The Measure of Just Compensation

Katrina Miriam Wyman[*]

This Article responds to a little-noticed aspect of the reaction to the U.S. Supreme Court's 2005 decision in Kelo v. City of New London*: the renewed discussion that the case has prompted about how much compensation governments should pay when they take people's homes through eminent domain. Since* Kelo*, there have been many proposals to increase the compensation that governments pay when they take property. These proposals aim to deter government takings by increasing the costs of takings, and to more fully compensate takees for their losses. This Article argues that the debate about eminent domain compensation is being conducted within too narrow a framework because many of the proposed reforms start from the same problematic assumption. Specifically, many of the proposals assume that takings compensation ideally should leave takees subjectively indifferent to takings. This Article critiques that assumption and argues that takings compensation should aim to leave takees objectively indifferent to takings. The Article also sketches an objective compensation measure that contrasts with the subjective ideal underlying existing takings compensation law and many current reform proposals.*

[*] Associate Professor, New York University School of Law. This Article benefited considerably from comments and suggestions from Vicki Been, Kevin Davis, Barbara Fried, Clayton Gillette, Fernando Gomez, Lewis Kornhauser, Rick Hills, Amnon Lehavi, Daryl Levinson, Daphna Lewinsohn-Zamir, Liam Murphy, Christopher Serkin and Frank Upham, from workshops with faculty and the Furman Fellows at NYU, a faculty workshop at Queen's University, a seminar at Universitat Pompeu Fabra, and a workshop at the XXIII World Congress of Philosophy of Law and Social Philosophy in Cracow, Poland. Jay Cosel and Matt Williams provided helpful research assistance. Ali Karaouni from the UC Davis Law Review provided excellent editorial assistance. The Filomen D'Agostino and Max E. Greenberg Research Fund at New York University School of Law provided financial assistance.

TABLE OF CONTENTS

INTRODUCTION

This Article responds to a relatively little-noticed aspect of the reaction to the U.S. Supreme Court's 2005 decision in *Kelo v. City of New London*:[1] the renewed discussion that the case has prompted about how much compensation governments should pay when they take people's homes through eminent domain.[2]

The backdrop to *Kelo* is the efforts of the city of New London, Connecticut to revitalize its downtown, which has been in economic decline for decades.[3] In *Kelo,* several property owners challenged the City's expropriation of their houses as part of its economic development plan.[4] The property owners argued that an expropriation for economic development violates the Fifth Amendment's requirement that takings be for a public use.[5] The Court disagreed. It ruled 5-4 that economic development is a valid public use under the Fifth Amendment, at least if the taking is pursuant to a development plan.[6]

The *Kelo* decision generated widespread public outrage.[7] Many Americans, spurred perhaps by Justice O'Connor's dissent,[8] have come to believe that because of *Kelo*, their homes are more vulnerable to being taken through eminent domain. Much of the public outrage

[1] Kelo v. City of New London, 545 U.S. 469 (2005).

[2] This Article tracks the recent discussion by focusing on the appropriate measure of compensation for homeowners who lose their properties through eminent domain. It does not address the appropriate measure of compensation for expropriated businesses or regulatory takings.

[3] *Kelo*, 545 U.S. at 473.

[4] Technically, it was not the city of New London but the New London Development Corporation ("NLDC") that proposed to take the petitioners' properties through eminent domain. But like the Supreme Court, I treat the city and the NLDC as one. *Kelo,* 545 U.S. at 475 n.3.

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

[6] *Kelo*, 545 U.S. at 483-90.

[7] *The* Kelo *Decision: Investigating Takings of Homes and other Private Property: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 106, 106 (2005) (testimony of Thomas W. Merrill, Charles Keller Beekman Professor of Law, Columbia University) [hereinafter *Merrill Testimony*]; Daniel H. Cole, *Why* Kelo *Is Not Good News For Local Planners and Developers*, 22 GA. ST. U. L. REV. 803, 803 (2006); David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After* Kelo, 101 NW. U. L. REV. 365, 365 (2007); Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 711 (2006); Terry Pristin, *Voters Back Limits on Eminent Domain,* N.Y. TIMES, Nov. 15, 2006, at C6.

[8] *See generally Kelo*, 545 U.S. at 494-505.

Kelo generated has been channeled into efforts to limit the ability of governments to take property, especially for economic development.[9]

However, like previous deferential Supreme Court interpretations of the public use requirement, *Kelo* also has prompted many proposals to increase compensation for takings.[10] These reform proposals aim to

[9] Legislatures as well as courts have been involved in limiting the scope for using eminent domain. Norwood v. Horney, 853 N.E.2d 1115, 1141-42 (Ohio 2006); Bd. of County Comm'rs v. Lowery, 136 P.3d 639, 651-52 (Okla. 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 5 (2006) ("From June 23, 2005 through July 31, 2006, . . . 23 . . . states placed restrictions on the use of eminent domain . . . ."); Sandefur, *supra* note 7, at 711; Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. 183, 185 (2007); Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-*Kelo *State Legislation*, 82 N.Y.U. L. REV. 177, 177 (2007); Castle Coalition, *Model Legislation*, http://www.castlecoalition.org/legislation/index.html#Anchor-Model-49575 (last visited Oct. 12, 2007).

[10] For recent proposals from academics, see *Merrill Testimony*, *supra* note 7, at 116, 120, 122-23; Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private,* 59 STAN. L. REV. 871, 890-95 (2007); Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 926-28 (2004); John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 803-19 (2006); Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 995-1002 (2004); Clayton P. Gillette, Kelo *and the Local Political Process*, 34 HOFSTRA L. REV. 13, 16 (2005); Michael A. Heller & Roderick M. Hills, *LADS and the Art of Land Assembly*, 121 HARV. L. REV. (forthcoming 2007) (manuscript at 4-7, 27-36, on file with author); James J. Kelly, Jr., *"We Shall Not Be Moved": Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN'S L. REV. 923, 972-89 (2006); James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 867 (2004); Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. (forthcoming 2007) (manuscript at 25-40, http://works.bepress.com/amnon_lehavi/4) [hereinafter Lehavi & Licht, *Eminent Domain, Inc.*]; Amnon Lehavi & Amir N. Licht, *Squaring the Eminent Domain Circle: A New Approach to Land Assembly Problems*, LAND LINES, Jan. 2007, at 14, 18-19 [hereinafter Lehavi & Licht, *Squaring the Eminent Domain Circle*]; Alberto B. Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post-*Kelo, 41 WAKE FOREST L. REV. 237, 289-99 (2006); Christopher Serkin, *Big Differences For Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1680-97 (2006) [hereinafter Serkin, *Big Differences*]; Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 905-27 (2007); Nathan Burdsal, Note, *Just Compensation and the Seller's Paradox*, 20 BYU J. PUB. L. 79, 94-98 (2005).

For a helpful survey of legislative proposals concerning eminent domain, see Castle Coalition, Citizens Fighting Eminent Domain Abuse: State Legislative Actions, http://maps.castlecoalition.org/legislation.html.

For reactions to past decisions, see, for example, Laura H. Burney, *Just Compensation and the Condemnation of Future Interests: Empirical Evidence of the Failure of Fair Market Value*, 1989 BYU L. REV. 789, 792-93 (1989) (referring to importance of just compensation requirement in wake of Haw. Hous. Auth. v. Midkiff,

deter government takings and more fully compensate takees by increasing the required compensation. Some compensation reforms have already been implemented through state legislative amendments and ballot initiatives passed in 2006.[11] The future of most reform proposals, however, remains uncertain. Interestingly, that future could include a U.S. Supreme Court decision. In light of the questions that three Justices asked about eminent domain compensation during the oral argument of *Kelo*, some observers have predicted that the Supreme Court might revisit the formula for awarding just compensation.[12]

In this Article, I argue that the current debate about compensation for eminent domain is being conducted within too narrow a framework because many of the existing proposals start from the same assumption about the ideal measure of takings compensation. Specifically, many recent reform proposals, like the current compensation rules, presume that takings compensation should aim to "make victims subjectively indifferent to whether [the taking] . . . took place or not."[13] In other words, the premise of many proposals is that

467 U.S. 229 (1984)); James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1278 (1985) (same); Note, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 89 (1957) (referring to importance of compensation requirement in wake of Berman v. Parker, 348 U.S. 26 (1954)).

[11] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 42 (discussing recent state reforms concerning eminent domain).

[12] Transcript of Oral Argument at 21-23, *Kelo*, 545 U.S. 469 (2005) (No. 04-108), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-108.pdf (Justice Kennedy asking if there is scholarship about allowing property owners to share in gains from economic development); *id.* at 44-46, 48-51 (Justices Breyer, Kennedy, and Souter asking about adequacy of compensation); Brett Talley, *Restraining Eminent Domain Through Just Compensation:* Kelo v. City of New London, 125 S. Ct. 2655 (2005), 29 HARV. J.L. & PUB. POL'Y 759, 768 (2006); *see also* Gillette, *supra* note 10, at 20-21 (echoing calls of other commentators that "the next wave of litigation" about takings "should involve the question of just compensation").

[13] Richard Craswell, *Instrumental Theories of Compensation: A Survey*, 40 SAN DIEGO L. REV. 1135, 1149 (2003) (arguing that early economic analyses suggest that appropriate measure of compensation for breach of contract and torts (including property torts such as takings) is "setting damages at a level that would make victims subjectively indifferent to whether the wrong took place or not"). For an explicit statement that takings compensation should aim to leave takees subjectively indifferent to takings, see, for example, Glynn S. Lunney, Jr., *Takings, Efficiency, and Distributive Justice: A Response to Professor Dagan*, 99 MICH. L. REV. 157, 168 n.26 (2000) ("I would define 'just' compensation as that level of compensation that made the landowners indifferent between accepting the payment and the loss they experienced.").

takees should be paid enough to allow them to feel that they are in the same position after a taking as they were before the taking. As a practical matter, though, many reformers recognize that it is not feasible to implement a subjective measure of compensation and thus they countenance departures from the ideal on pragmatic grounds.[14]

This Article argues against aiming to leave takees subjectively indifferent to takings on normative grounds. Attempting to make takees subjectively indifferent makes takees' individual perceptions of their losses the basis for takings compensation. I argue that we should not attempt to leave takees subjectively indifferent because of the dangers involved in basing public policy choices, such as the measure of compensation, on individual preferences.[15] These dangers include the possibility that individual preferences may be objectionable, for example, because they are racist. In addition, individual preferences might be extremely expensive. They also might reflect existing inequalities that would be reinforced by basing public policy choices, such as takings compensation, on individual preferences.

This Article argues that takings compensation should aim to leave takees objectively, rather than subjectively, indifferent to takings. Under an objective measure of compensation like the one that I sketch in this Article, a takee would receive the compensation required to allow her to enjoy things that we as a society commonly value to the same extent that she enjoyed these things before the taking. The ideal measure of compensation would therefore not be the takee's personal assessment of her losses from a taking as it is under the subjective ideal. Rather, it would be a considered judgment by outsiders about the amount of compensation required to allow a takee to enjoy the elements of a socially valuable life to the same extent that she enjoyed them before the taking. Consider, for instance, a long-time homeowner whose house is expropriated. She would be compensated to allow her to re-establish herself after the taking in a neighborhood where she could enjoy valuable goods, such as community and autonomy, to roughly the same extent that she enjoyed them in her old neighborhood.[16]

---

[14] *See infra* Part II.

[15] *See generally* RONALD DWORKIN, *Equality of Welfare*, *in* SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 11, 11 (2000) (arguing against equality of welfare as metric for distributive justice).

[16] As this example illustrates, my arguments for an objective measure (and against a subjective measure) are not a defense of the current fair market value standard of compensation. In fact, I regard this standard as a proxy for a subjective measure, not an objective measure, because the standard reflects an aggregation of individual

This Article contributes to the current discussion about compensation for eminent domain in two ways. First, the Article emphasizes that the current debate about reforming takings compensation is being conducted within an unnecessarily narrow frame of reference. As I explain, many recent proposals for reforming takings compensation assume that it should ideally leave takees subjectively indifferent to takings.[17] Second, the Article argues that we should consider an objective measure of compensation, at least as a thought experiment. Choosing the appropriate measure of compensation for eminent domain inevitably involves selecting among imperfect alternatives. Both subjective and objective measures have drawbacks. The best choice, however, is most likely to be made after consideration of a full array of options.

This Article proceeds as follows. Part I explains the view of the purpose of the compensation requirement in the Takings Clause that underpins my analysis of the appropriate measure for just compensation. I argue that in paying takings compensation we are primarily engaged in an exercise in corrective justice in which we are attempting to make takees whole. Part II demonstrates that the existing compensation rules and many of the proposals for reforming them start from the same idea that making takees whole entails making them subjectively whole. Part III advances my normative critique of the subjective measure of takings compensation. Part IV outlines an alternative objective measure of takings compensation that should be considered, at least as a thought experiment.

I. THE PURPOSE OF TAKINGS COMPENSATION

In thinking about how much governments should pay when they take property, it is helpful to understand why governments are required to pay takings compensation. This Part sketches the view of the compensation requirement's purpose that underlies my analysis of the appropriate measure of compensation.

preferences, including those of the takee. *See infra* pp. 253-54.

[17] For example, Bell and Parchomovsky introduce their proposal for compensating takees based on self-assessed valuations by arguing that the main theories of the Takings Clause point virtually incontrovertibly to subjective valuation as the desired measure of compensation. *See* Bell & Parchomovksy, *supra* note 10, at 876. Similarly, Heller and Hills identify the benefits of their proposed "Land Assembly Districts" as including the possibility that Districts will allow property owners to capture the subjective value of their properties. Heller & Hills, *supra* note 10, at 7.

I start by analogizing a taking to a tort.[18] Like a property tort such as trespass, a taking involves an interference with a property right.[19] Extending the analogy, there are two common justifications for imposing liability for takings and torts: deterrence and justice.[20]

First, takings compensation, like tort liability, is often justified as a means of forcing decision makers to internalize the costs of their actions, thereby encouraging efficient decision making.[21] In particular, takings compensation is often described as a mechanism that requires governments to bear the costs of takings, and thereby motivates governments to make efficient decisions about whether to take property. Clearly, the compensation requirement constrains governmental takings because it presents a budget constraint. Without it, governments would not incur financial costs in exercising eminent domain, and presumably, there would be more governmental takings.[22]

Several factors suggest that takings compensation may not promote efficient government decision making, however. For example, governments are more responsive to political costs than monetary costs.[23] Moreover, monetary costs do not translate in any direct or

[18] Of course I recognize that the analogy is not perfect. For works of other scholars who analogize takings to torts, see RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 44 (1985) ("[T]here is no principled distinction between torts and takings."); *id.* at 74 (describing "torts . . . as a subclass of takings"); Scott Hershovitz, *Essay: Two Models of Tort (and Takings)*, 92 VA. L. REV. 1147, 1149-50, 1178-86 (2006) (analogizing takings to torts).

[19] *See* DAN B. DOBBS, DOBBS LAW OF REMEDIES 788 (2d ed. 1993) (analogizing temporary taking to trespass in indicating that rental value is appropriate measure of damages for both).

[20] There are, of course, other justifications or explanations for takings and tort compensation than the ones I mention here. *See, e.g.*, DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 32-52 (2002) (discussing three rationales for takings compensation and analogizing these to rationales for tort compensation); Craswell, *supra* note 13, at 1136-39 (discussing corrective justice and efficiency theories of compensation in different contexts).

[21] DANA & MERRILL, *supra* note 20, at 42-43 (outlining "fiscal illusion argument" for takings compensation and analogizing it to "deterrence rationale" for tort liability).

[22] There is empirical evidence that the requirement to pay compensation affects governmental decisions about takings. WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS & POLITICS 96-97 (1995); Joseph J. Cordes & Burton A. Weisbrod, *Government Behavior in Response to Compensation Requirements*, 11 J. PUB. ECON. 47, 55-57 (1979); Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 952 n.112 (2003); Serkin, *Big Differences*, *supra* note 10, at 1664 n.159.

[23] Daryl J. Levinson, *Making Governments Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000).

predictable way into political costs.[24] This is partly because taxpayers, not government decision makers, pay the monetary costs of government decisions.[25]

The translation of monetary costs into political costs may suffer particular distortions in the takings context. Takings compensation is often doubly externalized from government decision makers because takings are often done by local governments using state and/or federal funding.[26] When this happens, local decision makers not only externalize the costs of takings from themselves onto taxpayers, but onto taxpayers in other jurisdictions that cannot hold the decision makers accountable. This double externalization may lead governments to expropriate property even when it is inefficient to do so.[27]

Government takings decisions may also be distorted by attitudes toward risk. For instance, a municipality that is risk averse because it has a small tax base may be hypersensitive to the mandatory takings compensation requirement. As a result, the municipality might forgo an efficient taking because its aversion to risk prompts it to discount the benefits and exaggerate the costs of the taking.[28]

---

[24] *Id.*; Fennell, *supra* note 10, at 994-95.

[25] Fennell, *supra* note 10, at 994-95; Gillette, *supra* note 10, at 15-16.

[26] *See generally* 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 (2004) (emphasizing significance of federal and state funding of local takings). For example, most of the funding for the redevelopment project in *Kelo* came from the State of Connecticut's Department of Economic and Community Development. Ted Mann, *Fort Trumbull Saga Ends on Costly Note*, THE DAY, Aug. 23, 2006, at 1A. Similarly, "[m]ost of the financing for the [controversial] Poletown project . . . came from the United States government." Fischel, *supra*, at 943. The controversial urban renewal programs of the mid-twentieth century also were subsidized by the federal government. Note, *supra* note 10, at 91 n.134.

[27] However, sometimes state and federal funding of local takings may have positive effects. In particular, state and federal funding might encourage local governments to take private property in situations where the taking is efficient from a state or national perspective but economically inefficient from the local government perspective. *See* Serkin, *Big Differences*, *supra* note 10, at 1691-93 (arguing that subsidies from higher levels of government may encourage more efficient takings decisions by local governments in face of positive externalities).

[28] *Id.* (arguing that cost-internalization argument for takings compensation applies more to smaller local governments than larger local, state, and federal governments but noting that small local governments' assessments of takings might be distorted by risk aversion and externalities); *see also* Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 616-17 (1984) (arguing that governmental risk aversion supports less-than-full compensation on efficiency grounds).

The point is that it is difficult to predict the ex ante effects of takings compensation on governmental decision making. Sometimes takings compensation may have no effect on whether a government takes property because governments externalize the monetary costs of the compensation.[29] In other cases, takings compensation may deter governments from efficient takings because governments are risk averse. In light of the many variables affecting the impact of takings compensation on governmental decision making, I do not think that it is not worthwhile to attempt to calibrate the measure of compensation in an effort to encourage efficient governmental choices.

An alternative to the view that takings and tort compensation promote efficient decision making is the view that they promote justice. Most scholars who regard tort compensation as promoting justice view it as promoting corrective justice.[30] Although there are many theories of corrective justice, virtually all theories of corrective justice posit that wrongdoers have a duty to compensate the victims of their wrongs. The purpose of that compensation is defined differently in the various theories of corrective justice. According to some, the wrongdoer paying compensation restores the equality between wrongdoer and victim that was disrupted by the wrongdoer's harm to the victim.[31] Others suggest that compensation repairs the wrongful losses that the victim suffered at the hands of the wrongdoer.[32] The

[29] For a relatively recent skeptical analysis of the likely impact of increasing takings compensation on governmental conduct that identifies other reasons for doubting the deterrence effect of takings compensation, see NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 88-112 (2001).

[30] *See generally* JULES L. COLEMAN, RISKS AND WRONGS (1992) (offering theory of corrective justice and arguing that tort law implements this theory); Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349 (2002) (offering theory of corrective justice and arguing that private law, including tort law, embodies theory). However, there is a minority view that tort and takings compensation should promote distributive justice in the sense of a more equal distribution of resources, or sharing of benefits and burdens. Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 742 (1999); Jeffrey M. Gaba, *Taking "Justice and Fairness" Seriously: Distributive Justice and the Takings Clause*, 40 CREIGHTON L. REV. 569, 570 (2007); Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 195 (2000).

[31] Weinrib, *supra* note 30, at 349 ("Corrective justice . . . features the maintenance and restoration of the notional equality with which the parties enter the transaction."). This conception of the purpose of compensation makes sense when both the wrongdoer and the victim are individuals. It does not translate easily into the takings context, where the "wrongdoer" is a collective agent, usually a government. It is difficult to regard the government as ever having been equal to the takee, whether it is a person or a collective agent, such as a corporation.

[32] COLEMAN, *supra* note 30, at 329 ("Corrective justice imposes a duty to repair

key point to note is that virtually all theories of corrective justice envision compensation as making the victim whole by taking the victim back to a baseline that existed before the wrong. Prevailing theories of corrective justice do not question the justice of that pre-wrong baseline. Instead, they regard the justice of the baseline as a question of distributive justice to be addressed elsewhere, generally by legislatures rather than courts.[33] Thus, under corrective justice, the wrongdoer returns the victim to her preexisting baseline, even if the wrongdoer is much poorer than the victim and the wrongdoer's poverty stems from an unjust distribution of resources in society.

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 by returning her to the pre-interference baseline.

Supreme Court jurisprudence supports the idea that takings compensation is a means of doing corrective justice. Consider, for example, Justice Black's oft-quoted description in the 1960 case of *Armstrong v. United States* of the purpose of the Takings Clause.[34] Justice Black describes the purpose as "bar[ring] 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."[35] Some have interpreted this statement as indicating that takings compensation is intended to promote distributive justice.[36] Proponents of this

wrongful losses on those agents responsible for them.").

[33] *See, e.g.*, Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 985-95 (1988) (discussing relationship between politics and corrective and distributive justice).

[34] Armstrong v. United States, 364 U.S. 40, 49 (1960). On the impact of the *Armstrong* principle, see William Michael Treanor, *The* Armstrong *Principle, The Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1153 (1997) ("Justice Black's view has received a remarkable degree of assent across the spectrum of opinion. The *Armstrong* principle has become, according to Professor Glynn Lunney, a part of the 'ritual litany' employed in takings decisions."); *cf.* Serkin, *Big Differences*, *supra* note 10, at 1633 ("[F]airness considerations have been the hallmark of Supreme Court opinions.").

[35] *Armstrong*, 364 U.S. at 49. Justice Black's statement recalls a statement by Justice Patterson in the 1795 case of Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795): "Every Person ought to contribute his proportion for public purposes and public exigencies; but no 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 society at large."

[36] *See, e.g.*, Dagan, *supra* note 30, at 742 (Justice Black's "statement places the

interpretation focus on Justice Black's words that takings compensation is intended to ensure that "some people alone" do not "bear public burdens which, in all fairness and justice, should be borne" by everyone.[37] When considered in context, however, the statement is more plausibly interpreted as defining the purpose of takings compensation as bringing takees back to the position that they were in before the taking. By putting them back in that position, Justice Black seems to be suggesting, we set the stage for fairly allocating the costs of public burdens. Once takees are in the same position as before the taking, they can then be taxed according to whatever formula is used to allocate the costs of "public burdens" among the public generally.[38]

In this Article, I assume that takings compensation is an attempt to achieve corrective justice. My aim is to draw attention to the understanding of what it means to make somebody whole that underlies current compensation rules and many of the recent proposals for reforming them. Describing the purpose of takings compensation as making a takee whole raises the question of what it means to make a takee whole. As Professor Richard Craswell argues, the corrective justice notion that victims should be made whole "may tell us to restore the value of that which is lost, or something along those lines, but possible measures of 'value' are a dime a dozen."[39] In other words, there are many potential conceptions of what it means to make somebody whole.

Nonetheless, I argue that the existing takings compensation rules and many reform proposals implicitly adopt the same view of what it

Aristotelian notion of distributive justice . . . at the heart of takings jurisprudence"); Gaba, *supra* note 30, at 569-70 (arguing *Armstrong* principle imports distributive justice into Takings Clause).

[37] *Gaba*, supra note 30, at 574.

[38] Subsequent jurisprudence also supports the idea that takings compensation is a means of doing corrective justice. For instance, Supreme Court opinions refer to the purpose of takings compensation as making takees "whole." *See, e.g.*, United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) ("Although the market-value standard is a useful and generally sufficient tool for ascertaining the compensation required to make the owner whole . . . the Court has acknowledged that such an award does not necessarily compensate for all values an owner may derive from his property.").

[39] Craswell, *supra* note 13, at 1178 (referring to lack of concrete policy implications of compensatory goal in broad array of fields, not specifically in takings area); *see also* Ellen Smith Pryor, *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91, 138 n.138 (1993) (arguing that "corrective justice usually has been thought to provide the basis for some sort of full compensation or restoration demand" but that "corrective justice does not answer all questions about the method or amounts of compensation").

means to make somebody whole. Specifically, they assume that making somebody whole entails paying the person sufficient compensation to enable her to feel subjectively indifferent to her losses. To be clear, as a practical matter, the existing legal rules do not, and many of the proposals would not, fully compensate people for their subjective perceptions of their losses from takings. But existing jurisprudence and scholarship tend to characterize the failure to pay people compensation based on their subjective perceptions of their losses as an unfortunate deviation from the ideal, necessitated by the practical difficulty of calculating the compensation that would leave takees subjectively indifferent to takings.[40]

The idea that making people whole means compensating them based on their subjective perceptions of their losses is striking from at least two perspectives. First, it is striking in light of recent trends in tort compensation. Tort law, like takings law, confronts questions about how much individuals should be compensated for harms that they suffer without their consent. However, in recent decades, tort law has not embraced the idea now popular in the takings context that the goal of compensation should be to leave people subjectively indifferent to what happened to them.[41] On the contrary, in recent decades tort reformers have sought, and in many jurisdictions obtained, limits on compensation that make it hard to regard tort compensation as leaving individuals subjectively indifferent to their losses. These include caps on damages for pain and suffering, the very damages that purport to compensate tort victims for the emotional harms that they suffer.[42] The opposing trends in the tort and takings contexts with respect to compensation for intangible losses illustrate that there are alternatives to the prevailing view in takings law and scholarship that compensation ideally would leave takees subjectively indifferent to their losses.

Second, the assumption that takees ideally should be compensated based on subjective valuations of their losses is striking because it is at odds with the many philosophical critiques of using private preferences as the basis for public policy. I draw on these critiques in Part III, where I suggest important reasons for looking beyond the

[40] *See infra* Part II (discussing current compensation rules and reform proposals).

[41] *See infra* notes 60-61, 71-74 and accompanying text.

[42] MARC A. FRANKLIN ET AL., TORT LAW AND ITS ALTERNATIVES 809-14 (8th ed. 2006) (discussing tort reform since 1980s); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 169 (3d ed. 2002) ("Fixed limits on recovery for pain and suffering are a centerpiece of the national movement for statutory modification of tort law.").

narrow confines of the subjective valuation paradigm dominating existing takings law and scholarship.

II. EXISTING TAKINGS COMPENSATION RULES AND REFORM PROPOSALS

This Part argues that the existing legal rules governing compensation for takings, and many of the recently suggested reforms, assume that takees should be compensated based on their subjective valuations of their losses. I begin by briefly discussing the existing legal rules governing takings compensation. I then analyze the current proposals for reform.

A. Existing Legal Rules

The Fifth Amendment requires that governments pay "just compensation" when they take private property.[43] The Supreme Court has indicated that the purpose of paying just compensation is to make the takee "whole,"[44] and that this will usually be accomplished by paying fair market value.[45] "Under [the fair market value] standard, the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking."[46]

Judicial explanations for fair market value indicate that courts regard it as a measure of compensation that is second-best to the ideal of making takees subjectively indifferent to takings. The Supreme Court has stated that the first-best option would put "the owner of condemned property 'in as good a position pecuniarily as if his

[43] U.S. CONST. amend. V.

[44] United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979).

[45] United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 81 (1913). I say usually because while fair market value is the prevailing standard, the Court has recognized that there are a small number of situations where fair market value is not the appropriate measure of damages. *564.54 Acres of Land*, 441 U.S. at 511; Christopher Serkin, *The Meaning of Value: Assessing Just Compensation For Regulatory Takings*, 99 NW. U. L. REV. 677, 683 n.24 (2005) ("Fair market value does not apply where it would be too difficult to measure or where manifest injustice would result.").

[46] *564.54 Acres of Land*, 441 U.S. at 511. The standard method for determining fair market value is the comparable sales method. Two less often used methods are income capitalization and reproduction. Michael Debow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579, 581-82 (1995). On the legal fiction that the fair market value standard represents, see, for example, Thomas W. Merrill, *Incomplete Compensation For Takings*, 11 N.Y.U. ENVTL. L.J. 110, 116-17 (2002) ("[A]s astute observers have long recognized, the concept of fair market value is essentially a fiction in the context of takings of property. Fair market value would perhaps be more easily ascertainable if takings took place in thick markets in which there were many buyers and sellers.").

property had not been taken.'"[47] However, the Court has suggested that subjective indifference is not a practical objective for takings compensation because it is nearly impossible for an outsider to accurately determine how much an owner subjectively values his or her losses. Once takees know their properties will be taken, they have an incentive to exaggerate subjective valuations of their properties to increase the compensation paid. Consider, for example, Justice Marshall's explanation for the fair market value standard:

> In giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property "in as good a position pecuniarily as if his property had not been taken." However, this principle of indemnity has not been given its full and literal force. 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.[48]

Thus according to Supreme Court jurisprudence, fair market value is a compromise. It reflects many individuals' preferences, not only the takee's. This fact may have prompted Justice Marshall to describe fair market value as "a relatively objective working rule."[49] But fair

---

[47] *564.54 Acres of Land*, 441 U.S. at 510-11 (quoting Olson v. United States, 292 U.S. 246, 254 (1934)).

[48] *Id.* at 510-11. Justice Frankfurter said:

> The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use. In view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.

Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949).

[49] It should be noted that there are other possible explanations for the choice of fair market value as the standard under the Fifth Amendment than the one given in Supreme Court jurisprudence. *See, e.g.,* DANA & MERRILL, *supra* note 20, at 175-79 (noting that fair market value standard could be explained on basis that it is cheaper

market value is not an objective standard as I use that term in this Article because fair market value is ultimately rooted in individual preferences, including those of the takee.[50]

Under the fair market value standard, the Fifth Amendment's "just compensation" standard does not require government to compensate certain kinds of losses that takees may experience.[51] These non-compensable losses fall into three categories. One category is out-of-pocket expenses that takees incur but that fair market value does not cover. These include attorney's fees,[52] relocation costs, and the cost of

to administer than other standards, but also suggesting three other possible explanations: incomplete compensation allows more property owners to be compensated, forces takees to internalize costs of their activities, and subsidizes public goods); Merrill, *supra* note 46, at 128-34 (same). Given the reasons articulated in Supreme Court jurisprudence for fair market value, I think of Merrill's three alternative explanations as creative and plausible justifications, rather than explanations, for the choice of fair market value.

[50] If, unlike me, you regard fair market value as an objective standard, then you can interpret this Article as critiquing reform proposals that presume the desirability of a subjective measure of compensation. In addition, you could interpret this Article as suggesting, at least as a thought experiment, a different objective measure from fair market value, specifically one that is less dependent on individual preferences than fair market value.

[51] Judge Posner makes the point in the following passage from Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988):

> Compensation in the constitutional sense is . . . not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to *his* property. Many 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"). Such owners are hurt when the government takes their property and gives them just its market value in return. The taking in effect confiscates the additional (call it "personal") value that they obtain from the property . . . .

For helpful academic discussions of what is not compensated under the fair market value standard, see, for example, Bell & Parchomovsky, *supra* note 10, at 885-90; Fennell, *supra* note 10, at 962-67; Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 106-10 (2006); Merrill, *supra* note 46, at 111, 118-19, 122; Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. REV. 283, 334-38, 351-52 (1991); Serkin, *supra* note 45, at 683 n.24.

[52] Lawyers tend to take condemnation cases on a contingency fee basis, taking perhaps one-third of any amount that their efforts generate. *Merrill Testimony*, *supra* note 7, at 120-21; Brett Nelson, *Eminent Disaster*, FORBES.COM, Aug. 10, 2005, http://www.forbes.com/smallbusiness/2005/08/09/entrepreneur-legal-realestate-cx_bn_0809eminentdomain.html.

replacing the expropriated property if that cost exceeds its fair market value. A second category of non-compensable losses is difficult-to-quantify intangible (or subjective) losses. These include losses due to an owner's sentimental attachments to the property or community in which it is located, and idiosyncratic tastes that have no market value. Intangible losses also include losses owners suffer from being deprived of the autonomous choice of keeping or selling their property.[53] A third item to which takees have no claims under the fair market value standard is not strictly speaking a loss, but rather a gain. In particular, the standard denies takees a share of any gains that the expropriation of their property generates. Imagine that, as in *Kelo*, the property is taken for a government-sponsored economic development project. The expropriated owner has no legal entitlement under Supreme Court jurisprudence to any share of the gains generated by the development.

Notably, there are federal and state statutes and state constitutional provisions requiring payment of more than fair market value in some circumstances. For example, depending on the taker and the purpose of the taking, there may be federal or state statutory or state constitutional requirements to pay out-of-pocket expenses such as attorney's fees,[54] relocation costs,[55] and replacement costs.[56] Moreover, as a result of recent legislative changes, several states now require payments for intangible losses, such as owner's sentimental attachments to property.[57]

In addition to statutory and state constitutional mandates to pay more than fair market value, governments sometimes voluntarily pay more than fair market value.[58] For instance, governments may pay

[53] Fennell, *supra* note 10, at 966-67.

[54] Garnett, *supra* note 51, at 129-30 (describing state statutes requiring payment of attorney's fees).

[55] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 27; Garnett, *supra* note 51, at 121.

[56] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 27; Garnett, *supra* note 51, at 121; *see* 42 U.S.C. § 4626 (2000); 49 C.F.R. § 24.404 (2006).

[57] *See infra* note 61 (describing recent changes in compensation laws).

[58] *See* Fischel, *supra* note 26, at 950 (reporting that "[n]early all Poletown homeowners [from the famous 1981 Michigan Supreme Court *Poletown* decision] were in fact paid well-above the market value of their property"); Garnett, *supra* note 51, at 124-25 (suggesting takers pay more than fair market value, based on her own research and U.S. DEP'T OF TRANSP., RELOCATION RETROSPECTIVE STUDY (1996); U.S. DEP'T OF TRANSP., NATIONAL BUSINESS RELOCATION STUDY (2002)); Serkin, *Big Differences, supra* note 10, at 1640-41 (discussing government incentives to pay more than constitutional minimum); Burdsal, *supra* note 10, at 87-88 (referring to factors

more if the expropriated homeowners are a well-organized political lobby. Governments may also pay more than fair market value if they are strongly motivated to expropriate — for example, in cases where they are eager to commence a redevelopment project. In practice, when governments pay more than fair market value, they may compensate takees for some or all of their out-of-pocket and intangible losses and share part of the surplus generated by the taking. Some takees, therefore, probably approach subjective indifference to the taking, notwithstanding the fact the Supreme Court has required the payment of only fair market value.

B. Reform Proposals

Most recent compensation reform proposals would more fully realize the goal of paying expropriated owners enough to make them subjectively indifferent to takings.

One category of proposals would compensate takees for losses that they currently are forced to bear. Compensating takees for these losses might bring them closer to feeling subjectively indifferent to the expropriation. Some proposals, for instance, would compensate for out-of-pocket expenses such as attorney's fees in circumstances where they are not currently compensated.[59] Others propose compensating for hard-to-quantify intangible losses that takees may experience, such as the loss of community or autonomy. Some academics have suggested governments pay takees a multiple of fair market value or a bonus in situations where takees might experience intangible losses, such as when the takee has lived on the property for many years.[60]

that may induce condemners to settle for more than fair market value); Mann, *supra* note 26 (reporting that New London paid more than $2.3 million more for 12 properties at issue in *Kelo* "than their total appraised value in 2000").

There is no systematic empirical research about the compensation paid to takees. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 3.

[59] *See, e.g.*, IND. CODE §§ 32-24-1-14 to -15 (2006) (providing for litigation costs, including attorney's fees, under certain circumstances); MINN. STAT. § 117.031 (2006) (providing for attorney's and other fees if certain conditions satisfied).

[60] *See, e.g.*, *Merrill Testimony*, *supra* note 7, at 122 (proposing federal legislation "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"); Fee, *supra* note 10, at 807, 815 (arguing that compensation "should be the amount of compensation required to make the owner indifferent to the land acquisition at issue, . . . accounting for the owner's reasonable subjective value" and, in particular, suggesting that condemnors might be required "to pay homeowners market value plus X percent of the home's market value, where X depends on how long the owner has lived in the

Notably, the burst of eminent domain reforms at the state level since *Kelo* has already generated legislative and constitutional requirements that compensation be based on a multiple of fair market value or include a non-individualized bonus for intangible losses.[61]

A second category of proposals would provide property owners with the replacement value of their property if it is higher than the property's fair market value. That might be the case if, for example, a property owner could not afford similar housing after having been paid his property's market value. Consider, for instance, a physically disabled homeowner who retrofitted his house to accommodate his special needs. If the market does not value these improvements, market value compensation will not allow him to buy a home that

home"); Burdsal, *supra* note 10, at 95-96 ("[I]f it is discovered through data farming that the *average* homeowner in a community who has lived in her home for four years and has 50 percent of her wealth invested in the home would be neutral to the idea of selling her home at 1.2 times the estimated market value, then the 1.2 figure can work as a multiplier for *all* homeowners similarly situated."). For earlier proposals to compensate for intangible losses through bonus payments or multiples of fair market value, see, for example, EPSTEIN, supra note 18, at 174-75, 183-84; Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 735-37 (1973).

There is real-world experience using bonus payments and multiples of fair market value to compensate for intangible losses. *See, e.g.*, EPSTEIN, *supra* note 18, at 174, 184 (referring to 50% surplus above market value required under 1868 New Hampshire Mill Act and 10% bonus formerly awarded in England); W. Harold Bigham, *'Fair Market Value,' 'Just Compensation,' and the Constitution: A Critical View*, 24 VAND. L. REV. 63, 80-82 (1970) (indicating that in Canada, as of 1970, courts awarded market value plus "allowance" averaging 10% and sometimes reaching 50% of market value, drawing on English experience where courts awarded allowance on top of market value until 1919); Claeys, *supra* note 10, at 923-28 (discussing New Hampshire Mill Act and super-compensatory payments); Tsuyoshi Kotaka & David L. Callies, *Introduction* to TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES 7 (Tsuyoshi Kotaka & David L. Callies eds., 2002) (noting that Australia provides increased compensation up to additional 10% of market value for "'solatium': 'intangible and non-pecuniary disadvantage resulting from the acquisition.'").

[61] *See, e.g.*, MICH. CONST. art. X, § 2 (amended 2006) (requiring payment of "not less than 125%" of fair market value "in addition to any other reimbursement allowed by law" for taking "an individual's principal residence"); IND. CODE § 32-24-4.5-8 (2006) (requiring 125% or 150% of fair market value for some lands); 192 Kan. Sess. Laws (requiring legislature to consider compensating property owners at 200% of fair market value if legislature authorizes taking for private economic development including 25% bonus payment for takings for "auto race track facility or special bond project"); MO. ANN. STAT. § 523.039 (West 2007) (defining just compensation as highest of: (1) fair market value; (2) in case of primary residences, 125% of fair market value; (3) in case of property owned within family for at least 50 years, 150% of fair market value).

meets his needs. The replacement value, however, would allow the purchase of such a home.[62] The replacement value could be paid either in-kind (i.e., by guaranteeing the expropriated owner similar property after the completion of the area's redevelopment), or in cash (i.e., by paying compensation sufficient to allow the property owner to buy similar housing).[63] Paying the replacement value when it is higher than fair market value would allow takees to approach subjective indifference to the taking.[64]

Under a third category of proposals, takees would be accorded a share of the surplus generated by a taking.[65] A taking generates a

[62] Kelly, *supra* note 10, at 952 (illustrating potential for replacement value to exceed market value using example of physically disabled person with accessible home).

[63] MINN. STAT. § 117.187 (2006) (guaranteeing an owner who is forced to relocate damages "sufficient for an owner to purchase a comparable property in the community"); Assemb. B. 3075 2007 Leg., 230th Sess. (N.Y. 2007) (requiring that "just compensation . . . be measured by fair market replacement value [of the acquired property], which shall be at least equal to the actual cost of purchasing an equivalent property in a similarly situated location with a similar structure on the property"); NEW JERSEY DEP'T OF THE PUB. ADVOCATE, IN NEED OF REDEVELOPMENT: REPAIRING NEW JERSEY'S EMINENT DOMAIN LAWS: ABUSES AND REMEDIES, A FOLLOW-UP REPORT 25 (2007) (recommending families be paid at least replacement value for homes and higher compensation for tenants); NEW JERSEY DEP'T OF THE PUB. ADVOCATE, REFORMING THE USE OF EMINENT DOMAIN FOR PRIVATE REDEVELOPMENT IN NEW JERSEY 20 (2006) (recommending "that compensation for a taken home be based on the highest" of "the fair market value of the property" and "'replacement value' of the property, [defined as] the cost of a home of similar size and quality under comparable conditions, within a reasonable distance of the current property"); *id.* (proposing that "existing tenants and homeowners" have "the right of first refusal for a comparably sized apartment or property in the new development" constructed on their former property, "if applicable"); Kelly, *supra* note 10, at 929 (recommending that long-time community members whose properties are taken for redevelopment be guaranteed home in new redevelopment if it includes housing).

Currently, the federal Uniform Relocation Assistance and Real Properties Acquisition Act requires the payment of replacement value in some circumstances "[b]ecause it prohibits Takers from dislocating any occupant without first ensuring that she can secure comparable replacement housing." Garnett, *supra* note 51, at 121; *see also* 42 U.S.C. § 4626 (2000); 49 C.F.R. § 24.404 (2006). There are also precedents for providing in-kind replacements for expropriated property in Japan and Taiwan. Kotaka & Callies, *supra* note 60, at 7.

[64] *See* DOBBS, *supra* note 19, at 309 (indicating that "substitution cost damages [may] . . . protect the plaintiff's idiosyncratic personal values").

[65] At the oral argument of *Kelo*, Justice Kennedy raised the idea of allowing takees whose properties will be transferred to private owners to share in the gains of the taking. He asked the attorney for the petitioners, Scott Bullock of the Institute of Justice, whether there are "any writings or scholarship that indicates that when you have property being taken from one private person ultimately to go to another private

surplus when the taking is for an economic development project that increases the value of the taken property and/or other properties. Professor Clayton Gillette suggests that when private property is taken for economic development, compensation should "reflect not just the current value of the condemned land, but also some percentage of the proposed project's expected benefits to the municipality."[66] In a variant on this idea, some recent legislative bills propose that takees whose property is taken for economic development should be paid a multiple of fair market value.[67] The additional increment arguably would allow takees to share in the surplus that takings generate.

Some proponents of sharing the gains with takees propose this sharing to promote efficient government decisions about takings. The idea is that governments will be less likely to take property for inefficient economic development projects if governments are required to share the gains from development projects with takees. The assumption is that the additional mandatory compensation will encourage governments to take only when they are reasonably confident that the development in question will generate gains sufficient to cover the cost of compensation.[68]

For the reasons discussed in Part I, I doubt that we should seek to fine-tune the amount of compensation that governments are required to pay in an effort to promote efficient governmental decisions about takings. Forcing governments to pay a share of the expected gains in

person, that what we ought to do is adjust the measure of compensation, so that the owner — the condemnee — can receive some sort of a premium for the development?" Transcript, *supra* note 12, at 22. Later, in dialogue with the attorney for New London, Wesley Horton, Justice Kennedy commented, "It does seem ironic that 100 percent of the premium for the new development . . . goes to the developer and to the taxpayers and not to the property owner." *Id.* at 44-45.

[66] Gillette, *supra* note 10, at 21; *see also Merrill Testimony*, *supra* note 7, at 122 (proposing federal legislation "require that when a condemnation produces a gain in the underlying land values due to the assembly of multiple parcels, some part of this assembly gain has to be shared with the people whose property is taken"); Lehavi & Licht, *Eminent Domain, Inc*. *supra* note 10, at 4 (offering proposal that would allow takees to share in gains of development); Lehavi & Licht, *Squaring the Eminent Domain Circle*, *supra* note 10, at 19 (same); Heller & Hills, *supra* note 10, at 6 (proposing "Land Assembly Districts" partly to allow owners to capture a share of gains of land assembly).

[67] *See, e.g.*, 192 Kan. Sess. Laws (requiring legislature to consider compensating property owners at 200% of fair market value if legislature authorizes taking for private economic development and including 25% bonus payment for takings for "auto race track facility or a special bond project").

[68] *See* Gillette, *supra* note 10, at 21 (arguing that if governments were required to pay share of gains from economic development on top of value of land taken, local officials would be less willing "to make highly speculative uses of eminent domain").

economic development takings might discourage some inefficient takings. But it probably would not stop others and might block some efficient takings.[69]

Making governments share the gains from takings is consistent with a subjective theory of compensation. Many takees probably think they would have been able to extract a share of the surplus generated by an economic development project if their properties had not been forcibly acquired. When properties are expropriated for economic development, it is usually because they are unique in the sense of being in a location needed for the development. As holders of unique properties, takees would presumably have tried to hold out for a share of the surplus that any buyer without the power of eminent domain would pay for the property. Accordingly, giving takees a share of the surplus can be regarded as compensation for their inability to bargain for a share as a result of the taking. Takees compensated for this inability may be less likely to feel like they have lost from the taking.[70]

A fourth category of proposals moves further towards leaving takees subjectively indifferent to takings. These proposals recommend calculating takings compensation based on the property owner's subjective value of the property taken, rather than the property's fair market value.[71] Note that subjective value means something different from "subjective or intangible losses." Subjective or intangible losses, as I defined them above, are losses that are hard to quantify, such as losses due to an owner's sentimental attachments to property or

[69] *See supra* text accompanying notes 23-29.

[70] Thanks to Professor Daphna Lewinsohn-Zamir for suggesting the argument in this paragraph.

[71] *See, e.g.*, Bell & Parchomovsky, *supra* note 10, at 890-95 (explaining proposal); Lopez, *supra* note 10, at 242, 292-99 (same); *see also* Burdsal, *supra* note 10, at 96-98 (same).

For earlier proposals that eminent domain compensation be based on self-assessed valuations, see Abraham Bell & Gideon Parchomovsky, *Essay: Takings Reassessed*, 87 VA. L. REV. 277, 316 (2001) (proposing self-assessment mechanisms but not compensation for "idiosyncratic tastes"); Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1406 (2005); Fennell, *supra* note 10, at 995-1002 (suggesting self-assessment scheme where property owners could volunteer their properties for takings for private use, on condition that owners receive compensation based on amount that they choose in advance between 100% and 200% of appraised value); Saul Levmore, *Self-Assessed Valuation Systems For Tort and Other Law*, 68 VA. L. REV. 771, 841 (1982); Peter F. Colwell, *Privatization of Assessment, Zoning, and Eminent Domain*, ORER LETTER (Office of Real Estate Research at the Univ. of Ill. at Urbana-Champaign, Urbana-Champaign, Ill.), Spring 1990, at 2-3, 6-7. At least one jurisdiction, Taiwan, uses a form of self-assessment as a basis for compensating property owners when taking property. *Id*. at 6-7.

community.[72] A takee's subjective valuation of the property, on the other hand, is the value that the takee assigns to the property. In the mind of the takee, her property may be worth what it is worth on the market, the amount that it would cost her to replace it, or something entirely different. The proponents of subjective valuation, however, typically assume that a takee's subjective valuation of her property exceeds the fair market value because the takee would have sold the property if she valued it only at market value.[73]

In a recent article, Professors Abraham Bell and Gideon Parchomovsky propose a particularly interesting self-assessment mechanism for implementing subjective value as the measure of compensation.[74] Under their proposal, a government would announce that it was considering expropriating certain properties.[75] The owners of these properties would then report how much they valued their properties.[76] Armed with this information, the government would decide whether it was going to take the properties.[77] To encourage honest self-valuations, Bell and Parchomovsky propose that individuals whose properties ultimately are not taken would be required to pay property taxes based on their subjective valuations.[78] In addition, owners would have to sell their properties for at least their subjective valuations.[79] Alternatively, if the owners sold for less, they would have to pay the government the difference between how much they valued the property and the purchase price.[80] This proposal and others like it represent the ultimate realization of the ambition pervading takings law and scholarship to pay takees enough to leave them subjectively indifferent to takings. [81]

---

[72] *See supra* text accompanying note 53.

[73] *See* Colwell, *supra* note 71, at 2 ("[R]eservation prices for many owners would be above market values."). Strictly speaking, an owner might be reluctant to sell even if she valued her property at its fair market value, for example, because fair market value would not cover her moving expenses and other transaction costs.

[74] Bell & Parchomovsky, *supra* note 10, at 890-95.

[75] *Id.* at 892.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 893.

[81] A fifth category of reform proposal recommends that the measure of takings compensation be the insurance coverage that a takee would have bought ex ante. This proposal echoes proposals to base tort compensation on the insurance coverage that tort victims would have bought ex ante. For the leading law review article approaching takings as insurance, see Blume & Rubinfeld, *supra* note 28. It mainly

III. EVALUATION OF SUBJECTIVE MEASURE OF COMPENSATION

Part II argued that the existing legal rules governing takings compensation represent second-best efforts to leave takees subjectively indifferent to takings. It also suggested that many existing reform proposals would more fully realize the objective of leaving takees subjectively indifferent to takings. In this Part, I recognize the virtues of the dominant idea that takings compensation ideally would leave takees subjectively indifferent to their losses. My main purpose, however, is to emphasize the drawbacks of a subjective measure of compensation.

A. The Attractions of a Subjective Measure

As previously noted, the measure of compensation should reflect the purpose for requiring takings compensation.[82] If the purpose is to ensure that governments only take property when it is efficient to do

focuses on when takings compensation should be provided under the assumption that it is a form of insurance. *Id.* at 571. Blume and Rubinfeld only briefly discuss the appropriate measure of takings compensation under the assumption that takings compensation is insurance. That brief discussion suggests that the measure of compensation for takings should be "the market value that the land would have had if the behavior of all of the parties had not been affected by the certainty of compensation" because paying full market value could induce overinvestment in property. *Id.* at 622-23.

I do not discuss proposals to align takings compensation with the insurance against takings that individuals would have bought in fair insurance markets because, to my knowledge, there have not been any suggestions in the recent *Kelo*-era debates to make takings compensation reflect efficient insurance choices in a hypothetical market. I note, though, that the idea that takings compensation should reflect insurance decisions that individuals would have made presumes that individual preferences should determine compensation for takings and thus embodies a subjective approach to compensation. Under the takings-as-insurance theory, the measure of compensation would be the coverage choices that individuals would have made in fair markets, based on their individual preferences. Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1580 (1997) ("The insurance theory of compensation . . . translates the metaphor of making the victim whole into the economic objective of satisfying individual preferences."); Pryor, *supra* note 39, at 91-92 (noting that insurance theory of tort compensation is rooted in individual preferences). *But see* Blume & Rubinfeld, *supra* note 28, at 600-23 (referring to individual preferences in discussing when takings compensation should be available, but not in recommending appropriate level of compensation). Accordingly, proposals to base takings compensation on choices individuals would have made in buying insurance in hypothetical markets are vulnerable to the critiques that this Article offers of using a subjective measure for takings compensation.

[82] *See supra* Part I.

so, then the measure of just compensation probably should be the amount necessary to make takees subjectively indifferent to takings. If compensation was anything other than subjective value, governments would not pay the true costs of their takings, and hence governmental decisions about whether to take property could be distorted.[83] I argued in Part I, however, that there is little reason to calibrate takings compensation to ensure efficient government decisions about whether to take property, partly because governments respond to political rather than monetary costs. [84]

[83] Bell & Parchomovsky, *supra* note 10, at 882; Blume & Rubinfeld, *supra* note 28, at 619; Durham, *supra* note 10, at 1300-01; Glynn S. Lunney, Jr., *Compensation For Takings: How Much is Just?*, 42 CATH. U. L. REV. 721, 761 (1993); Lunney, *supra* note 13, at 168.

[84] *See supra* Part I. Furthermore, there are reasons for not compensating in accordance with takees' subjective perceptions of their losses even if, contrary to what I suggest, takings compensation should be calibrated to promote efficiency.

One reason is that we think that governmental decision making is subject to systematic distortions. For example, governments might be systematically risk averse (or risk preferring) in deciding whether to take properties. If so, compensation should be something less than (or more than) subjective value to ensure efficient government decisions.

We might also make the measure less than subjective value to encourage ex ante efficient decision making by private actors. If takees are completely compensated when their property is taken, then private actors may invest too much in their property and ignore the possible future risk of a taking. Blume & Rubinfeld, *supra* note 28, at 616-17; Merrill, *supra* note 46, at 131-33.

Moreover, we might not compensate for subjective losses if we think that takings compensation should mimic the level of compensation that individuals would buy in fair insurance markets. We would not compensate for subjective losses in this scenario because rational actors might not purchase insurance for those losses. *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 271 (2004) ("[I]nsurance coverage against loss of property does not ordinarily seem to reflect its sentimental value, only its market value or replacement cost."); Craswell, *supra* note 13, at 1153 ("[W]henever nonpecuniary losses are involved, there is an argument that damages should be less than fully compensatory, insofar as we are concerned with providing efficient levels of insurance."). *But see* Jennifer Arlen, *Tort Damages*, *in* 2 ENCYCLOPEDIA OF LAW & ECONOMICS 682, 705-06 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (discussing impact of injuries on "marginal utility of wealth" in context of discussing optimal insurance); Ronen Avraham, *Should Pain-and-Suffering Damages Be Abolished From Tort Law? More Experimental Evidence*, 55 U. TORONTO L.J. 941, 943 (2005) (providing evidence "that people demand not only monetary coverage but pain-and-suffering insurance as well"); Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1791 (1995) (challenging "the now-dominant view that tort compensation for pain and suffering is incompatible with consumers' insurance preferences"); Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773,

Imagine, as I suggested in Part I, that takings compensation is a means of achieving corrective justice.[85] Within this framework, there are two main arguments for structuring compensation to attempt to leave takees subjectively indifferent to takings.

One argument is that a subjective measure of compensation respects individual autonomy. When the state limits itself to promoting the satisfaction of individual preferences, the state remains neutral as between different people's preferences.[86] State neutrality is desirable because individual autonomy is an important value in many liberal societies, such as the United States.[87] Indeed, private property is often justified as a means of promoting individual autonomy because it gives individual owners a sphere in which they are free to pursue their choices.[88]

It is important to emphasize, though, that a subjective measure of takings compensation may not promote individual autonomy. The idea that respecting individual preferences furthers autonomy assumes that those preferences are the product of autonomous choices. But as I discuss in Part III.B, there are reasons to believe that individual preferences related to takings compensation are not always the product of autonomous choices. Sometimes these preferences are

778 (1995) ("[C]onsumers probably prefer full compensation for those pain-and-suffering injuries presently compensable in tort."); Pryor, *supra* note 39, at 108 (arguing that insurance theorists assume that marginal utility of money decreases after accident when marginal utility of money actually might increase).

[85] *See supra* notes 34-38 and accompanying text (suggesting jurisprudence characterizes takings compensation as making takees whole).

[86] *See* JOHN BROOME, ETHICS OUT OF ECONOMICS 5 (1999) (stating economists typically support preference satisfaction theories because many economists are liberals who "believe people should be left alone to manage their own lives"); John C. Harsanyi, *Morality and the Theory of Rational Behaviour*, *in* UTILITARIANISM AND BEYOND 39, 55 (Amartya Sen & Bernard Williams eds., 1982) (emphasizing that "preference utilitarianism is the only form of utilitarianism consistent with the important philosophical principle of *preference autonomy*"); Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1688 (2003) (arguing that actual preference theory in particular "is obviously antipaternalistic" because "[e]ach person's level of well-being is determined according to her judgment and sovereign decisions").

[87] *See* Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1129 (1986) ("American law generally treats private preferences as the appropriate basis for social choice.").

[88] *See* JESSE DUKEMINIER ET AL., PROPERTY 46 (6th ed. 2006) (noting private property "is said to nourish individuality and healthy diversity" and "political freedom").

better regarded as "the 'product of available information, of existing consumption patterns, of social pressures, and of legal rules.'"[89]

A second argument for a subjective measure of compensation is that it is easier to administer than an objective measure. It is often argued that public policymakers should aspire to satisfying individual preferences because preference satisfaction is a "simple" metric that is "easy to apply."[90] One practical advantage of restricting the state to promoting individual preference satisfaction is that the state avoids "the difficult question of what makes its citizens' lives flourish."[91] When the state aims to do more than satisfy individual preferences, it must implement a process for identifying another public policy objective that will be perceived as legitimate. For example, in the takings context, implementing an objective measure of compensation would require implementing an administrative or a judicial process that would generate a broadly acceptable conception of what makes a person whole to form the basis for calculating compensation.[92]

In light of the ease-of-administration argument for a subjective measure, it is worth reiterating the practical difficulties of implementing a subjective measure and proxies for one, such as fair market value. As discussed above, the Supreme Court has adopted fair market value as the standard for takings compensation because of the practical difficulty of determining the amount required to leave takees entirely subjectively indifferent to takings.[93] But even fair market value is difficult to determine for many expropriated properties, because they are unique properties in the path of a road or economic

[89] Pryor, *supra* note 39, at 144 (quoting CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 40 (1990)); *see also* Sunstein, *supra* note 87, at 1138-69 (identifying four categories of arguments against basing public policy on private preferences or using public policy to change private preferences). Neither Pryor nor Sunstein discusses whether takees should be compensated based on their subjective valuations of their losses. *See generally* Pryor, *supra* note 39 (critiquing insurance theory of tort compensation); Sunstein, *supra* note 87 (elaborating arguments for not basing social choices on private preferences).

[90] Lewinsohn-Zamir, *supra* note 86, at 1689 (describing, but rejecting, simplicity argument).

[91] *Id.*

[92] Part IV elaborates on the challenges involved in implementing an objective measure.

[93] *See supra* notes 47-48 and accompanying text. As explained above, I regard fair market value as a subjective measure since it reflects an aggregation of individual preferences. *See supra* note 50 and accompanying text.

development project for which there is no easily ascertainable market price.[94]

Proposals to compensate for hard-to-quantify intangible losses, such as a loss of community or autonomy, would also present administrative complications.[95] For instance, proposals to pay multiples of fair market value or bonus payments for intangible losses require a delineation of the circumstances when additional payments must be made. If family ownership of the property is a precondition for a bonus payment or multiple of fair market value, then it will be necessary to specify who counts as a family member. If extra payments are for takings of primary residences, then it will be necessary to define what properties are primary residences. These and other fact-intensive determinations are bound to complicate the calculation of compensation.

Schemes, such as Bell and Parchomovsky's, that attempt to compensate based on subjective valuations require government officials to enforce the disciplines intended to elucidate genuine subjective valuations. For example, under Bell and Parchomovsky's proposal, government officials would have to monitor real estate transactions to determine when properties are sold below subjective valuations, and collect offsetting payments from the selling homeowners.[96] Thus, in practice, Bell and Parchomovsky's proposal would likely lack the administrative simplicity that is one of the standard justifications for choosing individual preference satisfaction as a public policy goal.

B. Normative Critique of a Subjective Measure

While there are important practical reasons for rejecting a subjective measure of takings compensation, my principal objections to a

[94] DANA & MERRILL, *supra* note 20, at 170 (arguing that "the fair market value standard is inherently problematic" because "[t]akings involve forced exchanges of unique property rights").

[95] *See supra* text accompanying notes 60-61.

[96] Thanks to Professor Vicki Been for pointing out this practical implication of Bell and Parchomovsky's proposal. In a soon-to-be-published article, Amnon Lehavi and Amir Licht also question the practical feasibility of basing takings compensation on takees' subjective valuations. Lehavi & Licht, *Eminent Domain, Inc.*, *supra* note 10, at 24. As Professor Barbara Fried pointed out to me, Bell and Parchomovsky's proposal also raises a question of horizontal equity since it could mean that homeowners pay taxes assessed on different bases due solely to the fact some owners' properties were considered for expropriation.

subjective measure are normative. I now turn to that normative critique of a subjective measure of compensation.

At the outset, it is important to understand that my critique extrapolates from the debate over the past several decades in egalitarian political philosophy about the appropriate metric of distributive justice in various domains of public policy.[97] The premise of this debate is that something must be distributed in accordance with need, desert, merit, or some other principle for society to be distributively just.[98] The issue in the debate about the appropriate metric of distributive justice is what exactly must be distributed — primary goods (in John Rawls's formulation), resources (according to Ronald Dworkin), or something else. One idea that philosophers have considered, and in many cases rejected, is that the metric for distributive justice should be preference satisfaction. If preference satisfaction were the metric, societies would allocate things to enable individuals to have an equal ability to satisfy their own individual preferences.[99]

Some of the criticisms of individual preference satisfaction as a metric for distributive justice also apply to the idea of subjective compensation for takings.[100] At their core, both the idea of equalizing

[97] *See* Thomas M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 655, 655 (1975) [hereinafter Scanlon, *Preference and Urgency*] ("In applying principles of distributive justice, . . . we must appeal to some standard . . . as a ground for measuring the equality or inequality of shares . . . ."); Thomas M. Scanlon, Jr., The Tanner Lecture on Human Values at the University of Michigan: The Status of Well-Being 95 (Oct. 25, 1996), *available at* http://www.tannerlectures.utah.edu/lectures/Scanlon98.pdf (referring to "various standards that have been proposed as measures of distributive justice shares for purposes of assessing claims of justice, such as John Rawls's primary social goods (income and wealth, powers and liberties, and the social bases of self-respect) and Amartya Sen's capability sets (which include the 'functionings' such as good health, ability to take part in social life, and so on, of which an individual is capable)"); Amartya Sen, The Tanner Lecture on Human Values at Stanford University: Equality of What? 197 (May 22, 1979), *available at* http://www.tannerlectures.utah.edu/lectures/sen80.pdf ("Discussions in moral philosophy have offered us a wide menu in answer to the question: equality of what?"); *see also* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 51-52 (2002) (discussing significance of metric in consequentialist theories and controversy about whether metric should have objective or subjective basis).

[98] John Rawls, *Social Unity and Primary Goods*, *in* UTILITARIANISM AND BEYOND, *supra* note 86, at 159.

[99] Theories suggesting that individual preference satisfaction should be the basis for social policy draw on preference theories of well-being. Preference theories of well-being hold "that a person's well-being is determined by the extent to which her preferences are fulfilled." Lewinsohn-Zamir, *supra* note 86, at 1677.

[100] These criticisms also raise questions about the desirability of using subjective

based on preference satisfaction and the idea of paying takings compensation based on subjective assessments of losses use individual preferences as the basis of public policy. I extend the criticisms of doing distributive justice by equalizing preference satisfaction to the idea of doing corrective justice in takings by compensating takees based on their subjective perceptions of their losses. The import of my critique is that some of the reasons for not attempting to make society more distributively just by equalizing individuals' ability to satisfy their preferences also militate against basing takings compensation on the amount required to leave individuals subjectively indifferent to takings.

One objection to equalizing the ability of individuals to satisfy their preferences is that some individual preferences are objectionable. For example, egalitarian political philosophers often point out that some individual preferences are racist.[101] Consider how the objectionable-preference critique translates into a criticism of paying takees enough to make them subjectively indifferent to takings. To begin with, empirical evidence establishes that some whites prefer white neighborhoods and will pay a premium for homes in white neighborhoods.[102] Imagine a white takee who highly values his home at least partly because it is in a homogeneously white neighborhood. Paying this takee and others with similar racist preferences enough to make them subjectively indifferent would entail compensating these takees for objectionable racist preferences.[103]

measures of compensation in other areas, such as torts. But I only discuss the criticisms' implications for takings compensation.

[101] On the problem of objectionable preferences for theories advocating equalizing preference satisfaction, see, for example, DWORKIN, *supra* note 15, at 22-23 (discussing problems such as gains in welfare attributable to racial prejudice); G.A. Cohen, *Equality of What? On Welfare, Goods, and Capabilities*, *in* THE QUALITY OF LIFE 9, 11 (Martha Nussbaum & Amartya Sen eds., 1993) (discussing "offensive tastes" critique of equality of welfare).

[102] *See, e.g.*, Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 26 J. URB. AFF. 379, 390 (2004) (summarizing evidence of premium for white neighborhoods); A. Mechele Dickerson, *Caught in the Trap: Pricing Racial Housing Preferences*, 103 MICH. L. REV. 1273, 1284, 1285-86 (2005) (reviewing ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS & FATHERS ARE GOING BROKE (WITH SURPRISING SOLUTIONS THAT WILL CHANGE OUR CHILDREN'S FUTURES) (2004)) (referring to premium paid by "[m]iddle-class parents who flee racially integrated neighborhoods").

[103] *Cf.* Pryor, *supra* note 39, at 145 (criticizing insurance theory of tort compensation on basis that it would reinforce discrimination against disabled persons by basing compensation on individual preferences that reflect societal discrimination against disabled people).

Notably, under Bell and Parchomovsky's self-assessment mechanism, a takee living in a racially homogeneous neighborhood could include the value that she attaches to living in this neighborhood in her subjective valuation of her property. Moreover, there is nothing in their self-assessment mechanism to launder this objectionable preference from the compensation paid. Similarly, under proposals to compensate individuals for their subjective losses from takings through proxies such as bonus payments or multiples of fair market value, we could compensate individuals for distasteful preferences for racially homogeneous housing. Imagine a takee who qualifies for the payment of 125% of market value under a bonus payment scheme because she lived in her house for many years. The legal system would be rewarding racist preferences in paying the extra 25% if she remained in her house because her neighborhood stayed racially homogeneous while other neighborhoods integrated. Troublingly, the legal system is probably already compensating takees for objectionable preferences by paying fair market value. Fair market value incorporates objectionable preferences when, for example, many individuals are willing to pay more to live in racially homogenous neighborhoods rather than racially heterogeneous neighborhoods. Because there is evidence that some whites pay premiums to live in white neighborhoods, paying fair market value for homes in white neighborhoods presumably compensates individuals for objectionable racial preferences. Conversely, fair market value compensation for homes in African-American neighborhoods presumably reflects the discounts applied to homes in these areas because of racism.[104]

A second standard objection to equalizing preference satisfaction is that it may be considerably more expensive to satisfy the preferences of some people than the preferences of others. The argument is that there is no justification for paying people with expensive tastes the amounts necessary to satisfy those tastes, especially if preferences are chosen. Why, for instance, should individuals who choose to prefer elaborate swimming pools and garden statues receive the large amount of funds required to satisfy these costly preferences?[105]

---

[104] There is an analogous problem in tort compensation. Compensating women and minorities for lost income using employment market measures of income means that their compensation reflects wage discrimination that women and minorities face in the workplace. Jennifer Arlen, *Compensation Systems and Efficient Deterrence*, 52 MD. L. REV. 1093, 1106 n.50 (1993).

[105] On the problem of expensive tastes for theories advocating equalizing preference satisfaction, see, for example, DWORKIN, *supra* note 15, at 15, 48-59; Cohen, *supra* note 101, at 12-13.

The expensive-tastes objection to equalizing preference satisfaction may seem difficult at first to translate into a criticism of paying takees enough to make them subjectively indifferent to takings. In particular, takees with expensive tastes might argue that they should be compensated for these tastes when their properties are expropriated because they invested their own funds in adapting their properties to reflect their tastes. In other words, takees might stress that they are not seeking public funds to satisfy tastes they have not realized. Rather they seek compensation for investments they made to realize their tastes.

There remains, however, a problem with compensating takees for expensive tastes. In particular, compensating for expensive tastes may create a moral hazard. If we compensate people for their expensive tastes, we may subsidize the choice of such tastes.[106]

Bell and Parchomovsky's proposal clearly could subsidize expensive tastes.[107] Under their proposal, takees would receive an amount keyed to their subjective valuations of their properties. The takees would be fully reimbursed for expensive investments in their properties (provided they were willing to pay property taxes on their subjective valuations and the penalty if they sold their properties for less). Notably, however, even the current practice of paying fair market value may subsidize expensive tastes. If enough individuals have the same tastes, market prices will be affected. Consequently, paying

[106] *See generally* Blume & Rubinfeld, *supra* note 28, at 618 n.144 ("[I]t is important that the measure [of compensation] be one that cannot be directly affected by the behavior of the individual investors, since any compensation measure which can be affected by private behavior will create the possibility of inefficiency due to moral hazard."). Blume and Rubinfeld suggest that the measure of compensation for takings should be "the market value that the land would have had if the behavior of all of the parties had not been affected by the certainty of compensation" because paying full market value could induce overinvestment in property. *Id.* at 622-23. *See also* Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead*, 64 OHIO L.J. 451, 493-95 & 494 n.224 (2003) (arguing that state-provided takings compensation may encourage overinvestment in property and indicating that "[n]umerous cases have come before courts where aggrieved landowners sought the full value of their land *with* all new improvements"). *But see* Blume & Rubinfeld, supra note 28, at 618 n.145 (suggesting that "individual homeowners" are unlikely to be induced to overinvest in their properties because their "primary purpose in buying a home is consumption, rather than investment"); *see also* SHAVELL, *supra* note 84, at 131-33 (arguing that takings compensation may encourage excessive investments in property but also suggesting that overinvestment due to takings compensation likely is rare because most individuals face only small risk of having property taken).

[107] Bell & Parchomovsky, *supra* note 10, at 890-95.

takees market value allows individuals to fulfill expensive tastes with no risk that they will suffer for their tastes if their properties are taken.

A third critique of equalizing preference satisfaction emphasizes that preferences are adaptive. The adaptive-preference critique starts from the premise that individual preferences are not innate but rather the product of individual circumstances. The point of the critique is that equalizing the ability to satisfy preferences when preferences are the product of troubling circumstances, such as societal inequalities, reinforces the undesirable circumstances. As Amartya Sen explains, "[t]he insecure sharecropper, the exploited landless labourer, the overworked domestic servant, the subordinate housewife, may all come to terms with their respective predicaments in such a way that grievance and discontent are submerged in cheerful endurance by the necessity of uneventful survival."[108] As a result, paying the sharecropper, the laborer, the servant, and the housewife only enough to satisfy their preferences may condemn them to their stations in life. Similarly, paying the large landowner, the master, and the husband enough funds to satisfy their more refined tastes allows them to retain their privileges.

The adaptive-preferences critique of equalizing preference satisfaction applies to the theory of subjective compensation in the following way. Assume, as the adaptive-preferences critique does, that takees' circumstances influence takees' subjective assessments of how much they need to be made whole following a taking. Consider, for example, the possibility that individual incomes may affect people's subjective valuations of their properties. This is not far-fetched: there is evidence that higher-income individuals place a higher value on their lives than lower-income individuals.[109] The disparity in valuations could be due to higher-income individuals being happier than lower-income earners, higher-income individuals having more information about valuation, or other factors. Subjective valuations of property might be affected by income in the same way, resulting in

---

[108] AMARTYA SEN, *Essay 20: Goods and People*, *in* RESOURCES, VALUES AND DEVELOPMENT 509, 512 (1984).

[109] *See* Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 962-63 (1999) ("Economists have estimated that the elasticity of the value of life with respect to earnings (the percentage change in the value of life for a one percent change in earnings) is approximately one. Thus, for example, a 10% increase in income would lead to a 10% increase in the value of life."); *see also* Richard Abel, *General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (but Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253, 300 (2006) (emphasizing, in arguing against pain and suffering damages in tort, that willingness to pay "varies with income and wealth").

higher-income individuals valuing identical property more highly than lower-income earners. For instance, a higher-income takee might value a property more because he is better informed than a lower-income takee about its true value to the government taker, perhaps because the higher-income earner is more politically connected. A higher-income takee also might value the property more than a lower-income takee because the higher-income takee derives greater enjoyment from life in general. A lower-income earner, struggling to meet her daily needs, may derive less satisfaction from life, including from her home.[110] Regardless of the reason, the upshot is that to make takees subjectively indifferent to takings, we might be required to pay takees of different income levels different amounts of takings compensation for the same property, for reasons unrelated to the property. Thus, in compensating takees based on subjective valuations of their losses, we could end up reproducing existing inequalities within society to the detriment of those less well-off.[111]

One possible solution to the problems of objectionable, expensive, or adaptive preferences is to compensate individuals for all of their losses from a taking, except for losses stemming from these kinds of preferences.[112] However, laundering preferences in this way comes at

[110] Lehavi and Licht suggest a third reason why lower-income earners might subjectively value their property less than higher-income earners: "less well-off landowners, whose land is their sole material asset" may place lower values on their properties because these landowners are risk averse and fear the consequences of higher valuations. Lehavi & Licht, *Eminent Domain, Inc.*, *supra* note 10, at 25. Imagine, as Bell and Parchomovsky propose, that a landowner whose property is not taken subsequently must pay property taxes based on his or her subjective valuation. Lower-income landowners may be more scared by this potential consequence of stating a high valuation than higher-income landowners who could more easily afford the higher taxes.

[111] While I focus on the potentially regressive effects of subjective valuation, market value-based compensation also reinforces existing inequalities. Since the rich are likely to own more desirable properties in better locations than the poor, the rich likely receive higher compensation per physical unit of property taken than the poor under market valuation. Indeed, the very idea of paying compensation likely benefits the rich over the poor, because the poor are less likely to be property owners in the first place, given their limited incomes and wealth.

[112] *See* BROOME, *supra* note 86, at 4-5 (considering but rejecting ideal preference satisfaction theory of the good under which preferences that count are those of well-informed, rational individuals); LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 410-13, 418-31 (2002) (arguing against crediting uninformed preferences but opposing outright exclusion of objectionable preferences); Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L.J. 173, 179-96 (2000) (arguing for laundering external preferences); Harsanyi, *supra* note 86, at 56 (arguing for exclusion of certain preferences in determining social

a price: it effectively objectifies the measure of compensation by reducing the extent to which compensation represents the takee's subjective valuation of her losses.[113]

IV. AN ALTERNATIVE OBJECTIVE MEASURE OF COMPENSATION

Thus far I have emphasized the role of compensation in making takees whole.[114] In addition, I have argued that existing compensation law and many current reform proposals assume that making a takee whole ideally means leaving the takee subjectively indifferent to a taking.[115] Furthermore, I have underscored the normative problems with basing takings compensation on individuals' subjective assessments of their losses.[116] This Part outlines the basic elements of an alternative objective approach to takings compensation. I then discuss the implications of an objective measure and offer a hypothetical to make them more concrete.

In setting out an objective alternative, I am not arguing for a particular level of compensation — either the status quo, or something more or less. The reigning fair market value standard probably yields too little compensation in some circumstances under any plausible subjective or objective measure of compensation.[117] The following discussion is directed at the prevailing view that making somebody whole means rendering her subjectively indifferent to her losses. Of course, I acknowledge that an objective measure also has drawbacks. Inevitably, the choice of a measure of compensation for takings, and more broadly for any kind of wrong, involves trade-offs. In making those trade-offs, however, it is helpful to have in view a broad array of

utility, including preferences based on erroneous facts and "antisocial preferences, such as sadism, envy, resentment and malice").

[113] *See* DWORKIN, *supra* note 15, at 25, 27, 59 (discussing consequences of excluding certain individual preferences for theories advocating equalizing welfare).

[114] *See supra* notes 38-39 and accompanying text.

[115] *See supra* notes 48, 60-61, 71 and accompanying text.

[116] *See supra* notes 101-11 and accompanying text.

[117] It is striking that takers as well as takees are concerned about under-compensation of takees under current rules. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 14-17 (referring to concerns by some federal, state, and local officials about inadequate compensation for businesses because of limits under federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970); *id.* at 35-37 (discussing concerns of "property rights groups and owners" about inadequate compensation for eminent domain).

options. As suggested earlier, that is something that has been lacking in the current debate on takings compensation.[118]

A. Elements of an Objective Measure of Takings Compensation

The metric for assessing whether a takee has been made whole under a subjective measure is whether she is indifferent to the taking. In contrast, under an objective measure, whether a takee has been made whole is determined by reference to the considered judgments of others about what makes a person whole.[119]

1. Defining the Objective Metric

One challenge with implementing an objective measure of takings compensation is coming up with a broadly acceptable conception of what it means to make a person whole.[120] This is an especially difficult task in a liberal democratic society like the United States,

---

[118] *See supra* note 17 and accompanying text.

[119] I take my definition of an objective measure from definitions of objective theories of well-being. *See* Scanlon, *Preference and Urgency*, *supra* note 97, at 658 ("By an *objective criterion* I mean a criterion that provides a basis for appraisal of a person's level of well-being which is independent of that person's tastes and interests, thus allowing for the possibility that such an appraisal could be correct even though it conflicted with the preferences of the individual in question, not only as he believes they are but even as they would be if rendered consistent, corrected for factual errors, etc."); Lewinsohn-Zamir, *supra* note 86, at 1686 ("[A]n objective theory judges people's well-being by an external standard: the extent to which they attain the goods worth having in their lives (and avoid the intrinsically bad things).").

In a series of articles, Lewinsohn-Zamir has argued for approaching issues in property law through a welfarist lens, using an objective, rather than the prevailing subjective, conception of well-being. *See generally* Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326 (2006) [hereinafter Lewinsohn-Zamir, *In Defense of Redistribution*] (defending redistribution through private law); Lewinsohn-Zamir, *supra* note 86 (arguing for objective approach to welfare and property); Daphna Lewinsohn-Zamir, More is Not Always Better than Less — An Exploration in Property Law (unpublished manuscript, on file with author) (arguing, counterintuitively, that more is not always better than less).

For an argument that tort compensation does, and should, embody what I would label an objective measure, see generally Feldman, *supra* note 81. Feldman emphasizes that "[c]ommon-law authorities make no mention of preferences when explaining the function of tort awards." *Id.* at 1582. She suggests that tort awards protect "communally-agreed-upon normative judgments about the impact of a personal injury upon the victim's overall well-being." *Id.* at 1599.

[120] Pryor, *supra* note 39, at 121 n.102 (identifying problems with basing tort compensation on restoring "those functions, [abilities], and activities that are deemed basic to a meaningful quality of life").

where there are many different conceptions of what is important in life and society places a high value on allowing individuals to realize their goals. Indeed, the difficulty of coming up with a defensible conception is one reason some favor restricting government's role to promoting the satisfaction of individual preferences. As discussed above, defining government's role in this way avoids the need for government to choose among individual preferences or to declare some more valuable than others.[121]

As a starting point, consider two possible bases for an objective measure of takings compensation derived from moral philosophy. The first is rooted in objective list theories of well-being. The second draws on the idea that individuals enjoy quality of life if they have certain desirable capabilities.

Objective list theories of well-being suggest that what is important in life is achieving well-being. However, these theories define well-being not as satisfying one's own preferences, but rather as having a list of goods that are "worth having."[122] Among the goods these theories frequently deem worth having are "autonomy and liberty, understanding, accomplishment, deep and meaningful social relationships and enjoyment."[123] As the inclusion of liberty and autonomy within these lists suggests, objective list theories include the ability to satisfy one's own preferences as contributing to well-being. However, objective list theories do not define well-being entirely as satisfying one's personal preferences.[124] An objective list theory of well-being might yield the following metric for takings compensation: takees should be paid the amount necessary to enable them to enjoy the goods on the list of desirable things, at the same level that they enjoyed these goods before the taking.

A second possible basis for an objective measure of compensation is Sen's capability theory. Sen equates "quality of life" with enjoying capabilities.[125] Sen illustrates what capabilities are through the following example:

> Take a bicycle. It is, of course, a commodity. It has several characteristics, and let us concentrate on one particular

[121] *See supra* text accompanying notes 90-91.

[122] Lewinsohn-Zamir, *supra* note 86, at 1701 ("The objective approach to well-being usually is accompanied by a non-exhaustive 'list' of the goods worth having.").

[123] *Id.* at 1702.

[124] *See id.* at 1710-11.

[125] Martha Nussbaum and Amartya Sen, *Introduction* to THE QUALITY OF LIFE, *supra* note 101, at 1.

> characteristic, viz., transportation. Having a bike gives a person the ability to move about in a certain way that he may not be able to do without the bike. So the transportation characteristic of the bike gives the person the capability of moving in a certain way. That capability may give the person utility or happiness if he seeks such movement or finds it pleasurable. So there is, as it were, a sequence from a commodity (in this case a bike), to characteristics (in this case, transportation), to capability to function (in this case, the ability to move), to utility (in this case, pleasure from moving).[126]

As the example underscores, capabilities are not commodities (the bike is the commodity), utilities (like the pleasure that bike riding may produce), or achievements (like the actual riding of the bike). Rather, capabilities are freedoms — in the example, the capability that the bike owner has is the freedom to choose to ride his bike.[127]

Applying Sen's capability theory, the measure of compensation for takings would be the amount required to ensure that takees enjoy the same capabilities that we as a society deem valuable, before and after the taking.[128] Unfortunately, Sen does not clearly enumerate the capabilities that he believes are valuable. Instead, he prefers to allow different societies to define the capabilities that they value.[129]

---

[126] AMARTYA SEN, *Essay 14: Poor, Relatively Speaking*, *in* RESOURCES, VALUES AND DEVELOPMENT, *supra* note 108, at 325, 334.

[127] Amartya Sen, *Justice: Means versus Freedoms*, 19 PHIL. & PUB. AFF. 111, 117 (1990) (associating "capabilities" with "freedom" and "achievement" with "functionings"); *id.* at 118 ("Capability reflects a person's *freedom* to choose between alternative lives (functioning combinations) . . . .").

[128] I have not come across any proposals to use capability theory as a guide for takings compensation. However, Professor Jedediah Purdy has suggested that Sen's theory is relevant to property law. In particular, Purdy argues that Sen's conception of freedom provides a justification for private property and a metric for evaluating proposals related to property. Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1265, 1297 (2005). In addition, a few scholars have suggested that tort compensation either is, or should be, concerned with restoring something like capabilities. *See* Feldman, *supra* note 81, at 1585-94 (suggesting that making whole tort victim be defined as allowing victim to flourish); *id.* at 1585 n.72 (noting that focus on flourishing is similar to focus on capabilities in Sen's framework); Pryor, *supra* note 39, at 121 n.102 (referring to possibility of approaching torts compensation as something like regime for restoring lost capabilities by compensating for diminished "functions, [abilities], and activities that are deemed basic to a meaningful quality of life").

[129] David A. Crocker, *Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic, Part 2*, *in* WOMEN, CULTURE, AND DEVELOPMENT: A

Helpfully, Professor David Crocker has compiled a list of Sen's "scattered"[130] remarks on desirable capabilities.[131] Among these capabilities, the most relevant for defining the measure of compensation for eminent domain are: "'[b]eing able to have adequate shelter;'"[132] having the "'ability to form goals, commitments, values;'"[133] and "'being able to participate in the community.'"[134] Using capability theory as a guide, we could define the measure of compensation as the amount required to ensure that takees have the same capabilities after a taking as they had before the taking to have adequate shelter; to form goals, commitments, and values; and to participate in the community.

2. Calculating Compensation

Assume we could identify and justify a conception of what it means to make a person whole that could form the basis of an objective measure of takings compensation. The next challenge would be using this conception to calculate the compensation that takees would receive. We might implement an objective measure of takings compensation in any of three ways.[135]

First, we might try to come up with a single standard payment that all takees would receive for the taking of their property. We could

STUDY OF HUMAN CAPABILITIES 153, 170 (Martha C. Nussbaum & Jonathan Glover eds., 1995) ("Sen so far has offered only scattered suggestions and examples of valuable capabilities and functionings . . . ."); Mozaffar Qizilbash, *The Concept of Well-Being*, 14 ECON. & PHIL. 51, 53 (1998) (criticizing Sen's capability theory as open-ended because it does not provide much of list of required capabilities, in effort to be pluralist and "not to give priority to any particular conception of the good life").

[130] Crocker, *supra* note 129, at 170.

[131] *Id.* at 174-76. Crocker's summary of the capabilities that Sen identifies is offered in the context of summarizing Martha Nussbaum's "list of 'Basic Human Functional Capabilities.'" Crocker "map[s] Sen's scattered remarks onto Nussbaum's list." *Id.* at 174.

[132] Crocker, *supra* note 129, at 174 (quoting Martha Nussbaum, *Aristotelian Social Democracy*, *in* LIBERALISM AND THE GOOD 225 (R.B. Douglass et al. eds., 1990) (citing Amartya Sen, *Equality of What?*, *in* TANNER LECTURES ON HUMAN VALUES, VOLUME I 280 (S.M. McMurrin ed., 1980)).

[133] Crocker, *supra* note 129, at 175 (quoting Amartya Sen, *The Moral Standing of Markets*, 2 SOC. PHIL. & POL'Y 1, 218 (1985); AMARTYA SEN, ON ETHICS AND ECONOMICS 41 (1987)).

[134] Crocker, *supra* note 129, at 175 (quoting Sen, *The Moral Standing of Markets*, *supra* note 133, at 199).

[135] These three approaches are versions of the three that Pryor identifies for implementing the insurance theory of tort compensation. Pryor, *supra* note 39, at 121.

base this standard payment on how much on average takees lose from a taking in their ability to enjoy the goods worth having or certain socially valuable capabilities. While cheap to administer, a standard payment likely is a non-starter for many reasons. For instance, it ignores the differences among takings. Standardizing takings compensation in this way would mean that a property owner who loses a small parcel for a utility pole would be paid the same amount as a property owner whose entire farm is expropriated.[136]

A second way that we could implement an objective measure of compensation is through a schedule established by legislation or regulation. There are many precedents for awarding compensation based on schedules. Schedules are often used in no-fault compensation schemes that supplement or replace tort compensation for economic losses.[137] In addition, academics have proposed using schedules to calculate compensation for pain and suffering in tort awards.[138] In property, Professor Robert Ellickson has suggested using schedules to award owners bonuses, on top of fair market value, for the subjective value that owners attach to property. Ellickson proposes that owners receive "[d]ifferent percentages [of fair market value] based on factors such as the longevity of occupancy."[139]

Using a schedule to award takings compensation based on an objective measure would require categorizing takings based on the extent to which they interfere with takees' enjoyment of the good

[136] However, a standard flat payment might be more palatable if property owners could buy private insurance to cover losses not compensated by the flat payment from the governmental taker. For arguments for privately provided insurance against takings instead of governmental payment of takings compensation, see, for example, SHAVELL, *supra* note 84, at 127-34 (arguing private insurance market could provide takings compensation now provided by government); Calandrillo, *supra* note 106, at 499-521 (advocating privately provided insurance against physical takings).

[137] *See* FRANKLIN ET AL., *supra* note 42, at 816-83 (discussing no-fault compensation alternatives to tort for personal injury).

[138] *See, e.g.*, LAYCOCK, *supra* note 42, at 180 (discussing academic proposals for schedules for pain and suffering); Geistfeld, *supra* note 84, at 791-93 (discussing and critiquing use of schedules to calculate pain and suffering awards).

[139] Ellickson, *supra* note 60, at 736. Professor Ellickson made his proposal in discussing damages for nuisance. *Id.* at 736-37. Others have emphasized that the proposal also could apply to takings compensation. *See, e.g.*, DUKEMINIER ET AL., *supra* note 88, at 957 ("Professor Ellickson has suggested a system of bonuses to compensate for losses of personal value."). Notably, Professor Frank Michelman's landmark 1967 article on takings endorsed legislative approaches to takings compensation. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165, 1256 (1967).

life.[140] In addition, it would be necessary to determine how much compensation takees should receive for the different categories of takings.

Categorizing takings would not be a simple matter, although categorizations already have been proposed in other contexts.[141] Many factors potentially affect the extent to which a taking interferes with a takee's ability to enjoy valuable goods such as autonomy and community, or any of the capabilities to which Sen refers. Potentially relevant factors include: factors related to the property being taken, such as the cost of replacing it; whether the takee has a diversified portfolio of real and personal property holdings that mitigate the loss of a single real property; and personal characteristics of the takee, such as his or her social support network.

Defining a single or even a range of compensatory awards for different types of takings also would be complex. No-fault schedules usually are developed based on past awards in tort or settlements for similar injuries. Because there is no experience calculating takings compensation based on an objective measure, there are no precedents to guide the development of a schedule of monetary awards or ranges of awards applying an objective measure. Moreover, even if a schedule could be developed, the benefits of using a schedule could be dwarfed by the loss of the flexibility to tailor compensation to do "justice in the individual case."[142]

In light of the problems with scheduling objective takings awards, the best method of implementing an objective measure of takings compensation might be the case-by-case method now used to calculate takings compensation. Takings involve an entire parcel or a portion of it. When the entire parcel is taken, current law requires that the taker pay the takee at least the parcel's fair market value.[143] In the case of a

[140] *See* LAYCOCK, *supra* note 42, at 180 (describing "nine-level scale of severity of injury" developed by academic proponents of scheduling pain and suffering awards in tort).

[141] For example, Krier and Serkin suggest a very rough categorization of takings based on the extent to which they benefit the public or represent naked interest group transfers. They recommend that the compensation formula vary with the taking's purpose. Krier & Serkin, *supra* note 10, at 867.

[142] Geistfeld, *supra* note 84, at 792 (using this argument against scheduling tort awards for pain and suffering, referring to negative experience with federal sentencing guidelines). Again, though, the unfairness of compensating based on a damage schedule might be mitigated if individuals could purchase private takings insurance. *See supra* note 136.

[143] *See supra* Part II.A (describing existing legal rules concerning calculation of takings compensation).

partial taking, the taker is required to pay "the difference" between "the fair market value of what the owner has before the taking [and] . . . what the owner has after the taking."[144] Implementing an objective measure of compensation on an individualized basis would entail a similar exercise as awarding compensation for a partial taking under current law.

In particular, implementing an objective measure on a case-by-case basis would entail: (1) individually assessing the extent to which each takee enjoyed whatever things the objective measure deemed valuable before and after the taking, and (2) paying each takee an amount that would allow him or her to enjoy the valuable things to the same degree after the taking.

It would be challenging to determine the extent to which takees enjoyed the things agreed to be valuable both before and after the taking, and to translate any post-taking deficit into a monetary payment. But it is not clear that the challenge would be greater than other challenges that the judicial system confronts, albeit controversially, such as awarding damages for pain and suffering in tort.[145]

B. Implications of an Objective Measure

Compensating takees case-by-case using an objective measure of compensation would represent a significant departure from the existing approach to takings compensation and from the thrust of the reform proposals currently being debated.[146]

---

[144] Merrill, *supra* note 46, at 122 n.46 (noting that "[s]ome courts do not proceed this way").

[145] Professor Burney previously has suggested that takings compensation awards should parallel pain and suffering awards in tort. She argues that fair market value should be replaced as the default rule for takings compensation with a fairness standard. She suggests that the discretion that fact-finders would enjoy under this fairness standard could be cabined through jury instructions and statutes, explaining that "[i]f juries are permitted to decide questions as nebulous as mental anguish and pain and suffering, they should be allowed to determine a 'fair' condemnation award." Burney, *supra* note 10, at 799, 821. In my view, Burney's proposal, while provocative, does not come to grips with the controversy about jury awards for pain and suffering, perhaps because she was writing before this controversy became evident to many legal scholars. *See* Geistfeld, *supra* note 84, at 781-89 (describing system for determining compensation for pain and suffering in personal injury actions and problems with it). Part IV.B discusses the uncertainty, with potentially detrimental consequences, that an objective measure might generate.

[146] *See supra* Part II.

As explained above, the implementation of an objective measure would need to start with the development of a broadly acceptable conception of the good life.[147] This would be challenging in a liberal society that values giving people the opportunity to pursue their own preferences. To reach agreement on a defensible conception of the elements of the good life, it might be tempting to define the elements very generally, much as objective list theorists and Sen have done. But an objective measure based on a very general conception of the good life could generate considerable uncertainty with negative consequences.

For example, adjudicators might have difficulty applying an objective measure of compensation based on a very general conception of the good life because it would offer little interpretive guidance. Moreover, governments and takees might have a hard time negotiating takings compensation in the shadow of a compensation measure rooted in a very general conception of the good life. Such a measure would leave governments and takees guessing about the compensation that a court might award if their negotiations fail. As a result, litigation about compensation might increase. Over time, however, adjudicators, governments, and takees might become more comfortable with a compensation measure rooted in a very general conception of the good life. As adjudicators gained experience applying such a measure, their decisions presumably would provide guidance to other adjudicators and to governments and takees attempting to negotiate takings compensation.[148]

An objective measure also would represent a major departure because it would alter the unit of analysis in the compensation inquiry. Under the fair market value standard, the unit of analysis is the property since it is the property's fair market value that the takee is guaranteed. Under an objective measure, the unit of analysis would be the takee, at least if that measure was defined along the lines sketched in Part IV.A.1.

Imagine, for example, using Sen's capability theory as the starting point for an objective measure of takings compensation. The compensation would be the amount required to ensure that, before and after the taking, takees enjoyed the same freedoms to access adequate shelter; to form goals, commitments, and values; and to

[147] *See supra* note 120 and accompanying text.

[148] An objective measure based on a very general conception of the good life would be a standard rather than a rule and thus have the attendant costs and benefits of standards. *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (discussing benefits and costs of rules and standards).

participate in the community. The compensation that individuals received would reflect their personal characteristics and, only incidentally, their property's characteristics.[149]

Wealthy owners losing only one of their many properties through eminent domain might receive little or no compensation under a formula aiming to offset takings-induced reductions in capabilities. That is because taking a single piece of land from a wealthy person with a diversified portfolio of assets likely would have little or no impact on the person's ability to have adequate shelter; abilities to form goals, commitments or values; or ability to participate in the community. In turn, efforts to base compensation on the person rather than the property might be challenged under existing Supreme Court takings jurisprudence. The challengers could point to statements in the case law that takings compensation "is for the property," not the person.[150]

Shifting to an objective measure of compensation likely would affect not only the calculation of compensation ex post, but also government decisions ex ante about whether to take property. As mentioned above, it is difficult to assess whether government decisions about taking property are affected by the requirement to pay compensation, and if so whether the compensation requirement encourages more or less efficient decisions about whether to take property.[151] However, it

[149] Sen recognizes that allowing individuals to enjoy capabilities may require transferring different "commodities, income and resources" to different individuals, depending on factors such as where they live, their gender, their age, and so on. SEN, *supra* note 126, at 326.

[150] Consider, for instance, the following passage from Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1892):

> [T]his just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. 'No person shall be held to answer for a capital, or otherwise infamous crime,' etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the 'just compensation' is to be a full equivalent for the property taken.

On the other hand, the Court has stated that "[i]n giving content to the just compensation requirement of the Fifth Amendment, *this Court has sought to put the owner of condemned property* 'in as good a position pecuniarily as if his property had not been taken.'" United States v. 564.54 Acres of Land, 441 U.S. 506, 510 (emphasis added) (quoting Olson v. United States, 292 U.S. 246, 255 (1934)). The italicized portion of this statement suggests that compensation aims to address a harm done to the owner and leaves room for considering owners' characteristics in calculating takings compensation.

[151] *See supra* notes 23-29 and accompanying text.

seems reasonable to assume that changing the measure of compensation would have some implications for government takings decisions.

Imagine, as I suggested above, that an objective measure resulted in wealthier property owners receiving no or little compensation for takings. In response, governments might be more inclined to take the properties of wealthier individuals than they are now when market value is the basis for calculating compensation. However, any increase in governments' propensity to take from the wealthy as opposed to the poor likely would be mitigated at least to some extent by the probability that wealthier property owners are better positioned to defend their interests in the political process than poorer property owners.

Importantly, shifting to an objective measure of compensation might also have ex ante effects on individual decision making. For example, if wealthier individuals received little or no compensation under an objective measure, they might be less inclined to invest in properties they consider at risk of expropriation. Alternatively, wealthier individuals might respond to an objective measure by seeking private insurance against takings. That might spur the emergence of a market for private insurance against takings. The development of private takings insurance could be beneficial — private insurance may be a preferable means of compensating takees.[152]

While recognizing the changes that an objective measure would bring, it is also important to emphasize its continuity with current compensation practices and many reform proposals. By definition, an objective measure would mean that the starting point for assessing takings compensation would no longer be leaving takees subjectively indifferent to takings. As discussed above, abstracting away from individual preferences,[153] we would define a concept of the good life against which to measure a takee's situation before and after the taking. Then we would calculate a compensation award based on the post-takings deficit in quality of life attributable to the taking. As a result, there would be much less consideration of individuals' objectionable, expensive, or adaptive preferences in the determination of takings compensation.

---

[152] SHAVELL, *supra* note 84, at 127-34 (discussing private insurance against takings); Calandrillo, *supra* note 106, at 488-521 (same).

[153] *See* Sunstein, *supra* note 87, at 1146 n.63 (describing John Rawls's *A Theory of Justice* "as an effort to abstract from current preferences in order to see what preferences would emerge from a well-ordered society").

Individual preferences, however, would still be relevant in an attenuated way in the calculation of the dollar amount of the takings award. For example, in calculating the amount required to ensure that a takee continued to have access to adequate shelter, it likely would be necessary to take into account the market value of housing, which, as discussed before, reflects an aggregation of individual preferences.[154] The result would be similar to the current situation in personal injury compensation in tort where market measures are considered in valuing economic losses such as lost income and medical expenses, but not usually in valuing non-economic losses such as pain and suffering.[155]

A second way in which compensation under an objective measure would resemble compensation under a subjective measure is that compensation would remain focused on making the takee whole. Shifting to an objective measure of compensation would not transform takings compensation into a redistributive program aspiring to achieve a more equal distribution of things such as autonomy, liberty, community, capabilities, or resources. As under the prevailing approach to takings, we would still be engaged in a local exercise to correct an injustice done to a specific individual.

While I have used ideas from egalitarian political philosophy in critiquing the prevailing subjective ideal and advocating an objective measure, I have not suggested that we add distributive justice to the already onerous task of compensating takees. As others have emphasized, takings compensation is ill-suited to the promotion of distributive justice for several reasons. One is that takings are not typically targeted in a way that allows takings compensation to be used to systematically redistribute resources.[156]

---

[154] *See supra* note 50 and accompanying text.

[155] I say market measures do not *usually* influence pain and suffering awards because market measures sometimes influence tort awards for pain and suffering when these awards are calculated as a percentage of economic loss awards or capped based on economic losses.

[156] *See* Lewinsohn-Zamir, *In Defense of Redistribution*, *supra* note 119, at 391-92 (arguing against pursuing redistribution through takings compensation). Even Dean Hanoch Dagan, who favors considering the claimant's economic and political power in determining whether a regulation is a taking, recognizes the limited scope that takings law offers for promoting equality. Dagan, *supra* note 30, at 779, 802.

However, it is worth noting that many large-scale takings in the twentieth century disproportionately harmed minority racial and ethnic communities and less affluent persons. Kelo v. City of New London, 545 U.S. 469, 521-22 (2005) (Thomas, J., dissenting); Brief for NAACP et al. as Amici Curiae Supporting Petitioners at 7-8, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108).

Consider the following hypothetical to illustrate the ways in which relying on an objective measure would depart from, yet be continuous with, the prevailing approach to takings compensation. Imagine an elderly widow of modest means living alone in a home she inherited from her parents when they passed away several decades ago. Reflecting the fact that she has lived in the same home for a long time, the widow has a rich social network in her neighborhood, including friends, a doctor who makes house calls, and a grocery store and pharmacy that deliver. The local government announces one day that it will be taking her home to extend a street as part of a construction project the government is financing entirely by itself. The widow is upset. Under current law in most jurisdictions, she is entitled to fair market value. It is possible, though, that the local government might pay her more in an attempt to persuade her to move voluntarily and to avoid the costs of litigating the fair market value of her property.

Imagine instead that the background legal rule was Sen-inspired and required compensation that would allow the widow to enjoy the same valuable freedoms that she enjoyed before and after the taking. These freedoms could include the freedoms to access adequate shelter; to form goals, commitments, and values; and to participate in her community. Depending on how it is interpreted, the Sen-inspired measure might allow her to collect more than she would receive under a fair market value standard, because the award would not be intended solely to allow her to buy a new home at the same price as her existing property. She also might be awarded more than she would receive under a replacement value standard, once again because the award would be geared not just to allowing her to replicate the size and condition of her home but also the community that she enjoys. It is important to note, however, that the award would not radically transform the distribution of resources in the widow's community, by equalizing her holdings with those of her neighbors for example. The widow would receive only enough compensation to allow her to enjoy the same freedoms that she enjoyed before the taking to access adequate shelter; to form goals, commitments, and values; and to participate in a community.

CONCLUSION

I conclude with a story. At the suggestion of one of my colleagues, I recently watched the Australian movie *The Castle*.[157] It is a comedy

[157] THE CASTLE (Working Dog Productions 1997).

about a working class family whose home is right next to Melbourne airport. One day the airport decides to expropriate the family's home (and those of three neighbors) for an airport expansion. The father decides to fight the expropriations. His home, which he calls "his castle," is too dear to him to give up. He and his wife have raised four kids and four dogs in it, and the pool room houses his most precious possessions. Throughout the film the father shows no interest in the compensation the airport proposes to pay him for taking his home. At one point, he even rejects its offer of an extra AU$25,000 to keep him from taking his case to federal court.

The Castle gives us a glimpse of what drives some real-life homeowners, like Susette Kelo and Wilhelmina Dery in New London, Connecticut, to resist expropriations. As in *The Castle*, the property owners in *Kelo* were offered more than the fair market value of their properties.[158] But for them, compensation was not the issue. Their goal was to keep the homes that meant a great deal to them. Indeed, the petitioners' brief in *Kelo* asserted that they did "not want money or damages. They only [sought] to stop the use of eminent domain so that they [could] hold on to their most sacred and important of possessions: their homes."[159]

While there is a mass of scholarship about takings, relatively little of it is about how much takers should pay when they take property. As in both *The Castle* and *Kelo*, compensation generally has been at best a matter of secondary concern in legal scholarship about takings, at least until recently.[160] Moreover, when scholars have addressed the compensation question, they generally have assumed almost unthinkingly that the ideal measure of compensation would leave takees subjectively indifferent to takings.

In this Article I have argued that a subjective measure has drawbacks, and suggested that we consider an objective measure of compensation for takings, at least as a thought experiment. I recommend *The Castle* to those who continue to favor a subjective measure. Its story of one family's fight for its home offers an entirely different argument than the ones that I have developed for an objective measure: the futility of even trying to make takees who want

[158] Brief of Respondents at 8, *Kelo*, 545 U.S. 469 (No. 04-108), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs_04-05/04-108Resp.pdf.

[159] Brief of Petitioners at 2-3, *Kelo*, 545 U.S. 469 (No. 04-108), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs_04-05/04-108Pet.pdf.

[160] *See supra* note 10.

to remain in their homes subjectively indifferent to their expropriation.