

PUBLIC CHOICE AND JUST COMPENSATION

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Few areas of law have spawned such a rich scholarly literature, with contributions by so many major thinkers, as the takings clause. Yet there is no consensus today about takings law—only a general belief that the takings problem is difficult and that takings doctrine is a mess.¹

This article is yet another look at the takings puzzle. I will not attempt to discuss all possible perspectives on takings.² Instead, I will limit myself to discussing economic analyses of takings—not because of any presumption that constitutional rules can be explained through economic analysis, but for narrower reasons. The first is simply that this subfield has been the subject of enough scholarship to warrant separate treatment. Second, economics might well make a special contribution to the analysis of property rights, which seems relatively close to its traditional subject matter.

In Parts I and II of the article, I will survey the economic literature on takings. The minimum requirement for a theory of takings is that it account for the “easy” cases. The easiest case is simply the seizure of land by the government to build a road or dam.³ Unfortunately, existing economic models do poorly at explaining why the landowner is always compensated in this situation. Part I discusses economic models based on insurance, while Part II explores models

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1. See Jeremy Paul, *The Hidden Structure of Takings Law*, 64 *S. Cal. L. Rev.* 1393, 1395-97 (1991); Laura S. Underkuffler, *On Property: An Essay*, 100 *Yale L.J.* 127, 143 (1990); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 *Cal. L. Rev.* 1299, 1304-05, 1362 (1989).

2. See, e.g., Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 *Cal. L. Rev.* 53 (1990), for an interesting recent example of a non-economic analysis.

3. Laurence H. Tribe, *American Constitutional Law* 592-93 (Foundation Press, 2d ed. 1988); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law*, 80 *Harv. L. Rev.* 1165, 1189-90 (1967). Throughout this article, the term “government project” means a construction project requiring occupation of lands currently in private hands.

that focus on rent-seeking. Neither type of model provides a satisfactory explanation for these easy cases.

Part II outlines an alternative economic analysis of takings. According to public choice theory, legislators will normally offer compensation to landowners when property is taken for government projects. The reason is that landowners usually form a powerful lobby against a project unless they are "bought off."⁴ The takings clause converts this political custom into a formal requirement, thereby ensuring what tax analysts call "horizontal equity." Making the compensation requirement uniform also protects unusually vulnerable groups that might otherwise suffer from violations of the general custom of compensation.

In Part III, this model is extended to regulatory takings. This has been an area of increasing Supreme Court activity, culminating in the Court's recent decision in *Lucas v. South Carolina Coastal Council*.⁵

Essentially, I propose that a regulation should only be considered a taking when it is the functional equivalent of a government appropriation of land. As we will see, many of the Court's decisions fit with this theory. In particular, portions of the *Lucas* rationale are consistent with the theory, but the rule announced by the *Lucas* Court is overbroad.

I

The takings clause is a notorious source of difficulties in defining the legitimate scope of government regulation. Courts and commentators confess puzzlement about when a government regulation has "gone too far" and become a taking.⁶ Obviously, it would be nice if economic analysis could help illuminate this difficult problem. In this section, however, I will consider only the application of economic analysis to a much simpler situation: the straightforward case where the government seizes land to build a road or dam. Why do we require the government to compensate the landowner?

The conventional story about government compensation in this

4. In an earlier version of this paper, I argued that compensation would "almost always" be offered to landowners. As Professor Barton Thompson pointed out in his oral comments on the paper at the 1990 Stanford Conference on Economic Analysis and the Constitution, the theory does not require such a strong empirical postulate. It is sufficient that voluntary compensation be a normal legislative practice, but exceptions need not be particularly rare.

5. — U.S. —, 112 S. Ct. 2886, 60 U.S.L.W. 4842 (1992).

6. John E. Nowak, Ronald D. Rotunda, and J. Nelson Young, *Constitutional Law* 402-03 (West, 3d ed. 1986); Tribe, *American Constitutional Law* at 593 (cited in note 3).

simple case is nicely set out by William Fischel and Perry Shapiro. It runs as follows:

[M]ost economists and lawyers would, we believe, conclude that the government should pay for the property that it takes. The argument, especially that of economists, might be that forcing the government to pay for the resources it gets promotes efficiency. In a world lacking any compensation requirement, the obvious fear is that private investors will be inhibited by the thought that government will snatch the fruits of their venture. The fears of what will happen at the end of the process work themselves into the calculation of property owners at the beginning of that process, so that too little capital will be invested in productive enterprises. The compensation requirement thus serves the dual purpose of offering a substantial amount of protection to private entitlements, while disciplining the power of the state, which would otherwise overexpand unless made to pay for the resources that it consumes.⁷

On its face, this seems a plausible explanation for takings protection.

One reason for its plausibility is that it calls to mind a prototypical situation where compensation is an issue. Consider a small country that is attempting to attract a major foreign investor. There is a significant risk of strategic behavior: the government makes all kinds of promises to lure the foreign investor, then grabs the property later on. The existence of this risk deters foreign investment. Thus, the government may wish to make a binding commitment of compensation in order to attract investment and further economic growth. In this and similar situations, the Fischel and Shapiro story rings true.

The original Framers of the Constitution may have been concerned about protecting non-resident investors. Prior to the fifth amendment, a takings clause was included in the Northwest Ordinance because of fears that state legislators would seize lands owned by outsiders.⁸ Today, however, the typical application of the tak-

7. William A. Fischel and Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of 'Just Compensation' Law*, 17 J. Legal Stud. 269 (1988).

8. See Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L. J. 694, 707 (1985). There is some reason to think that the Framers, particularly Madison, were mostly concerned about the unfair distribution of burdens. See Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. Pa. L. Rev. 829, 843-44 (1989).

Professor Fischel has pointed out another form of discrimination against outsiders that is unlikely to be a problem at the state or federal level, but may well occur at the local level. This is the problem of overregulation of land use to benefit local residents at the expense of outsiders who would like to move into the community. Fischel suggests that a major function of the taking clause has been to deter overregulation at the local level. William A. Fischel,

ings clause is quite different. When a highway is built or a dam is constructed, the affected property is usually owned by local residents or businesses. This modifies the analysis considerably.

Consider the situation of a hypothetical foreign investor, Megalith Multinational Ltd. From Megalith's point of view, a compensation guarantee is a net gain, because compensation will be funded largely by local taxpayers. Correspondingly, Megalith also has special reason to fear seizure: from the government's point of view, a seizure without compensation is pure gain, transferring wealth from an outsider to local voters. Thus, a compensation rule is unambiguously desirable for the foreign investor such as Megalith.

The situation of the local resident—call her Susan Citizen—is quite different. For Susan, unlike Megalith, a compensation requirement is a mixed blessing. True, Susan gains if her own land is seized for a road, since she will receive compensation. But she also pays higher taxes (or receives lower government services) in order to finance the compensation payments when other people's land is seized. On average, the higher taxes just balance the possible expectation of compensation. In effect, Susan is buying insurance against a taking, and she will desire to do so only if she is risk-averse. (In contrast, Megalith need not be risk-averse to prefer a compensation rule, because compensation is financed by the locals—insurance is *always* a good deal if someone else is paying the premiums.) Moreover, Susan also has less reason to fear uncompensated takings. The uncompensated seizure of foreigners' property is attractive to politicians because foreigners cannot vote. But Susan *can* vote and therefore is a less attractive target for property seizure.⁹

Thus, the Fischel and Shapiro scenario applies in a fairly straightforward way to a country seeking to obtain foreign investment. It becomes considerably more problematic, however, in the typical takings situation, that of the local resident whose property is used for a road or dam. In that situation, we need to look carefully to see whether a compensation requirement can be justified as either (a) a form of insurance for risk-averse taxpayers, or (b) a disincentive against ill-conceived government projects.

Introduction: Utilitarian Balancing and Formalism in Takings, 88 Colum. L. Rev. 1581, 1582-84 (1988). This is an intriguing suggestion, but in this article I have not attempted to distinguish among levels of government along these lines. Although Fischel's analysis is somewhat different than that offered here, it has in common a focus on discrimination against the politically powerless—in the situation he posits, non-residents who cannot vote in local elections.

9. This analysis applies only in a democracy. In a non-democratic regime, a compensation rule would probably be highly beneficial for citizens for a variety of reasons, but it is hard to see how such a rule could be implemented.

The insurance model has been extensively explored by Lawrence Blume and Daniel Rubinfeld. They analyze the case of the local resident whose property becomes valueless because of a government project. As we saw with our hypothetical Susan Citizen, compensation operates as a form of insurance for a resident facing this risk. If the road is built through her property, she will receive compensation for the loss, but the compensation scheme is funded through taxes which she pays in the meantime. Functionally, as Blume and Rubinfeld point out, the taxes are equivalent to insurance premiums for risk-averse taxpayers.¹⁰

As they make clear, the Blume and Rubinfeld analysis does not explain why all landowners receive compensation. Their analysis suggests that takings compensation should track the demand for insurance by different groups of landowners. Only risk-averse taxpayers benefit from a compensation requirement, so they should be the main recipients of takings protection. Corporations should behave largely as if they were risk-neutral, since shareholders can limit risks through diversifying their portfolios. Hence, they should not desire takings compensation.¹¹ Moreover, the wealthy should be less willing to insure against losses of the same size than the poor, since a smaller portion of their total wealth is at risk.¹² For the same reason, compensation should be less desired where only a small part of a parcel is seized by the government.¹³ Thus, the insurance theory falls short of justifying the core principle of eminent domain, which is that *any* government seizure requires compensation.

It may be possible to come up with more complex explanations for this broader availability of takings compensation. With a little imagination, it might be possible to identify various transaction costs or secondary incentive effects which might justify expanding takings compensation beyond the individuals with a high demand for insurance. It is rather unsatisfying, however, to have to complicate the basic model so much in order to explain such "easy" cases.

In any event, the insurance model faces other challenges. One basic question is why, for those property owners who *do* desire insurance, the government should be the supplier of insurance coverage by way of the takings clause. Most property losses are covered by the private insurance market. If private insurance can cover the risk that property will be destroyed by fire, why not the risk that it

10. Lawrence Blume and Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Cal. L. Rev. 569, 590-94 (1984).

11. *Id.* at 612.

12. *Id.* at 606.

13. *Id.* at 616.

will be taken to make way for a new freeway? Why not leave takings compensation to Prudential and State Farm?

Blume and Rubinfeld offer two arguments for the impossibility of private insurance. The first is what economists call moral hazard: the tendency of insurance to diminish precautions against loss. Insurance would presumably decrease the incentive to lobby against seizure of the property.¹⁴ As Lewis Kaplow has pointed out, however, it is unclear why moral hazard is substantially more of a problem with takings than with fires.¹⁵ Private insurers might in fact be more capable of taking precautions against takings than individual citizens. If a potential taking affects a large number of landowners, they may have difficulty organizing their opposition. It might make a considerable amount of sense to transfer the responsibility for lobbying to the insurer to help overcome free-rider and other organizational problems. Also, self-insurance is a possibility for corporations—a category that notably includes institutional lenders, who probably receive a large share of all compensation for takings.

Blume and Rubinfeld also rely on “adverse selection” by individuals with inside knowledge about the possibility of takings.¹⁶ Adverse selection is the tendency of insurance programs to attract the riskiest customers: life insurance is the most attractive buy for the terminally ill, which is why insurers require physicals. Again, this does not seem to be an insurmountable barrier to private insurance. The local office of an insurer with numerous policies in the same town could probably monitor political developments as well as, if not better than, individual property owners. Thus, the insurers would not suffer from having less information about risk than insurance applicants. The adverse selection problem also does not seem inherently worse than other insurance markets, such as life insurance or auto insurance, which seem to function successfully.¹⁷ As in other markets, adverse selection could be countered by various techniques. For instance, adverse selection could be limited by requiring the insurance coverage to be purchased well in advance of the taking.

14. *Id.* at 594.

15. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 509, 549, 540 n.86 (1986). Kaplow may overstate this point. It is probably easier to monitor fire precautions than lobbying efforts—and there are obvious reasons for owners to be afraid of fires.

16. Blume and Rubinfeld, 72 Cal. L. Rev. at 595-96 (cited in note 10); see also Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1705 (1988).

17. See Thomas W. Merrill, *Rent Seeking and the Compensation Principle* (Book Review), 80 Nw. U. L. Rev. 1561, 1581-82 (1986).

There is inevitably an element of speculation in discussing whether the market could fill a need that actually has always been served by the government. Perhaps, if the government never gave compensation for takings, moral hazard or adverse selection would turn out to be more serious problems than presently seems likely. But this kind of conjecture is not a satisfying basis for either a positive or a normative theory.

Thus, the affirmative argument for government-provided, mandatory insurance against takings is only moderately persuasive. Worse, there is actually a fairly strong counter-argument, which Louis Kaplow has developed in detail. Government compensation for takings creates a potentially serious moral hazard of its own. Suppose a landowner is considering a further investment in his property, but there is some chance that the property will be flooded by a proposed dam. We would like the owner to consider this possibility when deciding whether to make an investment, since the investment will be wasted if the dam is built. But if the owner can obtain full government compensation for the flooding, she has no reason to take the possibility of the dam into account. (If the dam is not built, the owner can expect a return from her additional investment, while she gets her money back from the government if the dam is built after all.) So the owner is indifferent to the possible construction of the dam and hence will tend to overinvest, with a consequential loss in economic efficiency.¹⁸

Blume and Rubinfeld acknowledge this problem. They attempt to deal with it by adjusting compensation awards so as to eliminate the incentive for additional excessive investments.¹⁹ This adjustment requires a determination of the most economically efficient use of the land, taking into account the possible government project. As Kaplow points out, this adjustment to the award may be difficult to make.²⁰ Unless this complex adjustment can be made, however, takings compensation may cause significant moral hazard.²¹

Fischel and Shapiro have offered a rather interesting defense against Kaplow's critique of the insurance argument. Essentially, they have tried to reinterpret that argument in a way that preserves

18. See Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 Cal. L. Rev. 1, 20 (1985); Kaplow, 99 Harv. L. Rev. at 529 (cited in note 15); Rose-Ackerman, 88 Colum. L. Rev. at 1702-04 (cited in note 16).

19. Blume and Rubinfeld, 72 Cal. L. Rev. at 619 (cited in note 10).

20. Kaplow, 99 Harv. L. Rev. at 532 n.61 (cited in note 15).

21. To the extent that condemnation law does not provide complete compensation to landowners, this moral hazard is diminished. Also, with respect to regulatory takings, the moral hazard is probably less simply because of the uncertainty of whether the courts will actually determine that the regulation is a taking.

the idea of loss aversion but avoids the analogy to insurance. As they note, the insurance rationale for takings law is usually attributed to Frank Michelman's classic article on just compensation.²² In that article, Michelman speaks of the "demoralization cost" of uncompensating takings, which sounds very much like a reference to risk aversion, and this ties into the idea of insurance. Fischel and Shapiro suggest, however, that Michelman really had something quite different in mind: a special psychological trauma experienced by individuals whose property is confiscated by the government.²³ Just as people are more upset about having a watch stolen than simply losing it, they are more upset about having property confiscated than destroyed in an accidental fire. Takings law responds to this special psychological cost.

Although this has not been the usual reading of Michelman, it may well be correct. The following passage in the Michelman article is particularly suggestive:

The worth of this kind of analysis in a utilitarian compensation program depends on a number of assumptions which, while not void of plausibility, are surely debatable. The assumptions are (1) that one thinks of himself not just as owning a total amount of wealth or income, but also as owning several discrete "things" whose destinies he controls; (2) that deprivation of one of these mentally circumscribed things is an event attended by pain of a specially acute or demoralizing kind, as compared with what one experiences in response to the different kind of event consisting of a general decline in one's net worth; and (3) that events of the specially painful kind can usually be identified by compensation tribunals with relative ease.²⁴

Thus, Michelman's theory is rooted in a psychology of takings; he seems to see the function of compensation awards to be as much therapeutic as economic.

While Fischel and Shapiro may be correct in their interpretation of Michelman,²⁵ Michelman's observation may not be useful as part of an economic analysis. We can account for almost anything by positing a specifically tailored set of preferences: people do whatever they do because that's what they prefer to do. If people have a special distaste for loss of specific parcels of property, we

22. Michelman, 80 Harv. L. Rev. 1165 (cited in note 3).

23. Fischel and Shapiro, 17 J. Legal Stud. 269 (cited in note 7).

24. Michelman, 80 Harv. L. Rev. at 1234 (cited in note 3). This analysis seems to offer no support for compensation to corporations, who presumably do not require psychological reassurance.

25. As Barton Thompson has observed, Michelman's meaning is quite unclear. See Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1477 n.117 (1990).

might expect to see legal rules geared to this preference. In particular, we might expect to see compensation rules if the majority of members of a society have a taste for compensation rules. But this analysis verges on tautology.

Assuming Michelman is right about human psychology, the important questions are why people feel this way and whether they are justified in doing so.²⁶ It seems unlikely that economics can contribute much to either of those inquiries.²⁷ Whatever else Michelman's observation about "pain of a specially acute or demoralizing kind" might be, it does not represent just another "cost" to be factored into an economic analysis. Michelman's observation may turn out to be important for some non-economic approach for takings, but it seems unlikely to contribute much to an economic analysis. In particular, it does not add very usefully to the insurance model.

Kaplow concludes that the case for compensating landowners is shaky, and that the insurance rationale is particularly weak, though he does not reject compensation out of hand.²⁸ My view is somewhat more sanguine. On balance, the insurance theory seems tenable but not highly persuasive. The arguments against compensation may not be quite as strong as Kaplow thinks, but the insurance rationale for compensation is less than overwhelming.²⁹ At best, then, the insurance theory should play only a supporting role in takings analysis. Given this apparently inconclusive coverage of the "easy" case for compensation, it seems particularly unlikely that the insurance theory is going to be much help in dealing with the less tractable problem of regulatory takings.

II

The average taxpayer may or may not receive desirable insurance coverage in the guise of takings compensation. Regardless of insurance benefits, however, takings compensation might benefit the

26. See *id.* at 1480. It is also unclear to me whether Michelman is empirically correct.

27. Moreover, Michelman's empirical conjecture seems potentially inconsistent with basic economic assumptions. If people are "thing oriented" rather than wealth oriented, then their preferences may be intransitive. That is, suppose I regard my car as worth \$5000 and my house as worth \$50,000, but I don't regard the total loss of the car as equivalent to a 10% decrease in the value of my house. I thus have two items, each of which I apparently regard as the equivalent of \$5000 in cash, but I do not regard the items as equivalent to each other. If this were to turn out to be a very general phenomenon, we would have to rethink most of microeconomics.

28. Kaplow, 99 *Harv. L. Rev.* at 552, 602-07 (cited in note 15).

29. For a recent defense of the insurance theory, see Schill, 137 *U. Pa. L. Rev.* at 853-56 (cited in note 8).

average taxpayer by reducing the level of government takings.³⁰ Just as tort liability can provide both insurance and incentives, so takings law might perform similar functions. Indeed, the standard account of takings presented by Fischel and Shapiro assumes that a compensation requirement prevents overexpansion of government programs.

We need to be careful in assessing the effect of takings compensation on state programs. If a project is economically efficient (so that its benefits exceed its costs) then the average citizen benefits from the project—the expected cost of the project (through loss of property seized by the government or through tax increases)—is exceeded by the benefit of the project. Hence, ignoring insurance effects for the moment, the taxpayer would be willing *ex ante* to have efficient projects proceed even without compensation. The incentive effects of a compensation rule are only desirable, in other words, to the extent that inefficient projects are deterred. This beneficial deterrence effect has to be balanced against the possible deterrence of efficient projects.³¹ What we will be examining, therefore, is whether the compensation requirement causes a net increase in the economic efficiency of government projects. Without any hard empirical evidence (or even much soft evidence), the conclusion on this point must remain debatable.

At first blush, it may seem fairly obvious that requiring the government to pay the full cost of projects will increase efficiency.³² In tort law, it is now the conventional wisdom that firms should be required to internalize the social costs of their activities, because externalities lead to overproduction. If we were dealing with a firm—such as a private utility or railroad with authority to engage in condemnation (or perhaps a monarchy run for the personal profit of the king)—then this usual idea would indeed apply, with the usual caveats. But the government is not a profit-maximizing firm.³³

If we adopt a public interest theory of government, internalizing a cost makes no difference. Public-spirited legislators would take into account all the costs and benefits of a proposal, whether those costs and benefits are funneled through the government's checking account or not. Thus, a public-regarding legislature

30. Cooter, 73 Cal. L. Rev. at 21-22 (cited in note 18).

31. See Thompson, 76 Va. L. Rev. at 1504 (cited in note 25).

32. Richard A. Posner, *Economic Analysis of Law* 51 (Little Brown, 3d ed. 1986).

33. See Schill, 137 U. Pa. L. Rev. at 857 (cited in note 8). In some countries, a dictator may operate the government for personal profit. In that situation, a takings requirement would optimize government behavior—but of course, a compensation rule would be unenforceable against the dictator.

should not suffer from "fiscal illusion." On the other hand, if we take a public choice approach, we need a much closer analysis to determine the effects of a compensation requirement on government activities. Public choice gives us no reason to expect that the response of government officers will mirror the responses of the owners of a private firm. To determine whether compensation requirements will lead legislators to disapprove inefficient projects, we need to examine the political dynamics closely.

Saul Levmore has suggested that the victims of takings, such as individuals whose land is used for a highway or dam, are unlikely to be well represented in the political process. Because they are an ad hoc group, they lack the advantages of repeat political players, particularly the ability to engage in logrolls.³⁴ Also, ad hoc groups are harder to organize, since the group cannot spread its initial organizational costs over a long period of time, and can offer few fringe benefits to members.

Although Levmore is clearly correct about the disadvantages of ad hoc groups, he may overstate their comparative weakness in the political process. The potential victims of takings lack the advantages of being repeat players in the political "game," but they are attractive "customers" for repeat players such as political parties or individual political entrepreneurs. Moreover they do have an important organizational advantage over some other groups, such as the taxpayers at large. They form a small group (relative to the electorate, at least) and often have high stakes (since they are about to have large amounts of property seized by the state). They also have the advantage of sharing a geographical connection, and that proximity makes it easier to form into a group and to identify them in the first place. As neighbors, they are likely to have community ties that make organization easier.³⁵

If public choice has any one key finding, it is that small groups with high stakes have a disproportionately great influence on the political process.³⁶ Apart from considerable anecdotal evidence

34. Saul Levmore, *Just Compensation and Just Politics*, 22 Conn. L. Rev. 285, 306-07 (1990). See also Schill, 137 U. Pa. L. Rev. at 860 n.116 (cited in note 8). Levmore's analysis is presaged in a formal model by Fischel and Perry, in which taking compensation arises from the propensity of majorities to exploit minorities. In the absence of compensation, politicians then back projects that benefit a majority at the expense of a minority, even if the result is a loss in social wealth. Full compensation, on the other hand, will result in the moral hazard problem that Kaplow identifies. Dropping a Rawlsian "veil of ignorance" in place, Fischel and Perry then conclude that the voters would unanimously favor partial compensation. See William A. Fischel and Perry Shapiro, *A Constitutional Choice Model of Compensation for Takings*, 9 Intl. Rev. of L. and Econ. 115 (1989).

35. Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 724-28 (1985).

36. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice*

about the influence of “special interest groups,” this finding is strongly supported by theory, because of the greater transaction costs of organizing larger groups. There is also a substantial body of reasonably rigorous empirical evidence about the influence of special interest groups. Moreover, even in the absence of constitutional requirements, compensation is often offered voluntarily by the government—which strongly suggests that there are substantial political rewards for doing so.³⁷ For example, prior to the adoption of the takings clause, state legislatures regularly provided landowners with compensation for takings, as did Parliament.³⁸

All things being equal, it probably is still true that the dispossessed are disadvantaged by the one-shot nature of their involvement. Thus, relative to other concentrated groups (such as the construction firms that may support government construction), they may have less clout (again, all things being equal). The relevant question is not, however, their political power relative to the groups favoring government projects. That balance of power may determine whether landowners will block the project. This does not tell us, however, whether imposing a compensation requirement will *change* the political outcome.

The real issue is comparative: will a compensation requirement make legislators *more* likely to give proper weight to the costs of projects. The effect of the compensation requirement is to buy off the landowners and shift the cost of the project to other groups. Politicians will give more weight to costs as a result of this shift only if these other groups have more political power than the landowners. But that seems unlikely because the other groups are likely to be so diffuse.³⁹

A similar difficulty attends Richard Epstein’s theory that the

Theory for Statutory Interpretation, 74 Va. L. Rev. 275, 285-95 (1988); Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 Cornell L. Rev. 280, 280-81, 288-91 (1990); Kaplow, 99 Harv. L. Rev. at 569 (cited in note 15); Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* ch. 1 (U. of Chi. Press, 1991) (“*Law and Public Choice*”).

37. Michelman, 80 Harv. L. Rev. at 1256 (cited in note 3). Indeed, compensation for physical invasions is almost universal in democracies. See William A. Fischel, *Exploring the Kozinski Paradox: Why is More Efficient Regulation a Taking of Property?* 49 (Berkeley Law and Economics Working Paper #91-10).

38. Note, 94 Yale L. J. at 695-96 n.6, 697 n.9 (cited in note 8).

39. See Thompson, 76 Va. L. Rev. at 1490 n.164 (cited in note 25). This observation is somewhat reminiscent of the moral hazard argument discussed by Rubinfeld and Blume. As they point out, one barrier to private insurance for takings is that the insured would have a lower incentive to resist government seizures. But a similar problem attends public “insurance” by way of the takings clause. Assuming full compensation, the people whose property is seized have no reason to resist government projects. Thus, a takings requirement eliminates an important source of opposition, thereby potentially increasing the number of inefficient projects.

takings clause is designed to prevent rent-seeking.⁴⁰ A great deal has been written about Epstein's general theory, and it is unnecessary to recap those discussions here. The point here is a narrow one. If we want to deter rent-seeking projects, such as highways that are only built to enrich the construction industry, it might conceivably be useful for courts to review and invalidate the projects. (I am putting aside obvious questions about judicial legitimacy and competence, all of which have been fully explored by Epstein's critics.⁴¹) But the compensation requirement does not mandate judicial review of the merits of particular construction projects. What it does mandate is that the owners of the property be compensated for their loss.⁴² This is not necessarily an effective way to limit rent-seeking.

Indeed, rent-seeking might be more effectively contained by an *anti*-compensation requirement, prohibiting the government from *ever* paying compensation for a taking. Although this may seem far-fetched, consider the Tellico Dam, best known as the subject of *TVA v. Hill*,⁴³ the so-called "snail darter" case. As you may recall, the dam had almost been completed when the snail darter, an endangered species, was discovered. Although \$100 million had already been spent on construction, the Court held that an injunction against completion was required by the Endangered Species Act. That is the part of the story commonly known, but the aftermath is more important for present purposes.

After the Court's decision, the statute was amended to provide a special review process for projects like the Tellico Dam. The report of the review group raises doubts that completion of the dam was economically warranted. The dam's benefits may have been about equal to the value of the farmland that would be flooded, so even the small marginal cost of completion was questionable. In other words, it might almost have been economically efficient to preserve the dam unused as a public monument to rent-seeking rather than to close the flood gates! Despite the dam's dubious economic value, it was strongly supported by the Tennessee congress-

40. Richard A. Epstein, *A Last Word on Eminent Domain*, 41 U. Miami L. Rev. 253, 260, 273 (1986); Merrill, 80 Nw. U. L. Rev. at 1577-78 (cited in note 17).

41. See, e.g., Mark Kelman, *Taking Takings Seriously: An Essay for Centrists* (Book Review), 74 Cal. L. Rev. 1829 (1986); Joseph L. Sax, *Takings* (Book Review), 53 U. Chi. L. Rev. 279 (1986); Farber and Frickey, *Law and Public Choice* at 64-73 (cited in note 36).

42. The crucial point about the just compensation clause is that it creates only a "liability" rule rather than an entitlement. In other words, the government can proceed if it is willing to pay. Hence, the issue is whether the government must compensate, not whether it can act, provided only that the very weak requirement of a public purpose is satisfied. See, e.g., Underkuffler, 100 Yale L. J. at 143-44 (cited in note 1).

43. 437 U.S. 153 (1978).

sional delegation, which succeeded in passing a further amendment mandating completion of the dam.⁴⁴

Why did the Tennessee delegation so strongly favor a dam that would (quite apart from its environmental effects) possibly cost more than it was worth? In this respect, the political calculus mirrors that for other pork barrel projects. The costs of the project were being paid by the federal taxpayer, so far as construction was concerned. The major remaining cost of the project was the destruction of valuable farmland (possibly as valuable as the dam itself). But the voters of Tennessee did not experience this cost, because the takings clause shifted that expense from Tennessee farmers to federal taxpayers. Is it conceivable that the Tennessee delegation would have pressed for this project if local farmers had been forced to absorb their own losses? Surely Howard Baker and company would not have risked the wrath of the dispossessed Tennessee farmers. In the Tellico case—and with respect to pork barrel projects in general—it seems fairly clear that the compensation requirement made the government less responsive to costs, and therefore more likely to approve a project of debatable economic inefficiency.

A rule that flatly prohibited compensation would create a powerful lobby against government projects and would therefore tend to limit the number of inefficient projects. Of course, landowners will not invariably be a more powerful political force than alternative cost-bearers. Some projects would surely proceed anyway, with great hardship to the landowners. But the landowners would undoubtedly kill many projects. There is good reason to believe that the latter situation would be more common than its converse, in which compensation requirements deter bad projects.

To see this, consider the other possible candidates for bearing the cost. If the project is simply added to the budget, the general public will bear the cost, either in the form of increased taxes or a higher deficit. Often, the effect of a particular project on the level of taxes will be minuscule—particularly at the federal level, where the Supreme Court regards this effect as too trivial to provide taxpayers with standing.⁴⁵ Taxpayers are an extremely large, diffuse group.

44. For citations, see Roger W. Findley and Daniel A. Farber, *Environmental Law: Cases & Materials* 84 (West, 3d ed. 1991). The review committee evaluated the dam's benefits as less than those of partially dismantling it and further developing other parts of the river. See Note, *Environmental Law—The Endangered Species Act Amendments of 1978: Congress Responds to Tennessee Valley Authority v. Hill*, 25 *Wayne L. Rev.* 1327, 1338-39 (1979). On the economic irrationality of the project, see Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences*, 19 *U. Mich. J. L. Ref.* 805, 807-14 (1986).

45. Nowak, Rotunda, and Young, *Constitutional Law* § 2.12(f)(1) (cited in note 6).

History provides little reason to think they will be a powerful political force in resisting small increases in government spending.⁴⁶

If for some reason the taxpayers cannot be recruited to shoulder the cost (perhaps because of tax and borrowing limits in state constitutions), then the project will have to compete with existing claimants on the budget. To get in the budget, the proponents need merely defeat the marginal budget item—that is, the item currently having barely enough support to get in the budget in the absence of the proposed project.

To evaluate the effect of adopting a compensation requirement, as opposed to adopting the anti-compensation rule, we need to consider the potential political strength of landowners against that of other possible cost bearers. As Levmore points out, the landowners do suffer the disadvantage of being a one-shot group. But consider the alternatives: the taxpayers or the weakest of the currently successful interest groups. Just to make this specific, assume that the latter group consists of park users. If you were a politician, would you rather face:

- (a) Taxpayers who will experience a slight tax increase?
- (b) Park users whose programs will suffer small cutbacks?
- (c) Property owners whose houses are about to be seized without compensation?

Even without empirical evidence, the third answer seems implausible.

Assuming that the dispossessed will usually be a stronger political force than the alternative cost-bearers, a compensation requirement will lead to more rent-seeking (pork barrel) projects than an anti-compensation rule. (Note that this is true even if the landowners have little power in absolute terms, so long as they have more than the other potential cost-bearers.) The reason is that the compensation requirement will buy off the group otherwise most likely to bring costs forcefully to the attention of the legislators.

This argument may seem paradoxical. A prohibition on compensation shifts costs from the mass of taxpayers to a small number of landowners. This seems exploitative, and runs against the common assumption that small minorities need to be protected from overbearing majorities. But as Bruce Ackerman has pointed out, the lesson of public choice theory is that minorities are often disproportionately powerful compared with majorities. Often, it is the dif-

46. This point is made explicitly in the tax context by J. Mark Ramseyer and Minoru Nakazato, *Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow*, 75 Va. L. Rev. 1155, 1158 n.11, 1165 (1989).

fuse majority that is in danger of being exploited by a concentrated minority, rather than vice versa.⁴⁷ This is precisely what happens with pork barrel projects, where the federal taxpayers are effectively exploited by powerful local interests.

Thus, the rent-seeking theory has a serious flaw as an account of the takings clause: It seems to present a stronger case for banning compensation than for mandating it, if we are serious about controlling rent-seeking.

If we look at the typical government project, then, the conventional version of the rent-seeking argument for a compensation rule is quite weak. With respect to the *typical* project, requiring compensation is less likely to deter rent seeking than would a ban on compensation. This does not mean, however, that the present rule of mandatory compensation should be rejected. As we will see in the next section, the problem needs to be framed more carefully: we need to be clear about just which projects are in question, and just what alternative we are comparing with the mandatory compensation rule.

III

It might well be safer to stick to critique, rather than turning to the more hazardous enterprise of presenting an alternative theory. Past experience suggests slim prospects of success for any theory of takings. It seems worthwhile, however, to venture a brief exploration of the affirmative implications of the analysis.

With respect to physical occupations of land by the government, there are three rules to consider:

- (1) The current rule, which mandates compensation.
- (2) A rule making compensation optional with the legislature.
- (3) A rule forbidding compensation.

We can surely reject the third possibility, the anti-compensation rule. Such a rule would have serious disadvantages. Even if risks are fully covered through insurance or portfolio diversification, the insurer (or investor) still has a powerful incentive to resist any new project. Even if its shareholders are fully diversified, for example, a corporation's managers are unlikely to be happy with a

47. See Ackerman, 98 Harv. L. Rev. at 723-34 (cited in note 35). Ackerman's general argument may, however, ignore some important countervailing forces. For example, it does not take into account the effect of prejudice on racial minorities, which so far have failed to derive the full political benefits he suggests stem from being "discrete and insular minorities." See Daniel A. Farber and Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 Cal. L. Rev. 685 (1991). Landowners, as a group, obviously do not suffer from similar disabilities.

government seizure of its property. The same is true of insurance companies, which could be expected to lobby hard against the losses covered by their policies. If anything, these groups might be even more effective as lobbyists than the individual property owners, since they are repeat players. Thus, with or without private insurance of the kind contemplated by Kaplow, we could expect strenuous lobbying against *all* government projects if government compensation were unavailable.

This outcome seems quite undesirable, partly because of the deadweight social costs of the lobbying itself, but also because the greater intensity of lobbying would probably eliminate many desirable projects. Not only would we get rid of rent-seeking projects, but we would have serious overkill of beneficial projects. Finally, even if we were to adopt a strict anti-compensation rule in the Constitution, there would be an overwhelming temptation for politicians to cheat and find ingenious ways to funnel compensation to property owners.

For all these reasons, not to mention obvious political realities, an anti-compensation rule is really not in the cards. The previous economic literature goes astray, therefore, in trying to compare a world with mandatory government compensation to a world in which there is never government compensation. The real choice is between a rule that mandates compensation and one that makes it optional with the legislature. An optional rule would produce compensation in most cases, perhaps the large majority, but there would be exceptions, particularly when the property owners for some reason were especially vulnerable politically.⁴⁸

Much of the previous literature has dealt with the choice between mandatory compensation and no compensation (Rules 1 and 3). Whatever validity the insurance and rent-seeking arguments might have in that context, they apply more strongly to the choice between Rules 1 and 2 (optional and mandatory compensation).⁴⁹ Thus, the theory presented here is at least as strong as competing economic theories, because the arguments made for those theories support this one at least as strongly.

The insurance argument is straightforward. It is one thing to suppose that individuals might privately insure against land seizures in a world where the government itself never compensates. As we

48. Rose-Ackerman, 88 Colum. L. Rev. at 1707 (cited in note 16).

49. Thus, the theory proposed in this article has at least the relative advantage of being at least as strong as all existing competitors. Or to put it another way, past theories have been unnecessarily weakened by the implicit assumption that the task of the theory was to compare a rule of zero compensation with a rule of mandatory compensation. Those theories are actually more successful in comparing mandatory and optional compensation.

have seen, however, the realistic alternative to mandatory compensation is usually voluntary compensation rather than zero compensation. But the prospect of voluntary government compensation substantially limits the incentive to buy insurance. If government compensation is widespread, landowners will rarely need private insurance against the speculative possibility that, if their land is ever seized, the government will violate its usual practice of compensation. Indeed, they would be likely to seek insurance only in the unusual cases where they expected a seizure but foresaw political obstacles to compensation, making adverse selection a major problem.

In this setting, the overinvestment argument (Kaplow's main counter to the insurance model) loses its sting. Denying compensation to the residual victims (those who fail to receive voluntary government compensation) deters overinvestment only by reducing the expected return in seizure cases. But the same effect can be achieved by uniformly decreasing the measure of compensation while paying compensation to all victims. Risk-neutral victims are indifferent between these choices, while risk-averse victims prefer the across-the-board reduction. Thus, overinvestment can better be dealt with by a uniform reduction in compensation levels.

For instance, suppose that the government voluntarily offers full compensation to ninety percent of all landowners. As Kaplow says, this offers an incentive to overinvest, since the landowner can expect to receive ninety percent of the excess investment back in case of a seizure. We cannot realistically prevent the government from offering at least some voluntary compensation. What we can do, however, is to offer all landowners ninety percent of the value of the land (instead of full value to ninety percent of them). This creates little more incentive for overinvestment, but does provide wider insurance coverage. Note that, unlike the complex compensation adjustment proposed by Blume and Rubinfeld, this solution requires only a percentage decrease in compensation awards. While we do not actually see anything as simple as a percentage reduction, we do find that eminent domain awards are subject to valuation rules that make them under-compensatory.

As compared with an optional compensation rule, mandating compensation also offers better control of rent-seeking. Under an optional compensation rule, the government will offer compensation except when the residual cost-bearers have more political clout than the victims of the seizure. But if we want to control rent-seeking, these are just the cases where we *should* offer compensation, so as to trigger the political efforts of these residual cost-bearers. A

mandatory rule extends cooperation to this crucial category of cases.

The rent-seeking point may seem confusing, given my earlier criticisms in Part II of the rent-seeking argument for just compensation. Suppose we divide the universe of potential government projects into two groups.⁵⁰ *Class I* consists of those projects which would be blocked if the cost of the project remained on those whose land is being seized—roughly speaking, those projects where the landowners are more politically powerful than the taxpayers generally. *Class II* consists of the remaining cases, in which the taxpayers would generate stronger political opposition to bearing costs than the landowners. Payment of compensation shifts the cost of the project from the landowner to the taxpayer. Thus, compensation will decrease the likelihood that the project will be adopted only if the project belongs to Class II. If we are considering the *typical* government project, paying compensation will deter adoption of the project only if we assume that the typical project belongs to Class II. Earlier in this paper, I have argued that in fact the contrary is probably true. For this reason, a rule forbidding compensation, which deters Class I projects, would be more likely to deter the typical government project, simply because the relative size of the two classes of projects. Thus, if we are comparing an anti-compensation rule with a full compensation rule, as we were earlier, the rent-seeking argument for compensation doesn't work.

If voluntary compensation is allowed, however, the argument plays out quite differently. The legislature will always want to offer compensation to Class I projects anyway, so as to limit the political opposition to the project.⁵¹ Hence, the only projects where compensation is *not* voluntarily offered will belong to Class II. Even though the typical project belongs to Class I, we no longer care about the typical projects because they are getting compensated anyway. Only in the *atypical* (Class II) cases will compensation ever become a litigated issue. Those cases involve projects that, by definition, could be more easily blocked by the taxpayers than by the landowners. Hence, a compensation requirement will deter those projects by mobilizing a more politically powerful group in

50. I am putting aside the possibility that the political forces might be balanced precisely evenly in some subset of cases. In those cases, a compensation rule will make no difference to the political attractiveness of a project.

51. A complete theory would need to take into account the possibility that politicians would have incomplete information about the political forces involved, and so would sometimes make mistakes in deciding whether to compensate voluntarily. There is no apparent reason to think that this would change the conclusion fundamentally.

opposition.⁵² Optional compensation not only leaves politically weak owners uncompensated, but also makes it more likely that their land will be used, even if other land would be more suitable. Thus, as compared with an optional compensation rate, the mandatory compensation rule can limit inefficient construction projects.⁵³

Mandating compensation rather than making it optional has two other advantages. As Kaplow stresses, there is an important benefit to predictability so that landowners can make sensible investment decisions.⁵⁴ The mandatory rule obviously furthers predictability. There is also another, less obvious advantage to a compensation requirement. By mandating compensation, the takings clause has led the courts to develop uniform rules about how compensation is to be calculated. This uniformity is quite beneficial, since otherwise landowners may be unclear about the amount of compensation even if they are confident of receiving some payment from the government.

From the perspective outlined here, the takings clause is not best considered as forcing compensation on generally unwilling legislatures. Even without a constitutional mandate, legislatures could be expected to offer compensation quite often, perhaps routinely. On this view, the takings clause is like trade usage law.⁵⁵ Since a trade usage is (by definition) a customary industry practice, in most cases legal enforcement is superfluous. But one party to the con-

52. Thus, I agree with Schill's argument that a compensation requirement will deter exploitative behavior by factions toward politically weak adversaries. See Schill, 137 U. Pa. L. Rev. at 861-65 (cited in note 8). He seems to view this, however, as a common problem. Since I believe that Class II is relatively small, it seems likely to me that exploitative projects of this kind are atypical; indeed, I would argue that such projects are usually less attractive to factions than the pork-barrel projects contained in Class I, where the public as a whole is the subject of exploitation. But for the reasons discussed in the text, a mandatory compensation requirement has "bite" only for Class II cases, and in those cases Schill's argument actually is valid.

53. Note, however, that there is a potential for overdeterrence of Class II projects, because the opposing group (the taxpayers or the group favoring the marginal existing budget item) may kill even an efficient project if the benefits of the project are distributed elsewhere. But this problem should arise only under limited circumstances, because the taxpayers are less likely to kill efficient projects. If the benefits are very widely distributed, then many taxpayers will be beneficiaries and have little reason to oppose the project. On the other hand, if the beneficiaries are a small group, they will have inherent organizational advantages over the taxpayers at large, of the kind discussed in the text. Moreover, if the project is efficient, the beneficiaries will have a higher stake than the cost-bearers, and all things being equal will have greater incentives to take political action.

Nevertheless, for one reason or another, one of these mechanisms might misfire, killing an efficient project. This cost of having a mandatory compensation rule must be offset against its benefits.

54. Kaplow, 99 Harv. L. Rev. at 558-59 (cited in note 15).

55. For an explanation of this aspect of contract law, see E. Allen Farnsworth, *Contracts* § 7.13 (Little Brown, 2d ed. 1990).

tract will sometimes find it advantageous to violate the trade usage. Legal enforcement forestalls this strategically motivated misbehavior, thereby upholding the other party's reasonable expectations. Similarly, the takings clause prevents strategic defections by the legislature from the political "trade usage" of just compensation.

One of the puzzles of takings law is why a landowner is entitled to compensation when only a small part of the property is physically occupied by the government, but not when a government regulation causes an equivalent decrease in the market value of the tract. Why is physical occupation so important to takings law? The uniformity theory suggests two answers.

First, all things being equal, legislators are more likely to provide voluntary compensation for physical occupations, because landowners are likely to lobby more vigorously. (This is the opposite of Levmore's view that it is harder to organize opposition to physical takings because smaller groups are involved.)⁵⁶ One reason is that physical occupation is highly visible. This makes it easier for the individual ("rationally ignorant") landowner to assess her own situation, simply by looking at a map of the project. It also makes it easier for him to seek out other victims of the project, because they are easily identifiable. Finally, there may be a psychological loss associated with physical incursions that is likely to spark firmer lobbying efforts. Since physical occupations lead to more intense political pressure on legislators, the supporters of the project are more likely to offer compensation in order to buy off potential opposition. Because the purpose of the takings clause is to make compensation practice uniform, it follows the same contours and gives special attention to physical occupation.

The second reason for making physical occupation the key to compensation is that it provides a convenient bright line. In a clause which primarily functions to provide uniformity, a bright line is especially attractive. If courts used a diminution-of-value test, limiting compensation to cases where the extent of the physical occupation substantially decreased the value of the whole tract, additional uncertainty would be introduced. Thus, the benefits of uniformity, which help support the clause in the first place, strongly support a bright-line interpretation. The resulting rule is that the government must pay compensation whenever it physically occupies land.

56. Levmore, 22 Conn. L. Rev. at 320 (cited in note 34).

IV

There is little disagreement about whether landowners should be compensated when their lands are seized for roads or dams. As observed earlier, however, there is a great deal of dispute about regulatory takings. It is only natural to inquire about the implications of the uniformity theory for regulatory takings.

As its language suggests, the takings clause was apparently designed for condemnation cases in which the government seizes property for roads and the like.⁵⁷ In Justice Holmes's famous opinion in *Pennsylvania Coal Co. v. Mahon*,⁵⁸ however, the Court held that a taking can exist if the government "goes too far" in regulating private property. In *Pennsylvania Coal*, the Court struck down a law that effectively destroyed the economic value of certain mining rights.

In the last fifteen years, the Court has applied the takings clause to a variety of government regulations.⁵⁹ For instance, the federal government was required to pay a developer in order to obtain public access to a marina that the developer had connected with a public waterway.⁶⁰ To take another example, the Court also found a taking when New York required landlords to give their tenants access to cable television. The reason was that a cable box would "take" some of the space on the roof.⁶¹

Two 1987 cases provide particularly good illustrations of the current state of takings law. *Keystone*⁶² was in many respects a replay of the 1922 *Pennsylvania Coal* decision that began the law of regulatory takings. *Keystone* involved a newer Pennsylvania statute requiring coal mines to provide support for the land overhead, including homes, businesses, and public property such as schools. Despite the resemblance between the two Pennsylvania statutes, the Court distinguished *Pennsylvania Coal* and upheld the more recent statute. The majority found two important distinctions between the statutes. First, the more recent statute benefitted a much broader group. Second, the earlier statute made certain mines entirely

57. See Thompson, 76 Va. L. Rev. at 1458 (cited in note 25).

58. 260 U.S. 393 (1922).

59. John A. Humbach, *Economic Due Process and the Takings Clause*, 4 Pace Envir. L. Rev. 311 (1987); Herman Schwartz, *Property Rights and the Constitution: Will the Ugly Duckling Become a Swan?*, 37 Am. U. L. Rev. 9 (1987). Some lower-court judges have responded by more vigorously applying the takings clause to environmental regulations. See Lee R. Epstein, *Takings and Wetlands in the Claims Court: Florida Rock and Loveladies Harbor*, 20 Envir. L. Rep. 10517 (Envir. L. Institute, Washington, D.C., 1990).

60. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

61. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

62. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

unusable, while the newer statute only required that about five percent of the coal be left in the ground for support.

In contrast, the Court provided vigorous protection to property rights in another 1987 decision. *Nollan*⁶³ involved a California couple who wanted to build a larger beach house. As a condition for a building permit, the state required them to allow the public to walk along the beach. In his opinion for the Court, Justice Scalia conceded, for purposes of argument, that California could have banned the Nollan's construction entirely, in order to preserve the public's right to see the ocean from the street. But Scalia found an inadequate connection between the public's right to view the ocean and the permit condition. Hence, the Court held this permit condition to be a taking.

The takings clause has long been considered a particularly messy area doctrinally. Given the very different attitudes toward government regulation found in contemporaneous opinions such as *Keystone* and *Nollan*, it is not surprising that this reputation for incoherence has survived.⁶⁴ Nevertheless, the results in the cases (as opposed to the opinions) do fit a pattern.⁶⁵

The Court has frequently repeated Justice Holmes's statement that a sufficiently great decrease in the value of the regulated property constitutes a taking. Yet, only once since 1922 has the Court actually found a taking on this basis. Apparently, only the most extreme loss of value will trigger a takings holding.⁶⁶

In contrast, the Court has been quite willing to find a taking where the effect of the government regulation is not just to restrict the owner's control over her own property, but to transfer the right to use the property to a third party. In particular, where a third party is given the right to physically occupy real estate, the Court seems almost certain to find a taking.⁶⁷ (Tribe remarks that this "obsession" with physical invasions "borders on fetishism.")⁶⁸ For

63. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

64. For fuller discussions of the 1987 cases, see Robert Cooter and Thomas Ulen, *Law and Economics* (Scott, Foresmen, 2d ed. 1990); Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1; Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 Colum. L. Rev. 1630 (1988); Frank Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600 (1988).

65. Margaret Radin notes the existence of this pattern in Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1678-80, 1691-92 (1988).

66. *Lucas*, the one exception, is discussed below.

67. Charles Fried, *Protecting Property—Law and Politics*, 13 Harv. J. L. & Pub. Pol. 44, 52-53 (1990). For a recent application of this test, see *Yee v. Escondido*, 112 S. Ct. 1522 (1992).

68. Tribe, *American Constitutional Law* at 603 (cited in note 3). Professor Levmore is,

example, in *Nollan*, the Court was quick to find a taking where the government had required the Nollans to convey an easement.

The physical invasion cases are hard to square with any of the models considered in Parts I and II. Under insurance models, physical occupation should be unimportant; only diminution in value should matter. The rent-seeking models would also seem to have little connection with physical occupancy—it is hard to see why rent-seeking would be more likely to take the form of an easement. Indeed, transfers of possessory rights have a particular disadvantage as a method of rent-seeking, because they are relatively visible⁶⁹ and thus more likely to be resisted than more subtle regulatory intrusions. This leaves something of a puzzle about why the Court offers so much protection to possession—a right which Epstein has aptly described as the right to “blockade” others from using the property.⁷⁰

In contrast, the Court’s stress on physical occupancy fits nicely with the uniformity theory. Recall that this theory views the takings clause as an effort to universalize the common practice of legislatures. As we have seen, this theory requires government compensation whenever the government itself physically occupies property. If the government were allowed to evade this requirement by transferring possession to third parties without paying compensation, a serious loophole would be created. Rather than holding title to roads, for example, the government could charter a private road company, which could then be given the legal right to use designated land without compensation. This would create an obvious opportunity for strategic evasion of the takings clause. Since one purpose of the clause is to prevent strategic misbehavior, the clause should clearly be interpreted to plug this loophole. Besides inviting strategic misbehavior, exclusion of third-party transfers from the compensation requirement would open the door to ad

if anything, even more vehement in rejecting physical invasion as a factor in takings, as reflected in a hypothetical apparently based on the movie, *Down and Out in Beverly Hills*:

Imagine, for example, that the government planned to deal with the problem of homelessness by requiring all homeowners and landlords whose residential properties are worth more than \$60,000 per inhabitant to take in and care for one homeless person for a period of three years. Drafted and litigated properly (with perhaps some promise of compensation for any torts or crimes committed against the property owners), I think that this could be done in a way that did not amount to a compensable taking.

Saul Levmore, *Takings, Torts, and Special Interests*, 77 Va. L. Rev. 1333, 1359 (1991). See also *id.* at 1352 (questioning whether government seizures of numerous parcels of land should be considered takings).

69. Often, literally “visible”—as in the people strolling across the Nollan’s beach.

70. Richard A. Epstein, *Property and Necessity*, 13 Harv. J. L. & Pub. Pol. 2, 3 (1990).

hoc compensation schemes, reducing the benefits of a uniform approach.

Once we think of the takings clause as a method of universalizing the usual practice of government compensation for certain losses, it seems clear that the class of compensable events must be defined so as to block easy government evasion and maintain predictability. If we think of "just compensation" as being something like a contract term, the physical use standard seems quite plausible as a contractual formalization of the informal legislative practice.⁷¹

The Court's recent decision in *Lucas v. South Carolina Coastal Council*⁷² was its first in seventy years to find a taking based solely on diminution of value, rather than a third-party transfer. *Lucas* involved a beach preservation statute that allegedly created a complete bar to the development of certain land. The Court held that a land-use regulation of this type is a *per se* taking, unless the land's only economically viable uses were prohibited under *prior* state law, so that the owner never had the right to engage in them anyway.⁷³ Interestingly, the Court held that this rule only may apply to land, not personal property.⁷⁴ The Court also suggested that the rule may apply only to direct regulations of the use of land, as opposed to general regulations that incidentally make a particular parcel of land worthless.⁷⁵ In dissent, Justice Stevens argued that takings law should primarily be concerned with discrimination by regulations that target only a few individuals.⁷⁶

Although Justice Scalia's majority opinion does not focus on discrimination, its central rationale is consistent with the theme of this Article. In considering government appropriations, we have used government construction projects as a paradigm, but it is also common for the government to appropriate lands for preservation purposes. As Justice Scalia points out, development bans can operate as the functional equivalent of nature preserves:

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave

71. The theory might be taken as either normative or causal explanations of judicial decisions. I am hesitant to ascribe an unconscious awareness of my conclusions to the Justices. There is, however, at least some reason to think that intuitions about the political process have shaped takings law, and that public choice corresponds with the image of politics held by at least some Justices. See Thompson, 76 Va. L. Rev. at 1476 and n.111 (cited in note 25).

72. — U.S.—, 112 S. Ct. 2886, 60 U.S.L.W. 4842 (1992).

73. *Id.* at 4848.

74. *Id.* at 4848-49.

75. *Id.* at 4848 n.14.

76. *Id.* at 4858 (Stevens, J., dissenting). Under the analysis presented in this article, Stevens is correct that the generality of a regulation should be an important factor.

the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. . . . The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation.⁷⁷

Since landowners are typically compensated when their land is incorporated into national parks or other preservation areas, the “uniformity” rationale provides a strong argument for compensation when the government uses a preservation ban to achieve the same goal. The uniformity rationale also helps explain why the *Lucas* rule applies only to land, since the government does not customarily seize personal property for preservation purposes. It also explains why incidental effects on land values are irrelevant; unless a regulation is targeted at land use, it is unlikely to be a covert method of establishing a nature preserve. Only regulations that are functionally equivalent to government acquisitions should be treated as takings.

Unfortunately, *Lucas* focuses on loss of economic value, rather than on the more salient question of functional equivalency. A land use regulation that affects many landowners may create a range of effects, with little economic impact on many owners and enormous impacts on a few. The fact that a few of the owners happen to suffer a severe loss of market value does not establish that a regulation is functionally equivalent to an appropriation. Moreover, as Justice Stevens points out, *Lucas* actually creates a perverse disadvantage for landowners suffering some economic loss, who would be better off if they could arrange to suffer even more severe losses so that they could obtain compensation.⁷⁸

Lucas was correct, however, to recognize a nuisance exception from its loss-of-value rule. We do not customarily compensate people when we order them to halt nuisances, so the uniformity rationale does not apply.⁷⁹ But, as Justice Kennedy’s concurring opinion recognizes, the common law of nuisance provides only a partial description of behavior that is considered socially harmful, and hence

77. *Id.* at 4846.

78. *Id.* at 4859 (Stevens, J., dissenting).

79. The only exception to this statement may be *Spurs Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972), a rather unusual “coming to the nuisance” case.

appropriately banned without compensation.⁸⁰ Many statutes are neither the functional equivalent of appropriations (where compensation is normal) nor of nuisance decrees (where compensation is rare). In this rather large "grey area," there is no clear compensation practice to use as a benchmark. The uniformity rationale does not apply in this grey area, and the Court should not find a taking.

In short, while the fundamental rationale of *Lucas* is economically sound, the rule established by the Court is overbroad. By first including all claims by landowners who have suffered a sufficient economic loss, and then excluding only claims by those committing nuisances, the Court's rule does a poor job of identifying those regulations that are functionally equivalent to government land acquisitions. Functional equivalence, not economic loss or nuisance law, should provide the test.

V

Economic analysis can be a powerful critical tool.⁸¹ For example, there is considerable intuitive appeal to the idea that the takings clause prevents the government from imposing heavy costs on a few individuals instead of spreading them more broadly.⁸² As we have seen, however, once this concept is formalized in the insurance model of just compensation, its weaknesses become apparent. Thus, economic analysis can be a powerful critical tool. A plausible alternative conjecture is that targets of government land acquisitions are peculiarly incapable of protecting themselves through the political process. This is not an unattractive argument, but again economic analysis exposes its difficulties. Because the targets of takings are a relatively small group with high individual losses, public choice theory indicates that they typically can better protect their interests through the political process than many other groups, such as the taxpayers at large. Here, economic analysis makes a useful contribution by forcing a careful statement of the hypothesis and by connecting the takings issue with a more general problem, that of interest group influence.

80. *Id.* at 4850 (Kennedy, J., concurring in the judgment) ("The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society.")

81. Another promising field for economic analysis is the first amendment. See, e.g., Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. Cin. L. Rev. 1317 (1988); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 Harv. L. Rev. 554 (1991); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 Suffolk U. L. Rev. 1 (1986).

82. See Tribe, *American Constitutional Law* at 605 (cited in note 3). In *Yee v. Escondido*, 112 S. Ct. 1522, 4302 (1992), Justice O'Connor suggests that the concept of undue burden is crucial where there is no physical occupation.

Thus, the generality and precision encouraged by economic analysis can be helpful in exposing the flaws of some conventional constitutional arguments for compensation. On the other hand, economic analysis is not without its own drawbacks, including the notorious lack of realism of its assumptions. In particular, there is an emotional aspect to takings compensation that economics seems to miss. Perhaps economic analysis can only take us so far regarding these issues, and something more akin to Michelman's psychological theory is also needed.

In terms of the takings clause itself, economic analysis leaves us with a trio of explanations.⁸³ First, with regard to foreign investors, there is a straightforward argument for the takings clause as a form of precommitment by the legislature. Second, in the more typical situation where the property of citizens is used for roads or dams, there is a viable argument, but not a powerful one, for the takings clause as a form of insurance. Third, because the legislature will usually offer compensation voluntarily, the takings clause can be defended as a prophylactic barrier against a serious form of discrimination against politically disfavored groups.⁸⁴

As Kaplow has pointed out, it is important to have consistency in transition rules.⁸⁵ Since it is impractical to ban compensation entirely, the only feasible, consistent practice is to mandate compensation for all property owners whose land is seized by the government. This uniform rule has some efficiency benefits: it increases predictability and decreases the likelihood of strategic behavior.

The uniform rule also has important fairness value. Perhaps it would merely be bad luck if, in a world with a ban on government compensation, your land turned out to be in the path of a road or the reservoir of a dam. But in a world where government compensation is often available, it is unacceptable that some groups are denied compensation because of their unusual political vulnerability.

On this analysis, the main function of the takings clause is to formalize a frequent practice of democratic legislatures. Formality

83. There is no reason to expect that a practice will have the same normative or empirical justification in all situations. Thus, a careful analysis of takings compensation may well reveal that compensation has different justifications in different circumstances. Earlier writers may have tried too hard to uncover a unique justificatory theory. In my view, the uniformity theory is the most powerful and covers most situations, but it need not stand alone.

It should be noted that a fourth explanation applies to condemnation by private utilities, and perhaps to some government enterprises providing services for a fee. That is the cost-internalization argument discussed in text accompanying note 33.

84. The equal protection clause, as currently understood, would not be adequate to prevent such discrimination. Absent a showing of racial motivation, the government would have to establish only a rational basis.

85. Kaplow, 99 *Harv. L. Rev.* at 558-59 (cited in note 15).

offers the advantages of uniformity in coverage and also allows the development of systematic compensation measures. In turn, the existence of a uniform compensation requirement limits the need for monitoring proposed government projects and lobbying for compensation on an ad hoc basis.⁸⁶

This uniformity theory of takings centers on the risk of discrimination. Although the discussion has had a primarily normative focus, the theory could also serve as the basis for a positive theory of takings law. The prediction would be that the growth of takings law correlates with the risk of discrimination in various governmental settings. One specific prediction would be that the likelihood of finding a taking decreases to the extent that formalized procedures are used to control government decisionmaking. Thus, in contrast to legislative decisions, judicial decisions would rarely be considered takings, since the risk of discrimination is comparatively low. In zoning, the implication would be that legislative spot zoning, where the risk of discrimination is high, would be much more likely to be found to be a taking than a similar land use restriction imposed after an administrative hearing and judicial review.⁸⁷

The intuition supporting compensation for takings is very strong, but not easy to articulate. Given the array of scholars who have previously tackled the subject, it would be presumptuous to expect to dispose of the problem. But the economic analysis offered in this paper in the form of the uniformity theory does dovetail nicely with strong normative concerns about equality and fairness. Though it does not purport to be a complete explanation, at the very least it illuminates an important facet of takings law. It also suggests a relatively straightforward approach to regulatory takings: A regulation is a taking if it is functionally equivalent to a governmental land acquisition.

We are apt to think of constitutional rules as tailored either to protect particularly important individual interests or to prevent par-

86. It would be unrealistic to suggest that the Framers had this specific conception of just compensation. Nevertheless, the trade usage theory is consistent with two important aspects of their thought: their focus on physical appropriation, see Note, 94 *Yale L. J.* at 711 (cited in note 8), and on the danger of political abuse by factions at the expense of weaker groups, see *The Federalist* No. 10 (J. Madison).

Professor McConnell has suggested that one reason for applying the free exercise clause only to the federal government was the view that small, intensely affected minorities would have adequate political power on the state level, but not in the remote arena of Washington politics. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 *Harv. L. Rev.* 1409, 1476 (1990). If so, the same reason may explain why the takings clause was applied only to the federal government.

87. See also Levmore, 77 *Va. L. Rev.* at 1345 (cited in note 68) (suggesting that spot zoning is likely to be considered a taking because the affected individuals are often politically unprotected).

ticularly dangerous political pathologies. If this analysis of the takings clause is correct, we also need to remember a third possible function of individual rights: providing horizontal equity. It may seem a small thing to insist that what the government does for most people voluntarily, it should do for the politically weak as well. Nonetheless, it is an important principle of civilized government, and one deserving of respect.