times Business Day, http://www.nytimes.com/interactive/business/buy-rent-calculator.html (on file with the *Columbia Law Review*) (last visited April 6, 2013) (comparing cost of buying with cost of renting home).

110. See, e.g., IRS, Pub. 523, Selling Your Home 4 (2012) (describing how selling expenses are to be removed from calculations of amount of income realized by selling home).

111. Fannie Mae, National Housing Survey: Third Quarter, 2011, at 75 (2011).

112. Id.

113. These results are consistent with past surveys. See, e.g., Fannie Mae, National Housing Survey: July–September 2010 Quarterly Wave 69 (2010) (finding between 40% and 41% of owners never or almost never check their homes' value, while between 24% and 26% check that value only every few years).

114. Fannie Mae's survey sample was limited to homeowners. A similar survey of owners of commercial real estate conceivably might reveal that such owners are more attentive to fluctuations in their property's market prices and therefore more likely to exploit any opportunities to sell at a favorable price. Thus, it is possible that the "would already have sold" argument might, as an empirical matter, have more relevance in the commercial property context.

erty, but it is important to recognize that fair market value also is affected by the subjective value of those who choose not to sell, and therefore incorporates that value (without unduly privileging it). The reason is basic to the workings of a market system: The price that will ultimately be agreed to by a willing buyer and a willing seller will reflect the alternatives available to each of them. A potential buyer in a market where there are many people eager to sell at a low price will have a stronger negotiating position than that buyer would have in a market where few people are willing to sell at a low price. As a result, the potential buyer will pay a lower price in the former market than she would in the latter.

A simple example can demonstrate this effect. Assume that Adams is willing to sell Blackacre for any price above $14,000 and that Jackson is willing to buy Blackacre for any price below $20,000. If, for simplicity's sake, one assumes perfect information and no impediments to bargaining, Adams and Jackson will be able to reach a deal for the sale of Blackacre, and the selling price will be somewhere between $14,000 and $20,000. But what will the price be exactly? The answer will depend at least in part on what other options are available to each party. Let us suppose that Van Buren owns Greenacre, a lot similar to Blackacre in size, quality, and location, and that Van Buren is willing to sell at any price above $16,000. In this case, Jackson will not ultimately buy from Van Buren, because Adams is willing to sell for less, but the presence of Van Buren will ensure that ultimately the selling price is between $14,000 and $16,000. (If Adams tried to hold out for more than $16,000, Jackson would simply buy from Van Buren instead.) Now suppose that Van Buren places a higher value on her property than formerly assumed; instead of being willing to sell at any price above $16,000, she is willing to sell only at a price above $19,000. Once again, Jackson will end up buying from Adams, because Adams is still the cheapest seller, but now the selling price will be between $14,000 and $19,000. The midpoint of the potential deal range when Van Buren places a lower value on her property is $13,000; when she places a higher value on her property, it is $16,500. So, ultimately, the transaction price between Adams and Jackson—the market price of Blackacre—will depend on the value that Van Buren places on similar property, even though in both scenarios Van Buren would have been unwilling to sell at that market price, and therefore in both scenarios ends up being a "nonseller."

Thus, market prices in fact reflect, to some degree, the reservation prices not only of those who choose to sell but also of those who choose not to sell.[115] These market prices, of course, will also reflect the reservation prices of those who choose not to buy, that is, those nonowners who

115. Consequently, the fair market value for a given piece of property will incorporate not only information about the subjective values of voluntary sellers of similar properties but information about the subjective values of nonsellers as well.

might have been interested in property of that sort but who found the market price to be too high to be attractive. If alternative potential buyers place a low value on the property, that fact will tend to pull the ultimate market price down toward the lower end of the range between the two reservation prices; if alternative potential buyers place a high value on the property, that fact will tend to pull the market price up. The end result will then reflect, at least in part, the values placed on the property by those who sold, those who chose not to sell, those who bought, and those who chose not to buy. This diverse inclusiveness of influences on the ultimate market price gives that price some intuitive appeal as reflecting a fair baseline of "typical" value against which an individual owner's subjective value could be measured to determine what fraction of that value is idiosyncratically large.

Nevertheless, someone might reply that because the market price only partially reflects the subjective value of nonsellers, it still reflects an inappropriately low baseline from which to calculate which amounts of subjective value are idiosyncratically large and therefore reasonably incompensable. Such a person might suspect that the proper baseline should be higher, derived solely from examining what values were typical among those who chose not to sell. As shall soon be evident, however, considerations of distributive fairness and the inherent nature of governmental sovereignty reveal that line of criticism to be implausible.

2. *Holdouts, Sovereignty, and Distributive Fairness.* — Suppose that the law were to use the typical value among nonsellers alone as the baseline for determining how much of a condemnee's subjective value was incompensable and idiosyncratically large. There are then two possibilities. Either the relevant nonsellers would be unwilling to sell at any price, or they would be willing to sell at some price, but only a price greater than is provided by fair market value. In the former case, straightforward considerations of governmental sovereignty entail that a baseline determined by treating those nonsellers' subjective values as "typical" would be inappropriate; in the latter case, considerations of distributive fairness will lead to a similar conclusion. Each of these two possibilities is worth examining separately.

To begin, consider those who simply refuse to sell at any price.[116] Some of these holdouts may, like Susette Kelo,[117] naturally attract sympa-

116. Their reservation prices are effectively infinite. This possibility is not purely hypothetical. Although some holdouts in eminent domain disputes eventually capitulate and agree to sell their property, others do not. Daniel Goldstein, who attained prominence as the face of resistance to the Atlantic Yards project in Brooklyn, ultimately agreed to sell his property—and acceded to a form of gag order that would limit his ability to speak out against the project—in exchange for $3 million. However, even Goldstein capitulated only after a New York court rejected his attempt to stop the use of eminent domain for the project. Andy Newman & Charles V. Bagli, Daniel Goldstein, Last Atlantic Yards Holdout, Leaves for $3 Million, N.Y. Times City Room (Apr. 21, 2010, 3:41 PM),

thy, while others may have less admirable motivations. Sympathetic or not, however, implacable holdouts pose an insuperable obstacle to the government's ability to acquire property for necessary public projects. If the proper baseline for calculating incompensable, idiosyncratically large subjective value were the baseline set by *these* nonsellers, then the government would have to provide an infinite level of compensation in order to take such property. In other words, the government would not be able to take that property at all. Such a conclusion would be inconsistent with governments' long history of possessing and exercising the power of eminent domain. Indeed, that power is typically considered to be an inherent attribute of governmental sovereignty.[118]

So the proper baseline cannot be the typical amount of subjective value found among owners who refuse to sell altogether. The next option to consider is the price set by owners who might sell at some price but only at a price that is appreciably higher than the property's market value. For purposes of clarity of exposition, let us assume that these owners are holding out for a price that is much higher than the property's market value. (This assumption is not essential to the argument, and it shall be relaxed shortly.) From a perspective focused solely on maximizing total social wealth, this choice of a baseline for "typical" subjective value might seem plausible. In an ideal world, if a public project does not generate enough wealth to enable the society to fully compensate even owners with extremely high idiosyncratic values, then undertaking the project would have a net negative effect on total social wealth. Such projects, from a social wealth maximization perspective, should not be undertaken at all. Alternatively, if the project does, in fact, create a net increase in total social wealth, then (in an ideal world free of transaction costs and similar impediments) there would seem to be no reason not to compensate even high-idiosyncratic-value holdouts for their full amount of subjective value in the property.

That argument, however, is plausible only if one assumes that maximizing total social wealth is the overriding goal of public projects and the power of eminent domain. Once one considers the distributional

---

http://cityroom.blogs.nytimes.com/2010/04/21/daniel-goldstein-last-atlantic-yards-holdout-leaves-for-3-million (on file with the *Columbia Law Review*). And some nonsellers simply are not willing to sell at all. In general, owners might altogether refuse to sell to the government for a wide range of reasons, including ideological reasons. A vivid artistic portrayal of this phenomenon (in the context of private land acquisition) sets in motion the plot of the Pixar animated motion picture *Up*. Up (Pixar Animation Studios 2009).

117. Kelo v. City of New London, 545 U.S. 469 (2005). However, since Kelo ultimately lost her legal challenge to the state's exercise of eminent domain, it is impossible to know for certain what she would have done if she had prevailed and then been offered a vastly higher price.

118. 1 Nichols, supra note 63, § 1.14 ("The principle that the power of eminent domain is an attribute of sovereignty has developed from two schools of legal thought.").

implications of the choice of baseline, very different consequences follow. Public projects, implemented through eminent domain, might cause a net loss in total social wealth but nonetheless have distributional consequences that are desirable enough to be compelling even in light of the loss in net wealth.[119] A simple hypothetical example can make this point clear: Imagine a universe with four people in it (*A*, *B*, *C*, and *D*) and that one must choose between two policies. One policy would result in person *A* having 100 total units of wealth and persons *B*, *C*, and *D* having zero total units of wealth. The other policy would result in each of the four people having 20 total units of wealth. The former policy would produce greater total social wealth (100 rather than 80), but many people would find the second option preferable nevertheless.[120]

Translating this observation to the eminent domain context is straightforward. Suppose that there is some public project that will be highly beneficial to many people and markedly more beneficial than alternative projects would be. Further, suppose that completion of the project requires taking several lots of privately owned land and that almost all of the owners of those lots are willing to sell to the government at or near the current market price, but that one owner has an extraordinarily large amount of subjective value in the property—that is, has an enormous idiosyncratic premium—and is willing to sell only at a stratospherically high price. If the total social value of the project is less than this enormous idiosyncratic premium, then the project could not go forward at all, even though someone who preferred the second policy option in

119. In other contexts, some have argued that the optimal policy approach is to pursue wealth-maximization policies and then use the tax system to redistribute wealth as desired. Even if one were to set aside any concerns about the real-world efficacy of such approaches, however, there would remain the fundamental problem that in the eminent domain context the extra "wealth" possessed by the high-subjective-value holdout is not taxable, for the simple reason that it is subjective and therefore nontransferable. Cf. Fennell, supra note 20, at 964 ("Because [the subjective value premium] is personal to the individual landowner, its confiscation in the course of eminent domain necessarily means its outright destruction rather than its transfer to someone else."); supra text accompanying notes 35–36 (discussing nontransferability of emotional ties). In eminent domain contexts, the choice between maximizing wealth and obtaining satisfactory distributions of wealth can be inescapable.

120. This might be because the distribution under the second policy is more equal, but egalitarianism is not the only possible reason to prefer the second option. One might also prefer the second option because it ensures that all four people have at least some wealth, whereas the first option leaves *B*, *C*, and *D* utterly destitute. Richard Epstein has famously and controversially asserted that "[t]he implicit normative limit upon the use of political power is that it should preserve the relative entitlements among the members of the group, both in the formation of the social order and in its ongoing operation," with a consequential moral requirement that "any surplus generated by the [coercive use of state power to promote a public project] . . . is divided among individuals in accordance with the size of their original contributions." Epstein, supra note 25, at 4–5. Even Epstein, however, would not endorse a distribution that concentrated all wealth in the hands of one person while leaving everyone else to die.

the hypothetical above might think that the project's distributional benefits are sufficiently compelling that the project should, in fact, occur. Moreover, even if the holdout's idiosyncratic value were less than the total value created by the project, similar distributional considerations might lead many to conclude that one person—the holdout—ought not to be allowed to demand an amount of compensation that consumed so much of the wealth created by the project that the benefits to everyone else would end up being minimal.[121]

Ordinary cases are likely to be less dramatic than our illustratively extreme example of a nonseller with stratospherically high subjective value, but the same basic principles and reasoning apply even when the nonsellers' idiosyncratic premiums are smaller. All that changes is the amount of wealth at stake.

This conclusion is not surprising, in light of the parallels between eminent domain and nuisance law.[122] In nuisance law, the standard for determining the reasonableness of a landowner's use is not whether that use is typical among people who engage in that kind of use but rather whether it is typical among the local owners as a whole. Likewise, the test for whether a plaintiff is hypersensitive is not whether that plaintiff's sensitivity is typical among owners who have very high sensitivities but rather whether it is typical among all owners. Similarly then, in eminent domain, the proper baseline for determining how much of a nonseller's subjective value is idiosyncratically large is not the amount of subjective value that is typical of owners who have high subjective value but rather the amount that is typical of owners as a whole. The logical implication is clear: The proper baseline for calculating the incompensable idiosyncratic premium should not be the baseline set by the subjective value that is typical of nonsellers only but instead should reflect the amount of subjective value that is typical of all owners.

And that, as noted earlier, is exactly what the fair market value standard provides.[123] Fair market value is not merely an administratively convenient standard but, in fact, provides a normatively reasonable baseline for determining which portion of an individual condemnee's subjective value is idiosyncratically large and therefore properly incompensable.

---

121. This argument has significant parallels to Robert Nozick's classic "utility monster" argument against utilitarianism in moral philosophy. See Robert Nozick, Anarchy, State, and Utopia 41 (1974) ("Utilitarian theory is embarrassed by the possibility of utility monsters who get enormously greater gains in utility from any sacrifice of others than these others lose. For, unacceptably, the theory seems to require that we all be sacrificed in the monster's maw, in order to increase total utility.").

122. See supra Part II.A (discussing applicability of nuisance law principles to analysis of eminent domain).

123. See supra Part I.B.1.

C. *Individual Components of Subjective Value*

The discussion so far has treated subjective value as a whole. However, the plausibility of noncompensation for idiosyncratically large amounts of subjective value might vary across the different types of subjective value identified earlier.[124] Hence, it is worth pausing to consider those components individually.

The argument in favor of noncompensation obviously is highly plausible in the case of gains from trade acquired by holding out. It seems quite plausible in the case of more limited gains from trade, in which the owner seeks to acquire a more modest portion of the surplus to be created by the project for which the taking is occurring. The mere fact of having been fortunate enough to be located where the public needs to build a project does not offer any principled grounds for demanding an idiosyncratically large share of the profit from that project. (Why should Ann, Bill, Carla, and Dwayne profit specially from the fact that the public happens to need their property, receiving a windfall at the public expense, while their neighbors Ethel and Frank do not?) Moreover, demanding such a share could make low-margin beneficial projects infeasible, with a resulting net cost to social welfare.

With respect to idiosyncratically large values derived from alterations made to condemned property, it is important to remember the constructed nature of the fair market value standard. The value of alterations which are unusual in a given locality might nevertheless be included in a piece of property's fair market value if it is determined that the relevantly comparable property has similar alterations. This sort of judgment may be more likely if the alterations are what one might call "pioneering improvements"—for example, gentrification of a moribund warehouse district—or were necessary to enable the property owner to live a life much like typical members of the community do. An example might be a system of ramps to enable a wheelchair-bound resident to have easier access to various facilities on the property. Faced with such property, a court might conclude that the proper method of calculating its fair market value is to find the value of other property with such features, or to use the replacement-construction-cost method. If so, then the fair market value standard will, in fact, provide full compensation for such alterations. Courts might treat more frivolous alterations differently, however. In such cases, it is not clear that fairness demands that the public fully compensate for idiosyncratically large amounts of frivolity.

Sentimental value is a similar case. If taking property with unusually high sentimental value is necessary for completion of a project useful to

124. See supra Part I.A.2 (noting subjective value includes, inter alia, sentimental value, value of owner-specific alterations, location benefits, and avoidance of both out-of-pocket expenses and information costs).

the public, then perhaps there is a duty not to demand compensation for more than the ordinary amount of sentimental value.[125]

Finally, it is inescapable that compensation for a property owner's loss of autonomy as a result of a coerced taking is something for which the public at large should provide some compensation. Why that is and what form that compensation should take are questions that the next Part addresses.

III. HOW SHOULD WE COMPENSATE?

Several commentators have proposed that condemnees should receive extra compensation, above fair market value, to compensate for the condemnees' loss of autonomy and sentimental value.[126] Meanwhile, in the aftermath of *Kelo*, states have begun to enact laws requiring that condemnees receive compensation that exceeds the taken property's fair market value by some specified percentage. For example, a 2006 amendment added the following sentence to the Michigan state constitution: "If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law."[127] Similar provisions have been enacted in Missouri[128] and Indiana,[129] while

---

125. The present author must confess, however, that his personal intuitions about this are ambivalent. There does seem to be an appreciable difference between the value one has in one's childhood home and an equally large attachment to an especially elaborate weathervane attached to one's house. To the extent that it makes sense to provide extra compensation for idiosyncratically large sentimental value, Part III discusses the proper form that such compensation should take. Nicole Garnett's study of uses of eminent domain in Chicago, however, suggests that governments may, whenever possible, simply try to avoid taking properties with high sentimental value. See Garnett, Neglected Political Economy, supra note 45, at 110–15 ("Takers simply may avoid taking properties with high subjective value. They have important incentives to do so . . . . [Owners of such properties] may generate unwanted—and potentially effective—political opposition to the government's plans.").

126. Academics in Sweden have made similar suggestions. See Leif Norell, Is the Market Value a Fair and Objective Measure for Determining Compensation for Compulsory Acquisition of Land?, 2008 Land Reform 19, 21 & n.3, available at ftp://ftp.fao.org/docrep/fao/011/i0470t/i0470t02.pdf (on file with the *Columbia Law Review*) ("[Werin] proposes that compensation could be determined as the market value plus a percentage increase. Other Swedish authors have expressed similar ideas. . . . [T]he increase is intended to cover the average difference between reservation price and market value." (citations omitted)).

127. Mich. Const. art. X, § 2.

128. In 2006, Missouri enacted a statute requiring that compensation for a primary residence taken through eminent domain be equal to 125% of the property's fair market value and that compensation for property that had been "owned within the same family for fifty or more years" be equal to 150% of the property's fair market value. (If both clauses apply, then the condemnee must receive the higher of the two amounts.) Act of

statutes in Iowa,[130] Connecticut,[131] and Rhode Island[132] have created analogous but more narrowly focused bonus provisions.[133] This Part examines where those statutes and proposals go astray and how properly to provide such compensation, to the extent that it is warranted.

A. *Compensating for the Loss of Autonomy*

Several academics have proposed using mechanisms for self-assessed valuation of taken property's value, in order to avoid practical obstacles to paying full compensation for taken property.[134] For example, Lee

---

July 13, 2006, H.B. 1944, sec. A, §§ 523.001, 523.039, 2006 Mo. Laws 435, 437–38 (codified at Mo. Ann. Stat. §§ 523.001, 523.039).

129. Indiana amended its laws to require that takings of agricultural land be compensated at 125% of taken property's fair market value (unless the landowner chooses to receive an equally sized parcel of land instead) and that takings of residences be compensated at 150% of fair market value (in addition to miscellaneous other sums). Act of March 24, 2006, P.L. 163-2006, § 17, 2006 Ind. Acts 3315, 3331–32 (codified at Ind. Code Ann. §§ 32-24-4.5-8(1)(A), -8(2)).

130. Iowa amended its laws to give administrative agencies permission to offer condemnees compensation equal to 130% of the condemned property's fair market value, in lieu of paying relocation expenses in addition to fair market value. Act of July 14, 2006, § 6, 2006 Iowa Acts 1031, 1035 (codified at Iowa Code § 6B.2B (2007)).

131. Connecticut enacted a provision requiring that when redevelopment agencies take property, the compensation paid must be 125% of the 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)).

132. Rhode Island enacted a provision similar to Connecticut's, requiring that owners of "property taken for economic development purposes" receive compensation equal to at least 150% of the taken property's fair market value. 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)).

133. Some foreign jurisdictions have similar provisions. The Canadian provinces of Manitoba and Ontario require payment of a 5% bonus above fair market value when the taken property is a residence. The Australian states of Victoria and Western Australia provide bonus payments capped at 10% above market value. India provides for a 30% bonus. Pakistan provides a bonus of 15% to 25%, depending on the nature of the acquirer. See M.J. Todd, The Application of Solatium Payments in the Assessment of Public Works Compensation 45–46 (2009) (unpublished Master of Property Studies dissertation, Lincoln University, N.Z.), available at http://researcharchive.lincoln.ac.nz/dspace/bitstream/10182/1481/13/todd_mpropstuds.pdf (on file with the *Columbia Law Review*) (summarizing availability of compensation payments above market value in various nations). Academics in Sweden also have advocated such bonuses. See Norell, supra note 126, at 21 (noting several authors' proposals).

134. See Bell & Parchomovsky, Taking Compensation, supra note 28, at 891–95 (summarizing various proposals and advocating use of self-assessed values linked to alienability restraints and tax liability); Fennell, supra note 20, at 995–96 (proposing that for certain types of uses of eminent domain, owners be allowed to opt-in to takings system in exchange for tax benefits linked to their self-assessed valuations); Saul Levmore, Self-Assessed Valuation Systems for Tort and Other Law, 68 Va. L. Rev. 771, 784–85 (1982) (suggesting linking self-assessed values to tax liability and proposing that self-assessment occur by choosing among competing outside assessments). The tacit assumption is that

Anne Fennell proposes using landowners' self-assessed valuations of autonomy's value to increase the level of compensation in some cases of takings where ownership of the condemned property is transferred to a private entity. She reasons that, in such cases, the condemnee's loss of autonomy does not receive the appropriate amount of nonmonetary compensation in the form of reciprocal social benefits.[135] Proposals to use a self-assessed valuation of the worth of autonomy face a fundamental difficulty shared with laws and proposals that seek to compensate for condemnees' loss of autonomy by, inter alia, requiring that compensation be set at a fixed percentage above fair market value. Both approaches rest upon the problematic assumption that the value of autonomy can vary among landowners.

1. *Unequal Compensation for Lost Autonomy.* — The problem is most obvious in the case of laws that increase the level of compensation by some fixed percentage of fair market value.[136] A simple example can make the problem clear. Suppose that the portion of the bonus attributable to compensating for lost autonomy is five percentage points, and, for simplicity, assume that the bonus contains no other component. That is, in order to compensate a condemnee for the autonomy lost by the government's taking of his or her property, the condemnee is awarded compensation equal to 105% of the taken property's fair market value. Further, suppose that Jackson and Van Buren are neighboring property owners. Jackson's property has a market value of $1 million, but the market value of Van Buren's property is only $100,000. If both owners' properties are taken through eminent domain, the compensation given to Jackson will be $50,000 above the fair market value of Jackson's property, while Van Buren will receive only a $5,000 bonus. But what reason is there to think that Jackson's autonomy is worth ten times as much as Van Buren's?

Put more generally, the problem with compensating for loss of autonomy by paying a bonus equal to a fixed percentage of fair market value is that it pays more compensation to owners of expensive property than it does to owners of inexpensive property. The usual effect will be to give more compensation to the rich than to the poor. But there is no reason to think that rich people's autonomy is inherently more valuable than poor people's autonomy or that any person's autonomy is inherently more valuable than anyone else's autonomy. To the extent that one thinks autonomy has moral significance, and thus any salience to deci-

---

the only reason not to provide full compensation is the practical difficulty of accurately assessing the total value that owners place on their property.

135. Fennell, supra note 20, at 995, 1002–03.

136. Although presumably not all of the additional percentage is intended to compensate for the condemnee's loss of autonomy, some fraction of the bonus presumably is.

sions about what deserves compensation, its significance presumably is equal among all persons.[137] Consequently, the amount of compensation should also be the same.

One might respond that if money has diminishing marginal utility—a typical assumption—then compensating for the unpleasant feelings caused by the loss of autonomy would in fact require paying rich people more money in compensation than poor people, in order to equalize the positive feelings that each received from the monetary compensation. Such a principle, however, would be anomalous in the general trend of American law, where damages awards and penalties are not typically adjusted to reflect diminishing marginal utility of money or phenomena such as hedonic adaptation.[138]

Moreover, this proposal, like suggestions to compensate for loss of autonomy in proportion to how much each person thinks he or she cares about autonomy, misidentifies the basic reason why compensation is owed for lost autonomy. Compensation is owed for the feelings because they are *justified* feelings. Not even critics of fair market value compensation would be perturbed if a condemnee who happened to have a visceral loathing for hospitals did not receive compensation for the negative feelings engendered by realizing that the land taken from him would be

---

137. The most obvious reflection of this principle in American law is, of course, the Thirteenth Amendment, which prohibits slavery or involuntary servitude in the United States. U.S. Const. amend. XIII, § 1. Some families of victims of the September 11, 2001 terrorist attacks raised analogous concerns about the September 11th Compensation Fund, which made payments based on deceased victims' expected future earnings. See Lloyd Dixon & Rachel Kaganoff Stern, Compensation for Losses from the 9/11 Attacks 36–37 (2004). Dixon and Kaganoff Stern explain how the Fund's compensation structure, which calculated payments based on expected lifetime earnings, left "those who received less wonder[ing] why the lives of their loved ones were valued less than others who made more money" and "encouraged people to vigorously pursue higher awards because the amount of the award became a measure of the worth of the deceased." Id. While the moral intuitions may be similar, however, this Article's argument does not entail finding that the Compensation Fund was necessarily ill conceived, because there is an important legal difference between the September 11th Victim Compensation Fund and eminent domain compensation: The former was designed to be a substitute for damages awards that victims' families might otherwise have received from tort suits against the airlines whose planes were hijacked during the attacks. See James R. Copland, Tragic Solutions: The 9/11 Victim Compensation Fund, Historical Antecedents, and Lessons for Tort Reform 19–24 (Jan. 13, 2005) (unpublished working paper) (on file with the *Columbia Law Review*) (describing purpose and structure of Compensation Fund).

138. See, e.g., Samuel R. Bagenstos & Margo Schlanger, Hedonic Damages, Hedonic Adaptation, and Disability, 60 Vand. L. Rev. 745, 758 (2007) (noting "evidence that juries and courts disregard evidence of hedonic adjustment"); Daniel A. Farber, What (If Anything) Can Economics Say About Equity?, 101 Mich. L. Rev. 1791, 1814–15 (2003) (book review) (noting "current tort rules ignore income levels" and thus effect of diminishing marginal utility of money).

used to construct a hospital.[139] Because hatred of hospitals is irrational, the negative feelings engendered by the public's construction of a hospital produce no claim for compensation from the public. Similarly, certain forms of state action are required as constitutive of a decent, free, and democratic society, even if specific beneficiaries of those actions feel no joy or consolation from them. Respect for the autonomy of each member of the political community—even those who do not care about their own autonomy, or think that they do not care—is one of those requirements.[140] To put it another way, respect for each member's liberty is necessarily a constitutive part of a free society. Therefore, when political society needs to abridge a particular member's autonomy (or liberty) in the service of the community's greater good, it is important that it do so in a way that maintains respect for that person's autonomy and liberty.

As the *Armstrong* principle indicates, a key consideration in takings law is avoiding unnecessary differential treatment among members of the political community. Taking only certain people's property to benefit the

---

139. Katrina Wyman goes further than this, arguing that the state should not compensate for loss of subjective value that is derived from morally objectionable preferences. Wyman, Just Compensation, supra note 100, at 268–69. Note that one fundamental difference between Wyman's argument and the argument in this Article is that the analysis here focuses on the sizes of individual owners' subjective value—on idiosyncratically large amounts of subjective value—rather than on the types of value. Cf. 1 Nichols, supra note 63, § 1A.03[3][d] (suggesting that "people in the [Rawlsian] original position would not choose to compensate idiosyncratic unreasonableness; accordingly, even if a value to the owner measure were adopted, this premium should not form part of a 'just' compensation system"). Note that this section of the Nichols treatise uses "idiosyncratic" in a narrower sense than this Article does. The treatise refers to "idiosyncratic unwillingness based on unreasonableness or irrationality or obstructionism." Id. The idiosyncratic premium to which this Article refers need not be irrational; the values that it includes may be perfectly reasonable for the owner to have. Its idiosyncrasy lies not in its *type* but in its *size*.

140. Questions of equal respect have occupied a prominent place in political philosophy in recent decades, often in conversation with John Rawls's *Political Liberalism*. See, e.g., Charles Larmore, The Moral Basis of Political Liberalism, 96 J. Phil. 599, 607–09, 625 (1999) (critically discussing Rawls's *Political Liberalism* as part of arguing that "our commitment to democracy or political self-determination cannot be understood except by appeal to a higher moral authority, which is the obligation to respect one another as persons"). See generally John Rawls, Political Liberalism (expanded ed. 2005). This literature is extensive and sophisticated and is accompanied by several decades of moral philosophical writing on "respect-for-persons" accounts of ethics, commonly (although not exclusively) in a broadly Kantian tradition. See generally, e.g., Carl Cranor, Toward a Theory of Respect for Persons, 12 Am. Phil. Q. 309 (1975) (offering analysis of respect); Stephen L. Darwall, Two Kinds of Respect, 88 Ethics 36 (1977) (distinguishing between "recognition respect" and "appraisal respect" and asserting that respect-for-persons accounts rely on former); Philip Pettit, Consequentialism and Respect for Persons, 100 Ethics 116 (1989) (arguing consequentialism is capable of justifying moral requirements of respect). Although the details of these philosophical debates are beyond the scope of this Article, they bear witness to the vitality of the notion of respect as an important constituent of a just society. For purposes of the present argument, recognizing the truth of the most broadly intuitive form of that elementary principle is sufficient.

community as a whole threatens the required equality of respect for each person's autonomy and liberty by potentially treating condemnees' autonomy and liberty as less valuable than other people's. Hence, compensation is owed to maintain that respect. Thus, since respect for the *equal* value of people's autonomy and liberty is the very foundation for requiring compensation for infringements of that autonomy, there is no reason to place *unequal* values on individual condemnees' autonomy. The compensation must be the same for all, lest the compensation itself produce the very inequality of respect that it was designed to avoid.

2. *Monetary Compensation and Respect.* — At this point, a natural concern that might arise is whether payments of money are even capable of providing compensation for lost autonomy. Lee Anne Fennell, for example, considers money and autonomy to be incommensurable, with the result that providing a monetary bonus to condemnees "does not adequately address the confiscation of autonomy that attends exercises of eminent domain."[141] This concern is worth considering in some detail. Whether lost autonomy simply is incommensurable with money in such a way that no monetary compensation for lost autonomy is possible will depend upon both the money's *material* effect and the money's *symbolic* effect.

The money's material effect is to increase the recipient's universe of feasible choices. This has the consequence of increasing the practical scope of the recipient's autonomy, which could compensate, at least partially, for eminent domain's having diminished the practical scope of that autonomy by removing the landowner's choice of whether to sell or keep the condemned property.[142] In this sense, monetary compensation in eminent domain works in a way similar to monetary damages for trespass or for personal injury torts. Health and money are fundamentally distinct, but just as a serious injury can decrease the number of choices that are practically available to a victim, so too can payment of monetary damages give the victim a universe of choices that is more similar in number, if not necessarily type, to the universe of choices practically

141. Fennell, supra note 20, at 994. Fennell's concerns about the inadequacy of money as compensation for lost autonomy, however, are fundamentally instrumental. She suggests that increasing the amount of compensation paid in eminent domain proceedings will not avoid the familiar public choice worry that governments are subject to "capture" by "powerful concentrated interests that will extract land from powerless landholders," since budgetary considerations have only an attenuated influence on politicians' deliberations. Id. at 994–95. Her focus is on protecting autonomy by preventing takings that fail to take the value of autonomy into account, not on attempting to compensate for lost autonomy after the loss has occurred.

142. Recognition of the importance of material goods for determining the practical scope of individuals' autonomy has been a hallmark of the "capabilities approach" to analyzing welfare, pioneered by Amartya Sen. See generally Amartya Sen, Commodities and Capabilities (1985).

available before the injury.[143] Thus, as far as the material dimension of lost autonomy goes, there is no inherently unbridgeable gulf between that loss and monetary compensation.

Things become more complicated when one considers the money's symbolic effect. The loss of autonomy resulting from a forced transfer of property has an important symbolic or dignitary element in addition to its practical effects.[144] Implicit in the venerable maxim that "every man's home is his castle" is the notion that every homeowner is the monarch of his or her own little realm. To take that kingdom away without consent, so as to benefit others, dethrones the king and reduces him to a vassal. At least, that is the risk if the taking is not done in a way that preserves the condemnee's dignity.[145] The taking can express disrespect or cause reasonably felt psychological harm.

---

143. This principle is, of course, familiar from the role of tort damages in personal injury cases. See John C.P. Goldberg & Benjamin C. Zipursky, Torts 345 (2010) (arguing that in personal injury cases law cannot restore pre-tort condition but damage award can in some sense make up for plaintiff's loss).

144. Nicole Garnett has observed that "property owners who challenge takings on public use grounds sometimes sound as if they are motivated by perceived insults during the planning stages of a project." Garnett, Neglected Political Economy, supra note 45, at 127. The legal significance of dignitary harms has drawn growing recognition. For example, a recent empirical study by Leslie Meltzer Henry observed that the U.S. Supreme Court has increasingly relied on notions of dignity in its opinions and that this trend is accelerating. Leslie Meltzer Henry, The Jurisprudence of Dignity, 160 U. Pa. L. Rev. 169, 178–81 (2011) (noting that more than one hundred Supreme Court opinions since 1991 have invoked the term "human dignity" and demonstrating statistically significant increase in the term's rate of use since 1946). For a discussion of dignity concerns in overseas constitutional courts (in addition to the U.S. Supreme Court), and for a taxonomy of dignity that differs from Henry's, see generally Neomi Rao, Three Concepts of Dignity in Constitutional Law, 86 Notre Dame L. Rev. 183 (2011) (discussing dignity as "associated with autonomy and negative freedom," as maintenance of a "particular type of life," and as involving recognition of "individual and group differences").

145. There seems no reason to doubt that the scope of procedural protections available to potential condemnees is as important here as it is in other areas of the law for protecting the dignitary interests of people threatened with some legal burden. For the importance of procedural fairness in the perceived legitimacy of imposed legal obligations in general, see Tom R. Tyler, Why People Obey the Law 94–112 (1990) (discussing empirical evidence that "compliance with the law is influenced by judgments about the legitimacy of legal authority," which in turn depend on the perceived fairness of the procedures through which that authority is exercised); see also Garnett, Neglected Political Economy, supra note 45, at 128 (asserting that "the literature on the 'dignitary value' of due process suggests that the lack of a predeprivation opportunity to litigate the legitimacy of a condemnation may impose additional uncompensated losses on property owners"); cf. Thomas M. Franck, Fairness in International Law and Institutions 7–8 (1995) (arguing states' compliance with international laws derives from those laws' perceived legitimacy, in terms of both perceived procedural fairness and perceived equity of their distributional effects). Such concerns find frequent expression in complaints by critics of eminent domain that the process for determining whether to exercise eminent domain for a given project is often corrupted by powerful moneyed interests who stand to profit from such exercise. Even a procedurally impeccable exercise of eminent domain could, however,

These dignitary effects are especially likely to arise when the state uses eminent domain to transfer the condemned property to another private person rather than to the public as a whole.[146] Private parties stand on roughly equal footing with respect to moral worth and civic status, so using the state's coercive power to benefit one at the expense of another, without that other person's consent, risks offending that other person's dignity—that is, risks being inappropriately disrespectful to that person.[147] If the beneficiary of this exercise of state power is poorer or less powerful than the burdened party, egalitarian principles or sentiments may mitigate or eliminate any potential disrespect here. However, such circumstances are rarely, if ever, likely to be the case when eminent domain is used for the immediate benefit of a private entity.[148] Quite the

---

offend a landowner's dignity if the substantive result of the process were to impose a burden that affronts the landowner as an equally valued member of the civic community.

146. See, e.g., Garnett, Neglected Political Economy, supra note 45, at 137 ("[T]he dignitary harms of eminent domain may be high when the government forces the sale of land from one private party to another . . . .").

147. The situation is different when the result of an exercise of eminent domain is a transfer to a public entity, since the public at large arguably stands on a different footing from the individual condemnee. Such a taking might run less risk of manifesting disrespect for the equal dignity of the landowner whose property is taken, because the taker and the takee are in fact not equal. The extent to which private interests should be expected to give way to the general public's concerns is, of course, one of the perennial issues of political philosophy.

148. Although the assertion that exercises of eminent domain for the benefit of private entities will tend to favor the powerful over the powerless has a high level of intuitive plausibility, the author is not aware of any academic empirical studies that have provided a comprehensive study of such exercises. At the moment, such assertions rest principally on theoretical arguments and suggestive anecdotes. See, e.g., Daniel B. Kelly, The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence, 92 Cornell L. Rev. 1, 39–41 (2006) (arguing that "[p]rivate parties . . . manipulate the eminent domain process by exploiting disparities in legal and financial resources"). A comprehensive empirical study may in practice be impossible. A 2006 report by the United States Government Accountability Office examining eminent domain practices noted that the dearth of state or national data impeded objective assessment of the use of eminent domain, including answering "(1) how frequently eminent domain is used, (2) how often private-to-public or private-to-private transfer of property occurs, or (3) the purposes for which eminent domain has been used by state and local governments." U.S. Gov't Accountability Office, GAO-07-28, Eminent Domain: Information About Its Uses and Effect on Property Owners and Communities Is Limited 13 (2006), available at http://www.gao.gov/new.items/d0728.pdf (on file with the *Columbia Law Review*). Similarly, a study by the Castle Coalition, an advocacy group that favors greater restraints on eminent domain, attempted a nationwide analysis of the use of eminent domain to benefit private entities but reported significant limitations on available data:

> There is no official database of condemnation for private parties. Many, if not most, private condemnations go entirely unreported in public sources and thus could not be identified for this report. To give some sense of how few private condemnations are reported, the Connecticut courts recorded 543 redevelopment condemnations from 1998 through 2002. That's 17.5 times more than the 31 we found reported in newspapers. Connecticut is the only state that records

opposite: The beneficiary in such cases is commonly much richer and more powerful than the people whose property is taken. Mrs. Kelo is no match for the Pfizer pharmaceutical corporation.[149] The relative vehemence of popular outrage against takings for the direct benefit of private entities, compared to the typically muted reaction to takings for the direct benefit of public entities, is striking testimony to the significance of the dignitary element in the costs imposed on condemnees by takings.[150]

The dignitary costs of takings likely increase when the exercise of eminent domain is conditioned, by statute, upon a finding that the neighborhood in which the taken property sits is "blighted."[151] Such takings literally add insult to injury, and the stigmatization of condemnees' property (and by extension the condemnees who call it home) as a stain upon the local community is a powerful source of outrage about such condemnations.[152] The controversial history of the use of blight designa-

---

those numbers, and it may not be representative, but there are obviously many more condemnations for private use than even this report contains.

Dana Berliner, Castle Coal., Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain 2 (2003), available at http://castlecoalition.org/pdf/report/ED_report.pdf (on file with the *Columbia Law Review*).

149. Such disparities have the additional effect of fueling concerns among public choice theorists about "capture" of the procedural apparatus for determining exercises of eminent domain and similar dark suspicions among the public at large. See, e.g., Abraham Bell & Gideon Parchomovsky, The Hidden Function of Takings Compensation, 96 Va. L. Rev. 1673, 1681–82, 1686–89 (2010) (describing public choice theories that suggest how government takings may be influenced by interest groups).

150. Outrage about takings for the direct benefit of private entities has not been limited to the facts in *Kelo*. For example, controversy surrounding the current Atlantic Yards project in Brooklyn, New York has also captured public attention, becoming the subject not only of editorials but of impassioned documentary films and even a well-reviewed stage musical as well. Steven Cosson, In the Footprint: The Battle over Atlantic Yards (2010) (unpublished play); Battle for Brooklyn (Rumur 2011); Brooklyn Matters (Building History Productions 2007). Controversy over a plan to use eminent domain to take a boxing school and community center in National City, California, in order to pave the way for a condominium complex, made it all the way into the pages of Sports Illustrated. See Rick Reilly, An Unfair Fight, Sports Illustrated, Aug. 13, 2007, at 88, 88, available at http://sportsillustrated.cnn.com/vault/article/magazine/MAG1107877/index.htm (on file with the *Columbia Law Review*) (describing attempt to use eminent domain to condemn Community Youth Athletic Center).

151. "Blight" designations have been a central issue in the Atlantic Yards and Manhattanville takings cases in New York City. See Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721, 728–31 (N.Y. 2010) (discussing legal significance of blight designations and describing studies of whether Manhattanville was blighted); Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164, 171–73 (N.Y. 2009) (detailing Atlantic Yards litigants' competing thresholds for finding of blight and discussing appropriateness of judicial review of blight determinations).

152. See, e.g., Reilly, supra note 150, at 88 (describing use of blight designation as "strong-arm tactics . . . being used so rich businessmen can get richer" and commenting that author observed gym to be far from blighted); George F. Will, Op-Ed., In N.Y.,

tions in "urban renewal," and the populations that it displaced, bears witness to the relationship between "blight" and social stigma.[153]

The question then is whether payments of money when autonomy is infringed can mitigate or eliminate the dignitary harm caused by that infringement. Payments of money do not always signify or constitute respectfulness in a relationship. Indeed, in some circumstances, payment of money can itself be disrespectful.[154] Paradigmatic examples would include offers to pay money in exchange for intimacy (including, but not limited to, sexual intimacy) and offers to pay a bribe to induce a public official to neglect his duty. Monetary payments in exchange for items of fundamental human value also may raise concerns about commodification. Commodification, however, is properly a concern only when money is offered to induce a voluntary transaction in some item of fundamental value. When the money is paid not to induce a sale but as recompense for the loss of something that cannot be compensated in kind—such as autonomy—then commodification concerns leave the stage. Since compensation in kind is not possible, the only salient alternative to monetary compensation is not "noncommodifying" compensation, but rather no compensation at all.

Government's Eminent Arrogance, Wash. Post, Jan. 3, 2010, at A15 (discussing vibrancy of Atlantic Yards site despite "blighted" designation).

153. See, e.g., Wendell E. Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 6, 46–47 (2003) ("Blight was a facially neutral term infused with racial and ethnic prejudice . . . often used to describe the negative impact of certain residents on city neighborhoods."). For further discussion of racially motivated decisions about whose property to take for public use, see Garnett, Neglected Political Economy, supra note 45, at 120–21. For a suggestion that race may also affect the amount of compensation that condemnees receive, see Thomas W. Mitchell, Stephen Malpezzi & Richard K. Green, Forced Sale Risk: Class, Race, and the "Double Discount," 37 Fla. St. U. L. Rev. 589, 646–57 (2010) (raising possibility that "the race of a property owner may affect the price they can expect to receive in forced sales of real property").

154. This sort of worry is often raised in terms of concerns about "commodification," notably in the work of Margaret Radin. See, e.g., Margaret Jane Radin, Market-Inalienability, 100 Harv. L. Rev. 1849, 1905–06 (1987) ("A better view of personhood should understand many kinds of particulars . . . as integral to the self. To understand any of these as monetizable or completely detachable from the person . . . is to do violence to our deepest understanding of what it is to be human."); Radin, Property and Personhood, supra note 37, at 1005 (distinguishing between fungible and personal property and asserting "a few objects may be so close to the personal end of the continuum that no compensation [for taking them] could be 'just'"). See generally Margaret Jane Radin, Contested Commodities xi (1996) (offering "a pragmatic philosophical and legal approach to thinking about some of our contested commodities—those that are related to persons and the nature of human life"). For a collection of citations to some of the extensive philosophical and legal-theoretical literature on commodification, see Katharine Silbaugh, Commodification and Women's Household Labor, 9 Yale J.L. & Feminism 81, 84 n.8 (1997).

Moreover, under many circumstances, paying money can be a positive sign of respect. This, obviously, is true in the case of voluntary contributions made to someone who has provided a good for others to freely use without any obligation to pay—for example, musicians who make their work freely available to download. Voluntary payments to such people are not only a material reward but also a sign of respect for the person's talent and effort. Likewise, omitting to make a contribution in such circumstances can sometimes be disrespectful. More generally, paying money can be an act of respect when it is a tangible acknowledgement, costly to the acknowledger, of the legitimacy of the recipient's claims and of the recipient's moral or personal standing. In the case of payments in response to a loss of autonomy, what performs the critical expressive (or symbolic) role—that is, what helps to mitigate disrespect to the recipient's dignity—is the payer's acceptance of a reduction in the scope of his own autonomy (or being compelled by an authoritative figure to accept such a reduction), thereby leaving the payer with fewer resources after the payment than possessed before. The respect is thus being shown not by the payment increasing the recipient's autonomy but rather by the payer accepting a limitation on his own autonomy as a response to the recipient's loss of autonomy, and doing so as a matter not of grace but of duty. The parallel imposition of restraints on both parties' autonomy restores the condemnee to the dignitary equality shared by members of a free and democratic society.[155]

The respectfulness of monetary compensation is not automatic, however. For example, if the payment is considered trivial by the payer, it may not constitute an act of respect (and thus may not mitigate any dignitary harms) unless the payment is merely an incidental accompaniment to other symbolically or expressively significant acts. If the payment is to constitute a shared limitation on autonomy, then the payment ordinarily must be sizeable enough for its loss to be significant to the payer. At the same time, it should not be so large as to give the recipient what amounts

155. This is another way in which the commodification concern turns out not to apply in the case of compensation for lost autonomy. The way in which the payment works is not principally by placing a price on that autonomy, but rather by imposing a loss of autonomy on the party that takes the property, in tandem with the loss of autonomy by the person whose property is taken. Thus, respect is shown not by the takee's receiving money for his or her lost autonomy, but by the taker's losing autonomy as well. Ultimately, the lost autonomy is "compensated" by a parallel loss of autonomy; money's role in the affair is merely as a fungible intermediary—the basic role for which money exists in general.

Note that, on the argument sketched here, restoration of dignitary equality would not require that the money paid by the taker actually go to the takee. As long as the taker loses the money, it could go anywhere. Simply burning it would suffice. Obviously the law does not do that, and it would be peculiar if it did. The explanation is equally straightforward: Paying the money to the condemnee has the beneficial material effect, noted earlier, of increasing the condemnee's universe of feasible options, and thus of helping to bring the condemnee's autonomy closer to where it was before the taking.

to a windfall. Exactly what value or, more likely, what range of values satisfies both those requirements will likely depend on prevailing cultural practices and norms concerning manifestations of respect and the preservation of dignity. These practices and norms may well vary across time and geographical regions, and determining them is likely to be as much art as science. However, because the level of "compensation" for a condemnee's loss of autonomy should not vary among individual condemnees, determining the appropriate level is a task well suited for legislatures. Courts' distinct ability to make decisions based on the specific facts of individual cases is not relevant to this particular issue.

Two conclusions from this discussion should by now be clear. First, offering additional money to condemnees to compensate for the loss of autonomy inherent in eminent domain is not necessarily futile. Second, because all persons are moral equals, their autonomy has equal value, so any compensation provided specifically for the loss of autonomy should not depend upon the market value of the recipient's property or upon the recipient's subjective appreciation for the worth of his or her own autonomy. Compensation for loss of autonomy in eminent domain should be equal across all condemnees. The natural implication of these two conclusions is that the proper way to compensate for the condemnee's loss of autonomy is by providing a *fixed-dollar-amount* compensation bonus to each condemnee.

A similar conclusion follows when one turns from compensating for lost autonomy to compensating for lost sentimental value.

B. *Compensating for the Loss of Sentimental Value*

In order to compensate condemnees for the loss of sentimental value in their taken property, several academics have advocated increasing the sums paid to the burdened owners.[156] Commonly, these proposals involve paying a percentage bonus above fair market value, where the number of percentage points in the bonus depends upon how

156. See, e.g., The *Kelo* Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 122 (2005) (statement of Thomas W. Merrill, Charles Keller Beekman Professor, Columbia Law School) [hereinafter Merrill, *Kelo* Hearing Statement], available at http://www.access.gpo.gov/congress/senate/pdf/109hrg/24723.pdf (on file with the *Columbia Law Review*) (describing increased compensation as "promising reform idea"); Yun-chien Chang, Economic Value or Fair Market Value: What Form of Takings Compensation Is Efficient?, 20 Supreme Ct. Econ. Rev. (forthcoming 2012) (manuscript at 46), available at http://ssrn.com/abstract=1477670 (on file with the *Columbia Law Review*) (suggesting use of fair market value plus schedule of bonuses); Epstein, supra note 25, at 184 ("Bonus values . . . have a great deal to recommend them."); Fee, supra note 32, at 814–17 (suggesting use of "a statutory formula to increase the compensation as percentage of market value" for taken homes); Jack L. Knetsch & Thomas E. Borcherding, Expropriation of Private Property and the Basis for Compensation, 29 U. Toronto L.J. 237, 246–48 (1979) (discussing advantages of paying compensation bonuses above fair market value).

long the individual condemnee has owned or resided in the taken property.[157] For example, starting from an assumption that the sentimental value which property has for its owner increases the longer that the ownership has lasted, Thomas Merrill proposes that when the state takes a person's residence, farm, or business, compensation be increased by one percentage point above the property's fair market value for every consecutive year up to the present that the owner has occupied that property.[158] For example, suppose that Fillmore resided on Blackacre for ten years, then moved away for five years, and then returned to reside there for fifteen more years until the state exercised its power of eminent domain to take the property. According to this proposal, the state would owe Fillmore 115% of the property's fair market value in compensation for having to cede her property to the government.

Although the present author is aware of no state that has adopted this specific proposal, several states have enacted statutes that require that compensation for takings in eminent domain be set at a fixed percentage above the property's fair market value—for example, 125% of fair market value.[159] Presumably, some portion of that percentage bonus is intended to compensate for the property owner's loss of sentimental value, although these statutes do not necessarily limit the bonus to properties that had served as the condemnee's primary residence.[160] Thus,

---

157. Variations on this basic theme also have been proposed. See Nathan Bursdal, Note, Just Compensation and the Seller's Paradox, 20 BYU J. Pub. L. 79, 95–96 (2005) (proposing paying all condemnees percentage bonus determined by percentage bonus above fair market value that average property owner in relevant community would demand in order to be willing to sell).

158. Merrill, *Kelo* Hearing Statement, supra note 156, at 122 ("Another promising reform idea would be to require . . . that when occupied homes, businesses or farms are taken, the owner is entitled to a percentage bonus above fair market value, equal to one percentage point for each year the owner has continuously occupied the property."). John Fee endorses a similar approach but recommends bonuses twice as large as Merrill's, effectively increasing homeowners' compensation by approximately two percentage points for every year of continuous residence in the taken property (up to a maximum bonus of 60%). Fee, supra note 32, at 814–15, 818. The general notion of increasing compensation for property-related losses by adding a percentage bonus proportioned to length of occupancy, in order to account for sentimental value, predates the post-*Kelo* focus on takings law. Two decades earlier, Robert Ellickson offered a basically similar suggestion in the context of awarding damages for nuisances. See Ellickson, supra note 98, at 736–37 (1973) (suggesting use of market value damages plus "bonus award" to compensate nuisance claims). To the extent that this Article's criticism of this approach in the takings context is convincing, it is likely to apply to Ellickson's application of the approach in the nuisance context as well.

159. See supra notes 128–132 (citing relevant state statutes).

160. For example, although a Missouri statute sets compensation at 125% of fair market value for taken property that was "the owner's primary place of residence," Connecticut's compensation bonus provision contains no such limitation, and Indiana's compensation statute requires a 25% bonus even for taken agricultural land. See Conn.

these proposals can be treated as somewhat cruder versions of the academics' proposals.

These proposals and statutes make two significant mistakes. The first mistake is assuming that fair market value itself includes no compensation for owners' sentimental attachments to their property. As discussed earlier, this assumption is false.[161] Fair market value includes compensation for the marginal seller's sentimental value and, thus, over time, for the amount of sentimental value that is typical of a large number of property owners in a locality.[162] As a result, if the aim is to adjust compensation to reflect the individual condemnee's level of sentimental value in the taken property, the correct approach would be to award an extra percentage point of fair market value in compensation for every year of residence *above the number of years typical of market sellers in that locality*, and to *deduct* a percentage point from fair market value for every year by which a condemnee's tenure falls short of the typical duration.[163] For example, if the market price was set by sellers who typically had lived in their residences for seven years before selling, then implementing this correction to the Merrill proposal would award a condemnee who had lived in his residence for fifteen years before the state took the property compensation equal to 108% of the property's fair market value. (Merrill et al. would incorrectly have awarded 115%.) And a condemnee who had lived in his residence for only three years by the time the property was taken would be entitled to receive compensation equal only to 96% of the property's fair market value, since $100 - (7 - 3) = 96$. Thus, once one understands what fair market value prices do and do not account for, one can recognize that the approach that Merrill recommends would require giving some condemnees *less* than fair market value compensation for their taken property.

Gen. Stat. Ann. § 8-129(a)(2) (West 2010); Ind. Code § 32-24-4.5-8(1)(A)(i) (2012); Mo. Ann. Stat. §§ 523.001(3), 523.039(2) (West 2013 Cum. Ann. Pocket Part).

161. See supra notes 70–72 and accompanying text (discussing how sentimental value is reflected in market value).

162. If Merrill et al. are correct to assume that sentimental value scales roughly linearly with duration of ownership, or at least is positively correlated with that duration, then the pool of sellers who set the market price for property in a given locality will be populated primarily by people with relatively low sentimental value in their property. Those with higher sentimental value will, by hypothesis, move less often and therefore will be relatively infrequent market participants.

163. This procedure would apply in the common case of having to estimate a taken property's value based on market transactions of similar properties. If, however, there had been a recent market transaction involving the very same property, and thus there was no need to estimate market values by looking at other properties, then simply adding a percentage bonus for each year that had passed since the most recent transaction of that property could be reasonable, to the extent that using percentage bonuses for sentimental value is reasonable at all. As will soon be evident, however, there is a fundamental general problem with using such percentage bonuses, and that problem appears irrespective of the amount of market price information available.

The more fundamental mistake in both the academics' proposals and the statutes is to award compensation for sentimental value as a percentage of the property's fair market value. The problem here is familiar from the discussion above of compensation for the loss of autonomy: Making the size of the compensation proportional to the market value of the taken property accords more value to the sentiments of wealthy property owners than it does to poor property owners who have lived in their residences for the same amount of time and formed the same connections to them.[164] There is no obvious reason to think that owners of valuable property form deeper emotional bonds with that property than owners of inexpensive property do, nor any reason to believe that the rich feel more emotional pain from the loss of their homes than the poor do. (In fact, insofar as the rich are likely to have more opportunities than the poor both to travel and to own vacation homes or other secondary residences, it is plausible that, if there is any difference at all between them in the intensity of their subjective attachments, it is the poor who have deeper bonds with their homes than the rich.)

Therefore, to the extent that one thinks that condemnees ought to be compensated for their idiosyncratically large amounts of sentimental value at all, the proper compensation is a fixed dollar amount given to every condemnee who has an equivalent amount of sentimental value in the condemned property, no matter what that property's market value may be. Moreover, since sentimental attachments are a characteristic not of the taken property, but rather of the people from whom it was taken, that fixed amount of compensation would have to be paid to *each resident* of the taken property. Thus, the amount of compensation paid to a displaced family of four would need to be four times as great as the amount of compensation paid to a displaced bachelor.[165] Compensation for the

---

164. A related problem is the fact that a property's market value often is determined in large part by factors that have nothing to do with sentimental value. If extra compensation for lost sentimental value is paid as a percentage of fair market value, then any fluctuation in the property's market value will affect the amount of that compensation, even if there is no connection between the causes of the market value fluctuation and the amount of sentiment present. For example, if oil is discovered on a parcel, doubling the property's market value, and that property is then condemned, a system that paid a sentimental-value bonus as a percentage of the condemned property's market value would accordingly double the amount of money that the condemnee receives. However, unless the condemnee has an unusual psychological attachment to petroleum, there is no reason to think that the discovery of oil has any effect whatsoever on the condemnee's sentimental attachment to the property or on the amount of compensation that the condemnee should receive.

165. This implication highlights the significant extent to which compensating for sentimental value at all is at least superficially in tension with the U.S. Supreme Court's assertion in *Monongahela* that compensation is for the property, not for the persons who own the property:

> [T]his just compensation . . . is for the property, and not to the owner. . . . Instead of . . . saying that no person shall be deprived of his property without just compensation, the personal element is left out [of the Takings Clause's lan-

compelled loss of values that are equal across persons should be scaled to the number of persons affected, not to the price of the property that they own.

CONCLUSION

This Article has challenged three basic propositions at the heart of the established understanding of fair market value compensation for taken property. Although each of these three challenges can be accepted or rejected separately, together they provide a fundamentally clearer and significantly revised understanding of the scope and fairness of that compensation. First, this Article has argued that fair market value compensation does not neglect entire categories of condemnees' subjective value in their property (aside from the value of each condemnee's own autonomy) but instead provides at least partial compensation for a significant amount of that value. What remains uncompensated is only idiosyncratically large amounts of subjective value—that is, the idiosyncratic premium (plus the value of autonomy). Second, this Article has argued that much of the subjective value that is omitted from the fair market value standard should not, in fairness, receive compensation. That is, fairness does not require full compensation for owners' idiosyncratic premiums. And, third, this Article has argued that statutory provisions increasing eminent domain compensation by requiring payment of fixed-percentage bonuses above fair market value, and similar prominent academic proposals for increasing that compensation, fundamentally misunderstand the nature of the lost autonomy and sentimental value for which they are compensating. Thus, they improperly undermine the inherent civic and moral equality of rich and poor property owners by overcompensating the rich while undercompensating the poor. Because the personhood of all owners, whether rich or poor, has equal value, providing compensation for lost autonomy and sentimental attachment by means of bonuses in fixed dollar amounts rather than fixed-percentage amounts is a requirement of moral equality.

---

guage], and the 'just compensation' is to be a full equivalent for the property taken.

Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893). This language is itself in tension with a later Court's assertion that "[the Constitution] merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not, what has the taker gained." Bos. Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910); see also Wyman, Just Compensation, supra note 100, at 282 n.150 (discussing cases about whether compensation is for property lost or for owner's loss).

SELECTED BIBLIOGRAPHY

Alexander, Gregory S., The Social-Obligation Norm in American Property Law, 94 Cornell L. Rev. 745 (2009).

Alexander, Gregory S., et al., A Statement of Progressive Property, 94 Cornell L. Rev. 743 (2009).

Am. Jur. 2d Adjoining Landowners vol. 1 (2005).

Am. Jur. 2d Nuisances vol. 58 (2012).

Bagenstos, Samuel R., & Margo Schlanger, Hedonic Damages, Hedonic Adaptation, and Disability, 60 Vand. L. Rev. 745 (2007).

Battle for Brooklyn (Rumur 2011).

Bell, Abraham & Gideon Parchomovsky, The Hidden Function of Takings Compensation, 96 Va. L. Rev. 1673 (2010).

Bell, Abraham & Gideon Parchomovsky, Taking Compensation Private, 59 Stan. L. Rev. 871 (2007).

Berger, Lawrence, The Public Use Requirement in Eminent Domain, 57 Or. L. Rev. 203 (1978).

Berliner, Dana, Castle Coalition, Public Power, Private Gain (2003), available at http://castlecoalition.org/index.php?option=com_content&task=view&id=312&Itemid=130.

Blume, Lawrence & Daniel L. Rubinfeld, Compensation for Takings: An Economic Analysis, 72 Calif. L. Rev. 569 (1984).

Brooklyn Matters (Building History Productions 2007).

Bursdal, Nathan, Note, Just Compensation and the Seller's Paradox, 20 BYU J. Pub. L. 79 (2005).

Chang, Yun-chien, Economic Value or Fair Market Value: What Form of Takings Compensation Is Efficient?, 20 Supreme Ct. Econ. Rev. (forthcoming 2012), available at http://ssrn.com/abstract=1477670.

Chordia, Tarun, Richard Roll & Avanidhar Subrahmanyam, Liquidity and Market Efficiency, 87 J. Fin. Econ. 249 (2008).

Claeys, Eric R., Virtue and Rights in American Property Law, 94 Cornell L. Rev. 889 (2009).

Cohen, Charles E., The Abstruse Science: *Kelo, Lochner*, and Representation Reinforcement in the Public Use Debate, 46 Duq. L. Rev. 375 (2008).

Cooter, Robert & Thomas Ulen, Law and Economics (5th ed. 2007).

Copland, James R., Tragic Solutions: The 9/11 Victim Compensation Fund, Historical Antecedents, and Lessons for Tort Reform (Jan. 13, 2005) (unpublished working paper).

Cosson, Steven, In the Footprint: The Battle over Atlantic Yards (2010) (unpublished play).

Cranor, Carl, Toward a Theory of Respect for Persons, 12 Am. Phil. Q. 309 (1975).

Dana, David A. & Thomas W. Merrill, Property: Takings (2002).

Darwall, Stephen L., Two Kinds of Respect, 88 Ethics 36 (1977).

Davidson, Nestor M., Property and Relative Status, 107 Mich. L. Rev. 757 (2009).

Dick, Philip K., We Can Remember It for You Wholesale (1966), reprinted in 2 The Collected Stories of Philip K. Dick 35 (1995).

Dixon, Lloyd & Rachel Kaganoff Stern, Compensation for Losses from the 9/11 Attacks (2004).

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

Epstein, Richard A., Takings: Private Property and the Power of Eminent Domain (1985).

Fama, Eugene, Efficient Capital Markets: A Review of Theory and Empirical Work, 25 J. Fin. 383 (1970).

Fannie Mae, National Housing Survey: July–September 2010 Quarterly Wave 69 (2010).

Fannie Mae, National Housing Survey: Third Quarter, 2011 (2011).

Farber, Daniel A., What (If Anything) Can Economics Say About Equity?, 101 Mich. L. Rev. 1791 (2003) (book review).

Fee, John, Eminent Domain and the Sanctity of Home, 81 Notre Dame L. Rev. 783 (2006).

Fennell, Lee Anne, Taking Eminent Domain Apart, 2004 Mich. St. L. Rev. 957.

Fischel, William A., The Political Economy of Public Use in *Poletown*: How Federal Grants Encourage Excessive Use of Eminent Domain, 2004 Mich. St. L. Rev. 929.

Foster, Sheila R. & Daniel Bonilla, Symposium, The Social Function of Property: A Comparative Perspective, Introduction, 80 Fordham L. Rev. 1003 (2011).

Franck, Thomas M., Fairness in International Law and Institutions (1995).

Gan, Li & Qi Li, Efficiency of Thin and Thick Markets (Nat'l Bureau of Econ. Research Working Paper No. 10815, 2004), available at http://www.nber.org/papers/w10815.

Garnett, Nicole Stelle, The Neglected Political Economy of Eminent Domain, 105 Mich. L. Rev. 101 (2006).

Garnett, Nicole Stelle, The Public-Use Question as a Takings Problem, 71 Geo. Wash. L. Rev. 934 (2003).

Goldberg, John C.P. & Benjamin C. Zipursky, Torts (2010).

Harman, Gilbert, Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error, 99 Proc. Aristotelian Soc'y 315 (1999).

Heller, Michael & Rick Hills, Land Assembly Districts, 121 Harv. L. Rev. 1465 (2008).

Henry, Leslie Meltzer, The Jurisprudence of Dignity, 160 U. Pa. L. Rev. 169 (2011).

Jolls, Christine, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471 (1998).

Keating, Gregory C., The Priority of Respect over Repair, 18 Legal Theory 293 (2012).

Kelly, Daniel B., Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism, 17 Supreme Ct. Econ. Rev. 173 (2009).

Kelly, Daniel B., The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence, 92 Cornell L. Rev. 1 (2006).

Knetsch, Jack L. & Thomas E. Borcherding, Expropriation of Private Property and the Basis for Compensation, 29 U. Toronto L.J. 237 (1979).

Krier, James E. & Christopher Serkin, Public Ruses, 2004 Mich. St. L. Rev. 859.

Larmore, Charles, The Moral Basis of Political Liberalism, 96 J. Phil. 599 (1999).

Levmore, Saul, Self-Assessed Valuation Systems for Tort and Other Law, 68 Va. L. Rev. 771 (1982).

Malkiel, Burton G., A Random Walk Down Wall Street: The Time-Tested Strategy for Successful Investing (10th ed. 2011).

Markell, David L., Tom Tyler & Sarah F. Brosnan, What Has Love Got to Do with It?: Sentimental Attachments and Legal Decision-Making, 57 Vill. L. Rev. 209 (2012).

Merrill, Thomas W., The Economics of Public Use, 72 Cornell L. Rev. 61 (1986).

Merrill, Thomas W. & Henry E. Smith, Property: Principles and Policies (2007).

Mitchell, Thomas W., Stephen Malpezzi & Richard K. Green, Forced Sale Risk: Class, Race, and the "Double Discount," 37 Fla. St. U. L. Rev. 589 (2010).

Norell, Leif, Is the Market Value a Fair and Objective Measure for Determining Compensation for Compulsory Acquisition of Land?, 2008 Land Reform 19, available at ftp://ftp.fao.org/docrep/fao/011/i0470t/i0470t02.pdf.

Nozick, Robert, Anarchy, State, and Utopia (1974).

Obrinsky, Mark, Research Notes: The High Cost of Short-Term Homeownership, Nat'l Multi Housing Council (Dec. 1, 1997), http://www.nmhc.org/Newsletter.cfm?ItemNumber=54687.

Penner, J.E., Nuisance and the Character of the Neighbourhood, 5 J. Envtl. L. 1 (1993).

Peñalver, Eduardo M., Land Virtues, 94 Cornell L. Rev. 821 (2009).

Pettit, Philip, Consequentialism and Respect for Persons, 100 Ethics 116 (1989).

Pritchett, Wendell E., The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1 (2003).

Radin, Margaret Jane, Contested Commodities (1996).

Radin, Margaret Jane, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1667 (1988).

Radin, Margaret Jane, Market-Inalienability, 100 Harv. L. Rev. 1849 (1987).

Radin, Margaret Jane, Property and Personhood, 34 Stan. L. Rev. 957 (1982).

Rao, Neomi, Three Concepts of Dignity in Constitutional Law, 86 Notre Dame L. Rev. 183 (2011).

Reilly, Rick, An Unfair Fight, Sports Illustrated, Aug. 13, 2007, at 88, available at http://sportsillustrated.cnn.com/vault/article/magazine/MAG1107877/index.htm.

Restatement (Second) of Torts (1979).

Restatement (Second) of Torts (1965).

Sackman, Julius L., et al., Nichols on Eminent Domain vols. 1, 4 (3d ed. 2012).

Sen, Amartya, Commodities and Capabilities (1985).

Shavell, Steven, Foundations of Economic Analysis of Law (2004).

Silbaugh, Katharine, Commodification and Women's Household Labor, 9 Yale J.L. & Feminism 81 (1997).

Singer, Joseph William, Property (3d ed. 2010).

Special Issue, Property and Obligation, 94 Cornell L. Rev. 743 (2009).

Symposium, The Social Function of Property: A Comparative Perspective, 80 Fordham L. Rev. 1003 (2011).

Thaler, Richard H. & Sendhil Mullainathan, Behavioral Economics, *in* The Concise Encyclopedia of Economics 34 (David R. Henderson ed., 2008).

Thompson, Jr., Barton H., Judicial Takings, 76 Va. L. Rev. 1449 (1990).

Todd, M.J., The Application of Solatium Payments in the Assessment of Public Works Compensation (2009) (unpublished Master of Property Studies dissertation, Lincoln University, N.Z.), available at http://researcharchive.lincoln.ac.nz/dspace/bitstream/10182/1481/13/todd_mpropstuds.pdf.

Treanor, William Michael, The *Armstrong* Principle, the Narratives of Takings, and Compensation Statutes, 38 Wm. & Mary L. Rev. 1151 (1997).

Tyler, Tom R., Why People Obey the Law (2006).

U.S. Gov't Accountability Office, GAO-07-28, Eminent Domain: Information About Its Uses and Effect on Property Owners and Communities Is Limited (2006), available at http://www.gao.gov/new.items/d0728.pdf.

Will, George F., Op-Ed., In N.Y., Government's Eminent Arrogance, Wash. Post, Jan. 3, 2010, at A15.

Wyman, Katrina M., Should Property Scholars Embrace Virtue Ethics? A Skeptical Comment, 94 Cornell L. Rev. 991 (2009).

Wyman, Katrina Miriam, The Measure of Just Compensation, 41 U.C. Davis L. Rev. 239 (2007).