"ALL TEMPERATE AND CIVILIZED GOVERNMENTS"; A BRIEF HISTORY OF JUST COMPENSATION IN THE NINETEENTH CENTURY

JAMES W. ELY JR.*

In 1816, Chancellor James Kent of New York, in the landmark case of *Gardner v. Trustees of Village of Newburgh*, insisted that to sustain the exercise of the power of eminent domain "a fair compensation must, in all cases, be previously made to the individuals affected." This limitation on legislative authority, the eminent jurist explained, "is adopted by all temperate and civilized governments from a deep and universal sense of its justice."[1] Hence, compensation was required for diversion of a water stream from the claimant's land, although at that date the New York Constitution contained no such express mandate. As we shall see, other courts in the nineteenth century echoed Kent's views. Taking Kent's confident assertion as a starting point, these remarks explore the origins of the just compensation norm, the rationale behind the compensation requirement, and early attempts to define the contours of such compensation.[2]

I. SOURCES OF THE COMPENSATION PRINCIPLE

The compensation norm can be traced to several sources. Perhaps foremost is the English common law tradition. Chapter 28 of the 1215 Magna Carta provided: "No constable or other of [o]ur bailiffs shall take corn or other chattels of any man without immediate payment,

---

* Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, Vanderbilt University. This Article is an expanded version of remarks presented at the Seventeenth Annual Brigham-Kanner Property Rights Conference at William & Mary Law School on October 2, 2020. I wish to acknowledge the excellent research assistance of Katie Hanschke and Meredith Ashley Capps of the Massey Law Library of Vanderbilt University.

1. Gardner v. Trs. of the Vill. of Newburgh, 2 Johns. Ch. 162, 166 (N.Y. 1816). *See also* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 275, 339 (1827) ("A provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent; and this principle in American constitutional jurisprudence is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law.").

2. For my earlier examination of these issues, see James W. Ely Jr., *The Historical Context of Just Compensation,* 30 THE PRACTICAL REAL ESTATE LAWYER 9–19 (2014).

unless the seller voluntarily consents to postponement of payment."[3] This appears to be an affirmation of a settled practice. Starting in the sixteenth century, Parliament authorized the acquisition of property for fortifications, roads, bridges, and river improvements. These acts regularly provided for a compensation scheme.[4] In his influential *Commentaries on the Laws of England* (1765–1769), William Blackstone treated compensation as an established principle of the common law. Acknowledging that Parliament could acquire property for "the public good," Blackstone famously observed: "But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained."[5]

Although the experience in colonial America was not always consistent, especially with respect to roadways, the evidence demonstrates the broad acceptance of the compensation principle. By modern standards, colonial governments made modest use of eminent domain. Lawmakers utilized eminent domain to construct a variety of public buildings, including courthouses, forts, lighthouses, and custom houses, as well as roads.[6] In addition, mill acts empowered the owner of a grist mill to erect a dam across a stream and thereby flood the adjacent lands of riparian owners upon the payment of compensation.[7] Compensation statutes spoke in terms of "true worth,' "due satisfaction," and "just satisfaction."[8] William B. Stoebuck aptly concluded that "compensation was the regular practice in England and America, as far as we can tell, during the whole colonial period."[9]

The Revolutionary Era was a period of constitutional experimentation by the newly independent states. Several states placed the

---

3. Chapter 28 of the 1215 Magna Carta, *reprinted in* A.E. DICK HOWARD, THE ROAD FROM RUNNYMEADE; MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 387 (University of Virginia Press 1968). For a discussion of Magna Carta as a source of protection for property rights, *see id.* at 332–40.

4. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 578–79 (1972).

5. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, A FACSIMILE OF THE FIRST EDITION OF 1765–1769, 135 (Univ. Chi. Press 1979).

6. James W. Ely, Jr., *"That due satisfaction may be made:" the Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 4–13 (1992).

7. 1 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES, 544–48 (3d ed. 1906).

8. Ely, *supra* note 6, at 6–12.

9. Stoebuck, *supra* note 4, at 583.

common law principle of compensation in their constitutions. The Massachusetts Constitution of 1780 mandated that "whenever the public exigencies require that the property of any individual should be appropriated to public use, he shall receive a reasonable compensation therefor."[10] Congress, under the Articles of Confederation, followed suit. The Northwest Ordinance of 1787 declared that if a person's property was taken for public use, "full compensation shall be made for the same."[11] The language was clearly a precursor to the Takings Clause of the Fifth Amendment.

Since Kent spoke of "all temperate and civilized governments," however, it is necessary to consider sources beyond the English common law tradition. Writing in 1625, Dutch diplomat and jurist Hugo Grotius was the first to employ the phrase "eminent domain."[12] He insisted that when the state acquires property under the power of eminent domain "the state is bound to make good at public expense the damage to those who lose their property."[13] Later in the seventeenth century, Samuel Pufendorf, a German jurist and natural law theorist, agreed that compensation was necessary.[14] Both were cited by Kent, who helped to cement their views in American law. We will revisit these influential continental authorities at a later point.

Drawing upon these diverse sources, a number of state courts during the antebellum period invoked unwritten fundamental principles to mandate payment of compensation when property was taken for public use even if the state constitution was silent on the matter.[15] The Supreme Court of New Jersey in *Sinnickson v. Johnson* (1838) brushed aside the contention that, absent a provision in the

---

10. MASS. CONST. of 1780, part 1, art. X.

11. An Ordinance for the government of the territory of the United States North West of the river Ohio (July 13, 1787), 32 JOURNALS OF THE CONTINENTAL CONGRESS 334, 340 (1774–1789). The Ordinance was reenacted in 1789 by the first Congress under the Constitution. An Act: To provide for the government of the territory north-west of the river Ohio, ch. 8, 1 Stat. 50 (Aug. 7, 1789). *See* Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L. J. 409, 453–57 (2013).

12. HUGO GROTIUS, ON THE LAW OF WAR AND PEACE (1625) bk. III, at 420 (Stephen E. Neff ed., 2012) (discussing "the right of eminent domain over the property of subjects").

13. *Id.* at 429.

14. SAMUEL PUFENDORF, ON THE LAW OF NATURE AND OF NATIONS 1285–86 (1672) (C.H. Oldfather & W.A. Oldfather trans., 1934).

15. J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 71–81 (1930–1931) (reviewing state court cases that invoked natural law to require payment of compensation when property was taken).

state constitution, the state could take property without compensation. "This power to take private property reaches back of all constitutional provisions," the court declared, "and it seems to have been considered a settled principle of universal law, that the right to compensation, is an incident to the exercise of that power: that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle."[16] It added that compensation "is operative as a principle of universal law; and the legislature of this State, can no more take private property for public use, without just compensation, than if this restraining principle were incorporated into, and made part of its State Constitution."[17]

Indeed, a leading commentator maintained that the Takings Clause of the Fifth Amendment was simply "an affirmation of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law."[18]

In the same vein, the Supreme Court of Georgia affirmed the compensation norm notwithstanding its absence in the state constitution. The court determined that the Takings Clause of the Fifth Amendment did

> not create or declare any new principle of restriction, either upon the legislation of the National or State governments, but simply recognized the existence of a great common law principle, founded in natural justice, especially applicable to all republican governments, and which derived no additional force as a principle, from being incorporated into the Constitution of the United States.[19]

It viewed the Fifth Amendment as merely declaratory "of a great constitutional principle of universal application."[20] Other state courts

16. Sinnickson v. Johnson, 17 N.J.L. 129, 145 (1839).

17. *Id.* at 146.

18. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 661 (1833).

19. Young v. McKenzie, 3 Ga. 31, 44 (1847).

20. *Id.* at 45. *See also* Parham v. Justs. of the Inferior Ct. of Decatur Cnty., 9 Ga. 341, 349–51 (1851) (treating compensation requirement as a long-established principle of common law binding on lawmakers absent a state constitutional provision on compensation). *See generally* Jason Mazzone, *The Bill of Rights in the Early State Courts,* 92 MINN. L. REV 1,

followed suit, treating the compensation requirement as a fundamental principle of universal application.[21] In *Pumpelly v. Green Bay Company* (1871), the U.S. Supreme Court joined the chorus, recognizing that the compensation limitation on the exercise of eminent domain was an essential element of the common law, even before it was incorporated into the Bill of Rights.[22]

II. REASONS FOR COMPENSATION REQUIREMENT

Although the compensation principle was seemingly settled before being expressly adopted in the written Bill of Rights, it remains to consider the rationale for mandating such compensation. Put bluntly, why should the state be expected to pay anything when it acquires private property? Indeed, the writings of Thomas Hobbes[23] and Jean-Jacques Rousseau[24] suggest that private property rights are subordinate to the needs of the state. Under this approach, the will of the community must prevail over claims of private rights in property. Common law sources give almost no attention to why compensation was necessary. John Locke, for example, did not squarely address the compensation issue, but declared: "The great and chief end therefore

37–43 (2007) (discussing state court decisions that viewed the just compensation requirement of the Fifth Amendment as stating a fundamental principle applicable to the states).

21. *Ex parte* Martin, 13 Ark., 198, 206 (1853) ("The duty of making compensation may be regarded as a law of natural justice, which has its sanction in every man's sense of right, and is recognized in the most arbitrary governments."); Stuyvesant v. Mayor of New York, 7 Cow. 588, 606 (N.Y. Sup. Ct. 1827) (acknowledging "a fundamental principle of civilized society, that private property shall not be taken even for public use without just compensation"). The North Carolina Constitution does not contain an express provision requiring compensation, but courts in that state have long taken the position that the legislature cannot take property without payment. Raleigh & Gaston Rail Road Co. v. Davis, 19 N.C. 451, 459–61 (1837); Station v. Norfolk & Carolina R.R. Co., 111 N.C. 278, 182–83 (1892) (reviewing prior authority).

22. Pumpelly v. Green Bay Co., 80 U.S. 166, 179 (1871) (Miller, J.) (citing Gardner v. Vill. of Newburgh, 2 Johns. Ch. 162 (N.Y. 1816)).

23. *See* RICHARD PIPES, PROPERTY AND FREEDOM 32 (Alfred A. Knopf ed. 1999) (summarizing Hobbes's thinking about private property: "Since it is the king who has made property possible, he has a legitimate claim on it: he can tax and confiscate without his subjects' consent."); Johan Olsthoorn, *Hobbes on Justice, Property Rights and Self-Ownership*, 36 HIST. OF POL. THOUGHT 471, 472 (2015) (noting that Hobbes repeatedly insisted that "private property rights are introduced by the civil laws and remain dependent on the will of the sovereign").

24. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, ch. IX (1762) (Rose M. Harrington trans., 1893) (declaring that "for the state, in regard to its members, is master of all their property by the social contract, which, in the state, serves as the basis of all rights" and that "the right which each individual has over his own property is subordinated to the right which the community has over all").

of Mens uniting into Commonwealths and putting themselves under Government, is the Preservation of their Property."[25] Hence, one might infer that Locke would find it unacceptable for government to simply take property without recompense, as such a step would be inconsistent with his thesis protective of property.[26] More concretely, some continental writers and natural law theorists offered a rationale. Samuel Pufendorf explained:

> Natural equity is observed, if, when some contribution must be made to preserve a common thing by such as participate in its benefits, each of them contributes only his own share, and no one bears a greater burden than another . . . . [T]he supreme sovereignty will be able to seize that thing for the necessities of the state, on condition, however, that whatever exceeds the just share of the owners must be refunded by other citizens.[27]

Pufendorf seemingly maintains that there is a general principle of equal treatment that applies to property interests. Since exercises of eminent domain inevitably fall unevenly upon members of the community, an indemnity is essential to achieve this "natural equity" in sharing the societal burden.

In the leading case of *Vanhorne's Lessee v. Dorrance* (1796), Justice William Paterson, who had been a member of the constitutional convention, addressed the purpose of the compensation norm. He explicated the purpose of the compensation in words that paralleled Pufendorf: "[N]o one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. This would by laying a burden upon an individual, which ought to be sustained by the society at large."[28]

---

25. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, ch. IX, ¶ 124 (1689) (Locke defined property as encompassing "Lives, Liberties and Estates"). *Id.* at ¶ 123.

26. Locke, of course, was highly influential with the founding generation. Ellen Frankel Paul, *Freedom of Contract and the 'Political Economy' of* Lochner v. New York, 1 NYU J L. & LIBERTY 515, 528–37 (2005) (surveying Locke's impact on the constitution-making process and concluding: "The founding, it would seem fair to say, was a 'Lockean moment.'"). In a regulatory takings case, Justice Anthony Kennedy brushed aside the state's contention that a successive title holder who took with notice could not challenge an earlier-enacted regulation. Suggesting the continuing impact of Locke, Kennedy declared: "The State may not put so potent a Hobbesian stick into the Lockean bundle." Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001).

27. PUFENDORF, *supra* note 14, at 1285.

28. Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 310 (1795).

The Supreme Court of Kentucky, in *Sutton's Heirs v. City of Louisville* (1837), endorsed this view. Noting that the proposed extension of a municipal street burdened the owners of a particular lot, it observed: "Improvements, made for common benefit, should be made by common means, or by a just distribution of the public burden, by approximating as near equality as may be reasonably expected in the administration of the concerns of a diversified community."[29]

The Supreme Court first addressed the aim of the compensation mandate in the landmark case of *Monongahela Navigation Company v United States* (1893). Justice David J. Brewer, speaking for a unanimous Court, explained the compensation requirement in terms of "natural equity." Citing *Sinnickson* and *Gardner*, Brewer proclaimed that the compensation principle

> prevents the public from loading upon one individual more than his just share of the burden of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.[30]

Justice Hugo Black echoed this view a half century later. In 1960, he observed that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[31] Justices Brewer and Black were wrestling with a fundamental question posed by the Takings Clause: should individual owners or the general public bear the expense of providing social goods? To achieve "natural equity" espoused by Pufendorf, the Takings Clause prevents the government from singling out a few individuals to contribute disproportionately toward the cost of public projects. As one prominent scholar insisted, aptly characterizing the prevailing understanding, "we must say that compensation exists to insure that no more of an individual's property rights will be taken from him than represents his just share of the cost of government."[32]

---

29. Sutton's Heirs v. City of Louisville, 35 Ky. 28, 33 (1837). *See also* James River & Kanawha Co. v. Turner, 36 Va. 313, 339 (1838) (Tucker, J.) (explaining just compensation principle in terms of placing public burdens equally upon all).

30. Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893).

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

32. Stoebuck, *supra* note 4, at 588.

III. EVOLUTION OF THE JUST COMPENSATION NORM

A. Who Determines Compensation

In the early nineteenth century, nearly all appropriations of property were the result of actions by the state governments or private corporations to whom state legislatures delegated the power of eminent domain.[33] Consequently, state courts for the most part took the lead in grappling with the concept of "just compensation." A threshold question was which governmental body should assess the amount of indemnity. Lawmakers sometimes sought to either fix the amount of compensation or determine the formula by which such compensation should be determined. As early as 1795, Justice Paterson rejected this practice, stressing that in eminent domain proceedings, the legislature "cannot constitutionally determine upon the amount of the compensation, or value of the land."[34] State courts likewise reasoned that compensation was a judicial matter. St. George Tucker, speaking for the Supreme Court of Appeals of Virginia, explained in 1842 that "the question of compensation is a judicial question, and it is not in the power of the legislature to settle it, since this would be to unite judicial and legislative power, and so to enable the government to decide in its own cause."[35]Other state courts moved in the same direction.[36] In 1868, Thomas M. Cooley, a leading scholar and treatise writer, insisted that the proceeding to determine compensation was "judicial in character." He added that: "It is not competent for the State itself to fix the compensation through the legislature, for this would make it the judge in its own cause."[37]

---

33. Not until 1876 did the Supreme Court determine that the federal government had eminent domain authority as an inherent aspect of sovereignty. In *Kohl v. United States*, 91 U.S. 367 (1876), the Court upheld the exercise of eminent domain by the United States to acquire land for a post office and pointed out that historically the states had condemned land for use by the federal government. *See also* Miss. & Rum River Boom Co. v. Patterson, 98 U.S. 403, 406 (1878) (Field, J.) ("The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty."). *See generally* William Baude, *Rethinking the Eminent Domain Power*, 122 YALE L. J. 1738 (2013) (asserting that the federal government was not originally understood to have general eminent domain power).

34. Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 312 (1795).

35. Tuckahoe Canal Company v. Tuckahoe & James River R.R. Company, 38 Va. 42 ,78 (1840).

36. *See, e.g.*, Penn. R.R. Co. v. Balt. & Ohio R.R. Co., 60 Md. 263, 269 (1883); Isom v. Miss. Cent. R.R., 36 Miss. 300, 315 (1858).

37. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 563 (1868).

In *Monongahela Navigation Company,* the Supreme Court brushed aside an effort by Congress to ascertain the measure of compensation for the acquisition of a lock and dam by excluding from consideration the value of a franchise to collect tolls, and strongly affirmed the judicial role. Writing for the Court, Justice Brewer declared:

> It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.[38]

B. Measure of Compensation

Courts were also called upon to ascertain what measure should be employed to determine the amount of "just compensation." Courts spoke in terms of an equivalent value for the property taken. Yet this goal was not easy to achieve. As the Iowa Supreme Court elaborated in 1855, the words "just compensation" "undoubtedly, mean a fair equivalent; that the person whose property is taken, shall be made whole. But while the end to be attained is plain, the mode of arriving at it, is not without its difficulty."[39] Courts and commentators gravitated to the fair market value at the time of the taking.[40] This standard, however, proved easier to articulate than to always apply.

Courts grappled with how to ascertain market value.[41] A fair market test presupposes a price set as part of a voluntary bargain between

---

38. Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893). The Supreme Court has repeatedly reaffirmed this cardinal principle. *See, e.g.*, United States v. New River Colliers Co., 262 U.S. 341, 343–44 (1923) (Butler, J.) ("The ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard.").

39. Sater v. Burlington & Mt. Pleasant Plank Rd. Co., 1 Iowa 386, 393 (1855).

40. Harrison v. Young, 9 Ga. 359, 364 (1851) ("When land or any other property is taken for public use, the owner is entitled to compensation for its whole value; not for this or that particular object, but for all purposes to which it may be appropriated. . . . The value of the land or anything else, is its price in the market."); Troy & Bos. R.R. Co. v. Lee, 13 Barb. 169, 172 (N.Y. Sup. Ct. 1852) (treating "the market value of the property" as the governing principle); Little Rock Junction Ry. v. Woodruff, 49 Ark. 381, 5 S.W. 792, 793–94 (1887); San Diego Land & Town Co. v. Neale, 78 Cal. 63, 67–68, 20 P. 372 (1888).

41. Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U.L. REV. 721, 723–29 (1993) (outlining different evaluation techniques employed by courts to ascertain fair market value).

a willing seller and a willing buyer.[42] Speaking for the Supreme Court in 1878, Justice Stephen J. Field set forth the common standard:

> In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses.[43]

This was clearly fictitious in the context of a forced sale. There was no willing seller, so comparisons to a private transaction are misleading. Moreover, in many instances there would be no recent sales of similar property nor any current price rates by which to determine fair market value. Landed property is typically unique. Absent such evidence, courts typically turned to the opinions of knowledgeable persons who gave estimates as to value.[44] Yet persons can differ widely in their assessment of what a property would bring in the open market. At the end of the day, even expert opinion is still an estimate.

Still, the fair market test is seemingly objective, and this, no doubt, is part of its appeal. It takes no account of subjective values that an owner has in his or her property. This would exclude not only sentimental attachment but the suitability of the property for personal needs. Nor does it consider relocation costs. Cooley, for example, conceded that the circumstances of different appropriations were sometimes so different "that it has been found somewhat difficult to establish a rule that shall always be just and fair." He explained that the "question is reduced to one of market value." Cooley agreed that "the market value may not seem to the owner an adequate compensation" for his own reasons, but maintained that such personal reasons cannot be taken into account in eminent domain proceedings which must "measure the worth of property by its value as an article of sale."[45] The Supreme Court also noted complexities in

---

42. 2 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 1228 (3d ed. 1906).

43. Miss. & Rum River Boom Co. v. Patterson, 98 U.S. 403, 408 (1878).

44. *See, e.g.*, *Little Rock Junction Ry.*, 5 S.W. at 794; *San Diego Land & Town Co.*, 78 Cal. at 69.

45. COOLEY, *supra* note 37.

applying the market value test: "So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases."[46] Notwithstanding shortcomings, the fair market value test remains the prevailing rule in determining just compensation. The Supreme Court has never squarely addressed the reasons for its adherence to this standard, but apparently it is seen as practical and relatively easy to apply. In *Miller v. United States* (1943), the Court observed: "In an effort, however, to find some practical standard, the courts early adopted and have retained, the concept of market value."[47]

C. Mode of Compensation

In the antebellum era, new challenges complicated the assessment of just compensation. The Fifth Amendment and most of its state counterparts mandate payment of "just compensation," and do not specify what form such compensation must take.[48] In *Vanhorne's Lessee,* Justice Paterson asserted: "No just compensation can be made except in money. Money is a common standard, by comparison with which the value of any thing may be ascertained. . . . Compensation is a recompense in value, a *quid pro quo*, and must be in money."[49] A few state constitutions expressly mandated that no property could be acquired by a private corporation until full compensation was paid in money.[50] But this was not the only view.[51] States in practice

46. *Miss. & Rum River Boom Co.*, 98 U.S. at 408.

47. Miller v. United States, 317 U.S. 369, 374 (1943). *See also* Olson v. United States, 292 U.S. 246 (1934) ("that equivalence in the market value of the property at the time of the taking contemporaneously paid in money").

48. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 195 (1985) ("The Constitution speaks only in terms of 'just compensation,' not of the form it must take. In principle, therefore, the state may provide compensation in what ever form it chooses".).

49. Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 315 (1795). *See also* Henry v. Dubuque & Pac. R.R. Co., 2 Iowa 288, 300 (1855) (construing "just compensation" provision in Iowa Constitution of 1846 to require that a person whose property was taken for public use "shall have a fair equivalent in money for the injury done him by such taking; in other words, that he shall be made whole, so far as money is a measure of compensation . . ."); Deaton v. City of Polk, 9 Iowa 594, 596 (1859) (citing *Henry*, and requiring monetary compensation where land was taken for a roadway without consideration of any advantages that might result to the landowner).

50. ALA. CONST. of 1868, art. XIII, § 5; ARK. CONST. of 1868, art. V, § 48; KAN. CONST. of 1859, art. XII, § 4.

51. Alton & Sangamon R.R. Co. v. Carpenter, 14 Ill. 190, 192 (1852) ("The word

enjoyed some latitude to provide compensation in a variety of forms, including implicit compensation.

As a practical matter, lawmakers found it difficult to raise substantial revenue to pay for public undertakings. As J. Willard Hurst has observed that "through most of the nineteenth century government found it impractical to command sizeable resources by taxation in a chronically cash-scarce economy."[52] Notwithstanding constitutional guarantees, therefore, state legislatures had every incentive to hold down the cost of acquiring property in eminent domain proceedings. Consequently, they sought to circumvent the need to make monetary payments.

The same considerations applied to acquisitions by private enterprises.[53] There was a widespread public desire to improve transportation facilities.[54] The ensuing transportation revolution triggered frequent delegation of eminent domain authority to privately owned canal, turnpike and railroad companies.[55] Often thinly capitalized, these private enterprises were undertaking speculative projects with uncertain prospects of success. State legislatures frequently sought to promote transportation schemes by curtailing the amount of monetary compensation awarded in eminent domain proceedings.

Some state courts were receptive to legislation curtailing the amount of compensation awards. In 1848, the Supreme Court of Pennsylvania, for example, expressed concern that generous just compensation awards might retard construction of railroads in the state.

---

compensation means that which is given as an equivalent for a loss, and the constitution does not determine how that equivalent shall be made up."). *See also* San Fran., Alameda & Stockton R.R. Co. v. Caldwell, 31 Cal. 368, 374 (1866) ("The Constitution does not require the compensation in such cases to be rendered in money . . . "); James River & Kanawha Co. v. Turner, 36 Va. 313, 325 (1838) (Parker, J.) ("But [compensation] need not be made in money, nor in any thing admitting of a certain, precise and invariable value.").

52. J. WILLIARD HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 167 (1972).

53. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 124 (3d ed. 2005) ("More often than not in the first half of the nineteenth century it was not the state itself that used the power.").

54. GEORGE ROGERS TAYLOR, THE TRANSPORTATION REVOLUTION, 1818–1860 (1951); DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848 325–69 (Oxford University Press 2007) (detailing the impact of the transportation revolution on American society).

55. JAMES W. ELY JR., RAILROADS AND AMERICAN LAW 35–36 (University Press of Kansas 2001) (discussing delegation of eminent domain power to railroad companies). *See also* Tide Water Canal Co. v. Archer, 9 G. & J. 476, 482–83 (Md. 1839) (upholding exercise of eminent domain by canal company).

It worried that "the damages will be swelled to such an amount as greatly to embarrass, if not seriously to endanger, the ultimate success of a work destined at no distant day to increase the prosperity of the commonwealth to an extent beyond the most sanguine calculations."[56] Likewise, a Virginia judge worried that if courts "give to the owner of the land, in every instance, the full value of his land, enhanced in value by the actual location of the road or canal through it, without abatement, I very much fear a serious blow will be given to the cherished policy of the state."[57] Insisting that the state constitution requires that "compensation shall be made in money to the full value of the property taken to public use," an Ohio judge bitterly charged in dissent that both lawmakers and judges were more anxious to promote enterprise than to vindicate the constitutional norm of just compensation. He maintained:

> Any other construction would never have been for a moment entertained, except from the fact that public improvements were deemed of the utmost importance to the growth and welfare of the state. An anxiety to carry out a scheme of internal improvements at the least possible expense, has induced the legislature and the courts to forget the provisions of the constitution. But, however great the public benefit derived from public improvements, it should be remembered that the highest possible public good is to secure every person in the full and complete enjoyment of his property. This clause of the constitution was designed to check the license of power, and secure to every person the full enjoyment of the natural and constitutional right.[58]

IV. OFFSET OF BENEFITS

A. Overview

The fair-market-value standard in total taking cases did not readily fit the circumstances of partial takings. With partial takings, there could be advantages or injury to the remaining portion of the property. The question of considering such benefits in the calculation of compensation was first raised in the context of local governments

56. Penn. R.R. v. Heister, 8 Pa. 445, 450 (1848).
57. James River & Kanawha Co. v. Turner, 36 Va. 313, 330 (1838) (Parker, J.).
58. Symonds v. City of Cincinnati, 14 Ohio 147, 184 (1846) (Read, J., dissenting).

laying out roadways.[59] In the same vein, the Ohio legislature in 1825 authorized the state canal commissioners to acquire land and materials by eminent domain for a state-sponsored canal project. The statute directed that the appraisers should "make a just and equitable estimate and appraisal of the loss or damage, if any over and above the benefit and advantage to the respective owners."[60]

The advent of privately owned canal and railroad companies in the early nineteenth century presented this issue in a new and more pressing light. Rather than acquiring an entire parcel of land, such enterprises typically took a strip of land through a larger parcel. Determining the just compensation proved especially vexing in partial-takings situations. In these circumstances, just compensation related to the actual value of the land acquired, as well as the impact of the acquisition on the remainder of the estate. The Supreme Court of Kansas explained in 1878 that compensation

> includes more than the mere value of the property taken, for often the main injury is not in the value of the property absolutely lost to the owner, but in the effect upon the balance of his property of the cutting out of the part taken. He is damaged therefore, more than in the value of that which is taken.[61]

For example, a tract severed by a roadway or canal might well be less valuable when divided. The severance might result in limited access between the divided parcels, or cause one portion to be cut off from a water supply, or necessitate additional fencing.

---

59. *See, e.g.*, Commonwealth v. Coombs, 2 Mass. 489, 492 (1807) ("In estimating the damages, the committee are not confined to the value of the land covered by the road, and the expense of fencing the ground. The owner may suffer much greater expense by the road depriving him of water, or by otherwise rendering the cultivation of his farm inconvenient and laborious; or it may happen that the new highway may essentially benefit his farm, and that he may suffer very little or no injury by the location."); Livingston v. City of New York, 8 Wend. 85, 101–02 (N.Y. 1831) (benefit to person whose land was taken for city street offset against loss or damage).

60. An Act to provide for the internal improvement of the State of Ohio, by navigable Canals, February 4, 1825, Laws of Ohio. The wording of this statute suggests that lawmakers contemplated there would be few situations in which losses to landowners outweighed presumed benefits. Other curious features of the measure were that the appraisers were to be appointed by the canal commissioners, the taking party, and there was no provision for judicial review of the determination by the appraisers.

61. Pottawatomie Cnty. Comm'rs v. O'Sullivan, 17 Kan. 58, 60 (1876) (Brewer, J.). *See also* Lewis v. City of Seattle, 5 Wash. 741, 755, 32 P. 794, 799 (1883) (declaring "often the damage to the remainder of the tract is of much more consequence than the value of the part taken"); LEWIS, *supra* note 42, at 1176–77.

In respect to transportation projects utilizing eminent domain, state legislatures often mandated that the value of perceived benefits should be offset against any loss suffered by the taking. State courts generally upheld this arrangement, at least in part, against constitutional objection.[62] Indeed, a few courts even maintained that the enhanced value to the remaining land might fully satisfy the just compensation requirement, and thus there would be no need for any monetary award.[63] As a practical matter, the land could be taken for free.[64]

To complicate matters, courts were not in agreement as to their understanding of offsets. Did offsets speak to whether a taking of property occurred, or did they represent an alternative mode of just compensation for a taking? The Supreme Court of Illinois exemplified the former position. It declared that if the enhanced value to the part of a tract not acquired by eminent domain was equal to the damages to the owner

> then in the very act of appropriating part of his land to the public use, an equivalent is rendered to him, in the increased value given to the rest. In such a case it cannot in any just sense

62. San Fran., Alameda & Stockton R.R. Co. v. Caldwell, 31 Cal. 368, 374 (1866) ("Just compensation requires a full indemnity and nothing more. When the value of the benefit is ascertained there can be no valid reason assigned against estimating it as a part of the compensation rendered for the particular property taken, as all the Constitution secures in such cases is a just compensation, which is all that the owner of property taken for public use can justly demand."); Whitman's Ex'r v. Wilmington & Susquehanna R.R. Co., 2 Harr. 514, 524 (Del. 1839) (affirming constitutionality of legislative requirement that determination of compensation should take into consideration advantages as well as disadvantages to owner's land, and declaring: "It is not easy to perceive any other mode of arriving at a just compensation than by considering all the consequences of the act complained of, whether they enhance or mitigate the injury.").

63. Alton & Sangamon R.R. Co. v. Carpenter, 14 Ill. 190, 192 (1852) ("If the advantages really and substantially resulting from the increased value given to that part of a tract of land not taken for public use are equal to the damages which the owner will sustain by the deprivation to which he is subjected, then in the very act of appropriating part of his land to the public use, an equivalent is rendered to him, in the increased value given to the rest."). Penn. R.R. v. Heister, 8 Pa. 445, 450 (1848) ("Is the property benefited, or is it injured by the improvement, is a most material injury. If benefited, the owner neither is, nor ought to be, entitled to recover any compensation whatever."); *Livingston*, 8 Wend. at 101 ("The owner of the property taken is entitled to a full compensation for the damage he sustains thereby, but if the taking of his property for the public improvement is a benefit rather than an injury to him, he certainly has no equitable claim to damages.").

64. CARMEN F. RANDOLPH, THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 253 (1894) ("The allowance of benefits may effect, in some cases, so just a balance between advantage and disadvantage as to reduce pecuniary compensation to the vanishing point").

> be said that any portion of his property has been taken, and consequently he is entitled to no compensation.[65]

In contrast, the Supreme Court of Indiana viewed offsetting as a means of satisfying the just compensation norm. Recognizing that an owner was entitled to "a fair recompense—something equivalent" when property was taken for public use, it emphasized that compensation did not necessarily mean payment in money. "The real controversy," the court explained, "is not as to the measure of damages, but as to the mode of compensation."[66] Of course, most courts did not devote time to probing the nature of benefit offsets. They generally just viewed offsets as a deduction from the injury suffered by the owner, and thus as a means of satisfying the compensation mandate.[67]

It was hardly a surprise that from the outset, the legislative practice of offsetting alleged benefits was highly controversial.[68] In a revealing 1838 exchange, Virginia judges sharply debated the extent to which offsetting advantages was consistent with the constitutional norm of just compensation. Judge Richard E. Parker took the position that

---

65. *Alton & Sangamon R.R. Co.,* 14 Ill. at 192.

66. McIntire v. State, 5 Blackf. 384, 385–84 (Ind. 1840). *See also San Francisco, Alameda & Stockton*, 31 Cal. at 374 (treating benefits as part of compensation).

67. The uncertainty over the understanding of benefit offsets anticipated a similar issue in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978) involving transferable development rights (TDRs). The City of New York designated Grand Central Terminal an historical landmark, thus imposing regulations which severely limited future changes to the structure. As part of this scheme the city granted Penn Central TDRs over other properties. Brushing aside a challenge, the Supreme Court majority concluded that the deprivation of developmental rights over Grand Central did not constitute an unconstitutional taking of property. It conceded that the TDRs would probably not amount to payment of just compensation if there had been a taking, but seemingly considered these "valuable" rights as a factor in determining the existence of a taking. *Id.* at 137. The dissenting justices found that the city's actions constituted a compensable taking. They charged that TDRs should be analyzed as a proffered just compensation, and insisted that they did not bear on the question of a taking. The dissenters characterized TDRs as having uncertain and contingent market value, and expressed doubt that such rights would constitute just compensation. *Id.* at 151. *See* EPSTEIN, *supra* note 48, at 190 ("In *Penn Central* the government evaded the constitutional command by paying Penn Central with a set of twisted and contingent rights that cannot be valued sensibly.").

68. In 1831 a New York attorney argued:

> Again; the compensation to be made is to be a *just* compensation, not a prospective and conjectural benefit and advantage to the adjoining lands of the owner, by reason of the street being opened; in this way no compensation whatever is made for the property taken. . . . Nothing but the value of the property awarded to him in *money* is just compensation.

Livingston v. City of N.Y., 8 Wend. at 92.

advantages to the landowner should be offset even if others in the community also enjoyed such benefits. He was untroubled by the unequal impact of this approach on those who lost part of their land, reasoning that "inequality, and even injustice, is incident to every imposition of burdens, for the use of the public."[69] The other judges rejected this analysis. Judge William Brockenbrough insisted that to permit the offset of general benefits to the community would deprive the landowner "of the just compensation intended by the constitution."[70] He would only allow consideration of advantages to the particular parcel of which a portion was condemned, not benefits shared in common with the community. Brockenbrough further opined that the legislature could not have intended to authorize a canal company "under the pretext of making him[the landowner] a compensation for a general advantage, which will deprive him of the just compensation intended by the constitution." He explained that the legislature could not have intended "to *compensate* the riparian proprietor for the land taken for public uses, by the value of the real or supposed advantages derived from the improved navigation, when those same advantages were conferred freely on all others, without being viewed as a *compensation*."[71] Agreeing, Judge Henry St. George Tucker asserted that to offset "advantages of a general character" would render the just compensation norm "a mockery, instead of a wise, just and salutary safeguard of the rights of the people." Tucker pointed out that the purpose of the just compensation norm was "to place the public burdens equally upon all, by paying the proprietor for that which is taken from him. This is the very object of the constitution." This object would be frustrated, he continued, because the offset of general advantages placed the landowner in a worse condition than his neighbor who enjoyed the benefits of a project but had not lost any of his land.[72]

As this exchange indicates, the use of offsets to reduce compensation awards was open to several objections. First, legislative mandates

69. James River & Kanawha Co. v. Turner, 36 Va. 313, 326 (1838).

70. *Id.* at 334–35.

71. *Id.*

72. *Id.* at 339. Tucker also distinguished between the land actually condemned and incidental damage to the residue of the parcel. He maintained that the full value of the land taken must be compensated "and cannot be extinguished by setting off speculative advantages." The special advantages to the residue could only be offset against the peculiar damage to the remainder of the tract. *Id.* at 441.

to offset the supposed advantages of a project were seemingly inconsistent with the cardinal principle that the determination of just compensation was a judicial responsibility. Second, the anticipated benefits were highly speculative and might never in fact be realized.[73] Indeed, a sizeable number of canal and railroad companies became insolvent, leaving the landowner with no advantages and no effective redress.[74]

Third, attempts to offset general benefits received by the community at large were highly inequitable. Neighboring owners might well also enjoy enhanced land values but did not have to bear any of the cost by having part of their land taken. The offsetting of general benefits thus tended to single out an individual landowner to suffer a loss that would benefit the community at large, a result, as Judge Tucker pointed out, that contradicted the very purpose of the constitutional guarantee of just compensation.[75] In 1849, the Supreme Judicial Court of Massachusetts acknowledged a "great inequality" to landowners

> by way of reduction of damages for his land thus taken, to be charged for all the incidental benefits, which he receives from the location of the railroad in the vicinity of his other land and establishment, while his neighbor, who is equally benefited, is exempt from any contribution to this object.[76]

Prominent authorities stressed the unfairness of offsetting general benefits. Cooley, for example, declared:

---

73. *See* Jones v. Wills Valley R.R. Co., 30 Ga. 43, 46 (1860) (Lumpkin, J.) (directing offset of benefits against incidental damages to remainder of land, although acknowledging that the railroad might never be built).

74. TAYLOR, *supra* note 54, at 340 (pointing out that by the 1840s revenue from canals was "so disappointing as to bankrupt private companies and saddle state governments with unprecedented debts"); ELY, *supra* note 55, at 19 (observing that "railroading was an expensive and speculative venture"). *See also* Kennedy v. Indianapolis, 103 U.S. 599, 600–01 (1881) (noting that the canal project at issue was abandoned and never completed).

75. ELY, *supra* note 55, at 191 (noting that the offset of general benefits tended to single out individuals to suffer loss for community benefit).

76. Meacham v. Fitchburg R.R. Co., 58 Mass. 291, 297 (1849). Other courts also stressed the inequity of offsetting general benefits. *See* R.R. Co. v. Foreman, 24 W. Va. 662, 672–73 (1884) ("The reason for this is obvious; for if their general benefits would be thus offset, against actual damages done the owner of the land, it would impose on him an unequal burden for the common good, exacting in effect contribution from those whose property is taken, and relieving others who derive an equal advantage from the public work.").

> But, in estimating either the injuries or the benefits, those which the owner sustains or receives in common with the community generally, and which are not peculiar to him and connected with his ownership, use, and enjoyment of the particular parcel of land, should be altogether excluded, as it would be unjust to compensate him for the one, or to charge him with the other, when no account is taken of such incidental benefits and injuries with other citizens who receive or feel them equally with himself, but whose lands do not chance to be taken.[77]

John Lewis, in his early and important treatise on eminent domain, also criticized consideration of general advantages in the assessment of compensation for partial takings: "These advantages may never be realized, and, if they are, it is unjust that one person should be obligated to pay for them by a contribution of property, while his neighbor whose property is not taken enjoys the same advantages without price."[78] Despite this trenchant criticism, some judges were untroubled by the inequity of upholding the offset of general benefits.[79]

B. Varied Reactions to the Offset of Benefits

States responded to the controversy over offsetting in diverse ways. Constitution makers and lawmakers in a few states closed the door early on this practice. For example, the Ohio Constitution of 1851 and the Iowa Constitution of 1857 provided that an assessment of damages should not take into account any imputed advantages to the landowner on account of the improvements.[80] The

77. COOLEY, *supra* note 37, at 566.

78. LEWIS, *supra* note 42, at 1198. *See also* RANDOLPH, *supra* note 64, at 251 ("The argument for disallowing general benefits is that otherwise one whose property is taken for a public use would be in effect forced to pay for an advantage which his neighbors would freely enjoy, the amount paid being, of course, the value of the general benefit.").

79. *See, e.g.*, Alton & Sangamon R.R. Co. v. Carpenter, 14 Ill. 190, 191 (1852) ("It is immaterial how the owner of the land is benefited, or that others whose lands are not entered upon are benefited to an equal or greater extent."); McIntire v. State, 5 Blackf. 384, 389 (Ind. 1840) ("If others, whose property the public exigency does not require, are equally benefited, it must be set down as one of those chances by which fortune distributes her favors—a distribution which no Legislature or other earthly power can render equal among men."); Greenville & Columbia R.R. Co. v. Partlow, 39 S.C.L. 428, 439 (1852) ("If his neighbors are more benefited by the construction of the road than he may be, that is no loss to him.").

80. OHIO CONST. of 1851, art. I; IOWA CONST. of 1857, art. I, § 18. Even before adoption of the 1857 Iowa Constitution, the Supreme Court of Iowa had construed the "just compensation" requirement of the earlier 1846 Constitution to mandate payment of the full value of

Kansas Constitution of 1859 mandated that a corporation could not appropriate a right of way until full compensation was made in money "irrespective of any benefit from any improvement proposed by such corporation."[81] The New York general railroad acts of 1848 and 1850 barred consideration of benefits when railroads acquired property by eminent domain.[82] A 1852 Indiana law directed that when a canal, railroad, or turnpike acquired property by eminent domain, in calculating just compensation "no deduction shall be made for any benefit that may be supposed to result to the owner, from the contemplated work."[83] Similarly, an 1852 Illinois statute mandated that when a railroad, turnpike, or "other public work" should invoke eminent domain, the commissioners to assess damages "shall not estimate any benefits or advantages which may accrue to lands affected in common with adjoining lands, on which such road or canal or other work does not pass."[84] Absent such constitutional or legislative limitations, however, courts addressed the question of benefit offsets as an aspect of determining the meaning of "just compensation."

In so doing, courts were called upon to address several interrelated questions. Should they permit any offset of supposed benefits

---

the property taken "without any regard whatever to the benefits and advantages resulting" to the landowner. Sater v. Burlington & Mount Pleasant Plank Rd. Co., 1 Iowa 386, 388 (1855). Nonetheless, many delegates to the 1857 Constitutional Convention insisted that this principle should be expressly incorporated in the Constitution. The proposal was adopted by a close vote. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 202–07 (1857).

81. KAN. CONST. of 1859, art. XII, § 4. *See* Pottawatomie Cnty. Comm'rs v. O'Sullivan, 17 Kan. 58, 60–61 (1876) (construing this provision to apply to transportation corporations and not to opening public roads).

82. An Act to authorize the formation of railroad corporations, ch.140, § 20, Laws of New York, 1848; An Act to authorize the formation of railroad corporations, ch. 140, § 16, Laws of New York. New York courts construed this measure to require that railroads must pay full market value with no benefit deductions for any land acquired by eminent domain but that benefits could be considered in assessing damages to the residue. *Newman v. Metropolitan Elevated Railway Company,* 118 N.Y. 618, 623, 23 N.E. 901 (1890).

83. 1852 Revised Statutes of Indiana, § 711, at 193. *See* White Water Valley R.R. Co. v. McClure, 29 Ind. 538, 539 (1868) ("It was evidently the intention of the legislature, in enacting this provision, to change the old rule of assessment in such cases, and to require that property taken by these corporations should be paid for, without regard to any benefit or enhanced value of the residue of the owner's property by the facilities afforded by the construction of the road.").

84. An Act to amend an Act entitled "An Act to amend the Law Condemning Right of Way for Purposes of Internal Improvement, 1852 Ill. Laws 1038. This measure was construed to mean that the landowner must receive the full value of land taken in money without regard to benefits, but that benefits could be taken into consideration in assessing damages to the remaining land. Hayes v. Ottawa, Oswego & Fox River Valley R.R. Co., 54 Ill. 373, 378 (1870); Wilson v. Rockford, Rock Island & St. Louis R.R. Co., 59 Ill. 273, 274–75 (1871).

to reduce the amount of monetary compensation? If so, should they uphold the offset of general advantages to the community resulting from projects or just the special benefits to a particular parcel? How should they differentiate between general and special benefits? Should offsets be allowed against the value of the land actually taken, the damage to the remainder of the parcel, or both? As might be expected, these inquiries proved a fertile source of litigation. Courts reached a wide range of conclusions and generalization is difficult. Although many of these cases involved transportation projects, it should be noted that state and local governments continued to claim offsets for the construction of streets and highways. The full complexity of benefit offsets cannot be treated in detail here.[85] Some representative examples illustrate the range of approaches adopted by courts.

A few state courts totally rejected the offset of benefits on constitutional grounds. At issue in *Carson v. Coleman* (1856) was a claim for compensation arising from a legislative scheme to straighten the channel of a creek. The legislation contained no provision for compensation to the affected landowners. The commissioners proposed to cut a new channel across a landowner's property and argued that the benefits expected to accrue to the landowner from the improvement should constitute his compensation. Dismissing this contention, the New Jersey Court of Chancery reasoned:

> There is but one fair construction to be put upon the language of the constitution. It means that, where private property is taken by virtue of the authority of the sovereign power, compensation shall be made in *money*; that a fair valuation shall be made of the property taken, and the amount of such valuation in money shall be paid to the Individual before his property can be taken from him.[86]

Tellingly, the court warned: "Any other construction would make this provision of the constitution utterly worthless. A means of legislation could soon be devised to substitute an imaginary benefit for that just compensation which was intended to be provided."[87]

---

85. For a comprehensive survey of cases dealing with the offset of benefits in partial takings in the nineteenth century, see LEWIS, *supra* note 42, at 1177–1206. *See also* Comment, *Eminent Domain—Set-Off of Benefits Against Damages to Remaining Land Denied*, 43 IOWA L. REV. 303–08 (1958).

86. Carson v. Coleman, 11 N.J. Eq. 106, 108 (1856).

87. *Id.* Subsequent legislation in New Jersey mandated the offset of benefits from a

Lawmakers often required the offset of damages in determining the amount of just compensation payable in partial takings. Strongly rejecting this approach, a pair of decisions by the Supreme Court of Mississippi invalidated a provision in a railroad charter requiring the jury, in assessing the injury to the owner whose land was taken, to "take into the estimate the benefit resulting to such owner or owners, by reason of said road passing through or upon said land, towards the extinguishment of such claim for damages." Invoking the state constitution, the court in *Beatty v. Brown* (1857) declared that the landowner

> was entitled to the cash value of the land when the assessment was made, and also to be indemnified for the damage to his adjacent land, consequent upon the location of the road. He was entitled to be paid in money. It was as clearly incompetent for the legislature to prescribe in what he should be paid, as to prescribe how much or how little he should receive.

The court added that one whose property is taken for a railroad "cannot be compelled to receive as compensation the estimated enhancement in the value of his remaining property."[88] It declared the charter provision authorizing the offset of benefits to be invalid. A year later, the Mississippi court, citing *Vanhorne's Lessees*, underscored its insistence that monetary compensation was constitutionally required in eminent domain proceedings. Emphasizing that the determination of just compensation was a judicial, not a legislative function, it dismissed "prospective railroad benefits, which may never occur, and in most instances, are never realized" as a "moonshine standard of value."[89]

A number of other states limited but did not entirely close the door on the offset of incidental benefits. In *Woodfolk v. Nashville & Chattanooga Railroad Company* (1852), for example, the Supreme Court of Tennessee emphatically declared that a landowner

> is entitled to the value of the land taken from him . . . in money, and that this value, when ascertained, cannot be liquidated, in

---

project, and this provision was construed to encompass the offset of particular benefits derived by the landowner against the value of the land taken. Loweree v. City of Newark, 38 N.J.L.151, 155 (1875) (land taken for opening of street).

88. Brown v. Beatty, 34 Miss. 227, 241–42 (1857).

89. Isom v. Miss. Cent. R.R., 36 Miss. 300, 312–13 (1858).

> whole or in part, by any "benefit or advantage" he may in fact or by supposition, derive from the making of the road, in the appreciation of his remaining land, or otherwise.[90]

It revealingly explained: "To compel him to take anything else, would render the constitutional guarantee ineffectual and delusive."[91] Yet the court ruled that any enhancement in value particular to the remaining land of the owner by virtue of the railroad could be offset against incidental loss to the parcel.[92] It cautioned that this was a separate inquiry from the valuation of the land actually taken. It further cautioned that such offset could not encompass the general increase in value common to all in the neighborhood produced by the public work.[93]

Taking a somewhat different tack, courts in Kentucky adhered to the view that when property was acquired by eminent domain, the state constitution mandated that the owner must "be paid, in money, the actual value of the property, and the actual or supposed advantage to him, of the appropriation cannot be set off against that value."[94] With respect to consequential injury to the owner's remaining land, on the other hand, Kentucky courts took the position that both special and general advantages arising from the project could set off against the disadvantages to the remainder of the parcel in determining just compensation.[95]

Notwithstanding this line of decisions, which sought to confine the scope of benefit offsets, a sizeable number of state courts in the antebellum era sustained the balance of either special benefits, or

---

90. Woodfolk v. Nashville & Chattanooga R.R. Co., 32 Tenn. 422, 436–37 (1852).

91. *Id.* at 440.

92. *Id.*

93. *Id.* at 441 (declaring that offset of benefits must be confined "to such improvements in value as is the result of running the road at that particular place, and not to the general rise of property in the country, or in that neighborhood, produced by the public work. That which is common to all should not be charged to him, because this is an advantage to which he is entitled as a citizen and tax-payer of the state."). For the same approach, see Chi., Kan. & Neb. Ry. Co. v. Wiebe, 25 Neb. 542, 41 N.W. 297 (1889) (excluding general benefits shared in common from consideration in the assessment of damages to the remainder of the parcel not taken).

94. Sutton's Heirs v. City of Louisville, 35 Ky. 28, 33–34 (1837). *See also* Rice v. Danville, Lancaster & Nicholasville Turnpike Rd. Co., 37 Ky. 81, 88 (1838) (affirming that there "must be a pecuniary compensation equivalent to the value of the land intended to be taken"); Jones v. Wills Valley R.R. Co., 30 Ga. 43, 45–46 (1860) (owner must be paid cash value of land taken, but benefits may be offset against incidental damages to residue).

95. *Sutton's Heirs*, 35 Ky. at 33.

both special and general benefits, against the value of the property actually taken as well as the damage to the remainder of the parcel. A decision by the Court of Appeals of South Carolina in *Greenville & Columbia Railroad Company v. Partlow* (1852) well exemplified this reasoning. In assessing the compensation for the construction of a rail line through the claimant's land, the court declared:

> Compensation is an equivalent for property taken, or for an injury. It must be ascertained by estimating the actual damage the party has sustained. That damage is the sum of the actual value of the property taken and of the injury done to the residue of the property, by the use of that part which is taken, less the benefit which accrues to the residue of the said property by the use of that which is taken. The benefit is, in part, an equivalent to the loss and damage.[96]

It added that the "benefit may consist in the enhanced value of the residue of the land."[97] If such imputed benefit exceeded the amount of the damage, the landowner was deemed fully compensated. Drawing no distinction between benefits unique to the owner and those general advantages received by the community at large, the court dismissed the argument that it was inequitable for contiguous owners to enjoy these same benefits of increased land value while suffering no loss. The court concluded that the claimant was simply entitled to compensation and "cannot require a premium." It added: "If his neighbors are more benefited by the construction of the road than he may be, that is no loss to him."[98]

As this survey makes clear, with some exceptions state courts proved quite receptive to the use of offsetting supposed advantages. Indeed, some were openly supportive of prompting enterprise by holding down compensation costs. Public opposition to such practice, however, mounted following the Civil War. Accordingly, a number of states adopted constitutional provisions which prevented transportation corporations from relying on the offset of imputed benefits in calculating compensation for acquiring property through eminent domain. For example, the South Carolina Constitution of 1868 declared: "No right of way shall be appropriated to the use of any

96. Greenville & Columbia R.R. Co. v. Partlow, 39 S.C.L. 428, 437 (1852).
97. *Id.*
98. *Id.* at 438–39.

corporation until full compensation therefor shall be first made, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation. . . ."[99] Note that these provisions halted offsets for business corporations and did not pertain to just compensation for takings of property by state and local governments.

C. Supreme Court

The Supreme Court was a late participant in the vexing controversy over just compensation and offsetting benefits. Recall that the Bill of Rights, including the Takings Clause of the Fifth Amendment, was originally understood to apply only to the federal government.[100] In 1850, the Supreme Court emphatically rejected a challenge alleging that Illinois had taken property for private use and awarded no compensation. "It rests with state legislatures and state courts," the Court intoned, "to protect their citizens from injustice and oppression of this kind."[101] Not until the seminal case of *Chicago, Burlington and Quincy Railroad Co. v. Chicago* (1897) did the Court rule that compensation for private property taken for public use was an essential element of due process guaranteed by the Fourteenth Amendment against state infringement.[102] For its part, the federal government rarely invoked eminent domain in the nineteenth century.[103]

It followed that the Supreme Court had little opportunity to consider the question of offsetting benefits during most of the nineteenth century. In an 1880 quiet-title action, Chief Justice Morrison R. Waite recognized that the construction of a canal

> might confer benefits that would be a just compensation for the private property taken for its use; but until such a structure is actually furnished complete, it can in no proper sense be said that the works have been constructed from which the benefits that are to make the compensation can proceed.[104]

---

99. S.C. CONST. of 1868, art. XII, § 3. For similar language *see, e.g.*, ARK. CONST. of 1868, art. V, § 48; CAL. CONST. of 1879, art. I, § 14; FLA. CONST. of 1886, art. XVI, § 29; N.D. CONST. of 1889, art. I, § 14.

100. Barron v. Mayor & City Council of Balt., 32 U.S. 243 (1833).

101. Mills v. St. Clair Cnty., 49 U.S. 569, 585 (1850).

102. Chi., Burlington & Quincy v. Chicago, 166 U.S. 228 (1897).

103. *See* FRIEDMAN, *supra* note 53.

104. Kennedy v. Indianapolis, 103 U.S. 599, 605 (1881).

This comment suggested a guarded openness to the offset of advantages. On the other hand, Justice Brewer in *Monongahela Navigation* expressed a more skeptical view about the appropriate use of offsets. At issue was the amount of compensation payable in an action by the federal government to acquire through eminent domain. a privately owned lock and dam on the Monongahela River. In the course of his opinion, Justice Brewer observed that the concept of just compensation "excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated. . . ." To be sure, this was not a situation of a partial taking where the issue was the impact on the remainder of a parcel. But Brewer signaled a cautionary approach with respect to general benefits.

The Supreme Court first squarely addressed the offset question in *Bauman v. Ross* (1897).[105] The case involved congressional legislation authorizing the commissioners of the District of Columbia to extend highways and for that purpose to condemn rights of way. The law provided that where only part of a tract was taken, the jury to assess damages "shall take into consideration the benefits that the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder." The Supreme Court strongly affirmed the power of Congress to provide for the deduction of benefits from the compensation for taking part of a parcel and injuring the rest. "The just compensation required by the constitution to be made to the owner," it explained, "is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public."[106] The Court pointed out that the "Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use."[107] It had no hesitancy in ruling that Congress could direct that "any special and direct benefits, capable of present estimate and reasonable computation" could be considered in assessing damages for the land taken, as well as for the part remaining.

105. 167 U.S. 548 (1897).
106. *Id.* at 574.
107. *Id.* at 584.

D. Summary of Offset Imbroglio

By the end of the nineteenth century, the practice of offsetting benefits in partial takings was widely accepted, but remained controversial and in flux. As we have seen, a number of states eliminated or curtailed this practice, either totally or with respect to transportation corporations. A majority of jurisdictions upheld the offset of special benefits, either against both the value of the land taken and damages to the remainder or just against the injury to the residue. Only a minority of jurisdictions permitted the offset of general advantages. The upshot was a high degree of confusion. In 1888, Issac F. Redfield, a leading commentator on railroad law observed: "But in consequence of numerous ingenious speculations in regard to possible advantages and disadvantages arising from public works for which lands are taken, the whole subject has become, in this country, especially, involved in more or less uncertainty."[108] "The constitutions, statutes, and decisions of the several States," another authority aptly pointed out, "so deal with this question as to create an inharmonious body of law."[109]

The distinction between special and general advantages was easy to articulate in the abstract but more difficult to apply in concrete situations. William A. Fischel has correctly pointed out: "The distinctions between general and special often seem arbitrary and unstable."[110] Courts repeatedly grappled with the tests to determine what amounted to special or general benefits.[111] Moreover, the assessment of damages and benefits was presented to a finder of fact, either jurors or appointed commissioners as state law dictated, under instructions from the trial court. These were fact-intensive inquiries based on different sets of circumstances. Accordingly, any generalization about results must be approached with caution.

V. SUBSIDY THESIS RECONSIDERED

A group of historians has posited the thesis that eminent domain policy in the nineteenth century functioned as a subsidy for transportation corporations. They maintain that courts developed doctrines

108. 1 ISSAC F. REDFIELD, THE LAW OF RAILROADS 270 (6th ed. 1888).

109. RANDOLPH, *supra* note 64, at 246.

110. WILLIAM J. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 85 (1995).

111. RANDOLPH, *supra* note 64, at 250–53 (differentiating special and general benefits); PHILIP NICHOLS, THE POWER OF EMINENT DOMAIN 332–37 (1909) (discussing tests for special benefits).

that minimized the expense of utilizing eminent domain, and in effect placed much of the cost on owners forced to sell their property at below market prices. "It is not too much to conclude," Harry N. Scheiber argued, "that in reality the states engaged in the systematic extraction of involuntary subsidies from persons on whom the costs of so-called public enterprises fortuitously fell."[112] According to this analysis, there was a sizeable gap between judicial rhetoric about the sanctity of property and the limited protection actually afforded landowners in eminent domain cases. In particular, these scholars allege that courts weakened the "just compensation" requirement. They insisted that the offset of estimated benefits was among the most potent devises to limit monetary compensation. "This offsetting doctrine," Scheiber maintained, "held down the state's costs, and provided the basis for a potentially large involuntary subsidy for the projects being undertaken."[113] Scheiber pointed to his research indicating that in Ohio (before 1851) and Illinois railroads were able to obtain land at virtually no cost due to generous assessments of offsets.[114] Similarly, Lawrence M. Friedman insisted that courts favored transportation companies over landowners, and that the offsetting doctrine amounted to a subsidy for such enterprise. He noted, however, that subsidies were generally popular because of the intense public desire for improved transport facilities.[115] Morton J. Horwitz advanced an even more sweeping subsidization theory, contending that courts in the antebellum era revamped the law governing eminent domain, nuisance, and torts in order to minimize compensation awards and facilitate economic development.[116]

A number of other scholars have cast a skeptical eye on the subsidy thesis from different perspectives. Peter Karsten, for instance, correctly pointed out that state courts tightened the scope of benefit offsets and that state constitutions increasingly prohibited the

112. Harry N. Scheiber, *The 'Takings' Clause and the Fifth Amendment: Original Intent and Significance in American Legal Development*, *in* THE BILL OF RIGHTS; ORIGINAL MEANING AND CURRENT UNDERSTANDING 241 (Eugene W. Hickok ed. 1991).

113. Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: the United States, 1789–1910*, 33 J. ECON. HIST. 232, 236 (1973).

114. HARRY N. SCHEIBER, OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820–1861, 277–78 (1969).

115. FRIEDMAN, *supra* note 53, at 124–25.

116. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, 63–108 (1977).

practice.[117] Fischel questioned the economic efficiency of offsets, noting the railroads received various kinds of gifts and subsidies. He pointed out that the perceived unfairness of offsets induced judges and lawmakers to substantially modify the application of offsets over time.[118] In his study of eminent domain awards in four mid-Atlantic states, Tony A. Freyer, directly challenged the subsidy thesis. He found that transportation companies preferred to avoid expensive and time-consuming litigation and rarely attacked compensation awards favorable to landowners in appellate courts.[119] Kermit L. Hall and Peter Karsten asserted that "the judiciary generally balked at allowing railroads such 'offsets,'" and concluded that "most railroads paid property owners considerably more than the objective value of the land they took."[120]

Given these disparate voices, this seems a propitious time to revisit the question of benefit offsets and their relationship to the constitutional norm of just compensation. We should begin by examining the relative position of lawmakers and judges. It bears emphasis that in many respects state legislatures played the most important role in determining eminent domain policy. After all, it was legislatures that delegated eminent domain authority to privately owned canal, turnpike, and railroad companies. Moreover, it was legislators who frequently mandated that perceived benefits should be offset against damages suffered by individual landowners. Judges were simply reacting to a legislative scheme. While some courts enthusiastically endorsed the notion of offsetting, others were more wary. A few insisted on payment of just compensation in money. In addition, the majority of courts modified the offset of benefits in ways that strengthened the rights of owners. By rejecting the offset of general advantages, they addressed the blatant unfairness of considering

---

117. Peter Karsten, *Supervising the "Spoiled Children of Legislation": Judicial Judgments Involving Quasi-Public Corporations in the Nineteenth Century U.S.,* 41 AM. J. LEGAL HIST. 315, 332–41 (1997).

118. FISCHEL, *supra* note 110, at 80–88.

119. Tony Freyer, *Reassessing the Impact of Eminent Domain in Early American Economic Development*, 1981 WISC. L. REV.1263, 1265–66, 1271–72. *See also* John D. Majewski, Commerce and Community: Economic Culture and Internal Improvements in Pennsylvania and Virginia, 1790–1860, 284–307 (1994) (Ph.D. diss, University of California, Los Angeles) (on file with the University of California, Los Angeles library) (finding that offset provisions were not consistently effective in reducing eminent domain awards in antebellum Virginia).

120. KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 130 (2d ed. 2009).

such widely shared benefits and curtailed the room for rank speculation about often speculative advantages. However imperfectly, courts generally took the lead in seeking to vindicate the just compensation principle. In due course, state constitution-makers and legislators followed the same path by curtailing or barring the use of offsets in compensation awards.

This is not to deny that transportation companies gained from the offset policy, but how much remains unclear. The subsidy thesis relies upon a large amount of guesswork. Scheiber, for example, maintained that offsets amounted to "a potentially large involuntary subsidy," but conceded that "a precise quantitative estimate of the subsidy cannot be calculated."[121] Freyer noted "the difficulties inherent in determining just how much of a benefit eminent domain was to transportation corporations, and who gained and who lost in the process."[122] No doubt the offset policy raised the distinct possibility of undercompensation for landowners by excessive evaluation of speculative benefits. On the other hand, railroads sometimes appealed without success from what they viewed as generous eminent domain awards.[123] Absent further empirical study of the frequency and extent to which compensation awards were reduced by offset, however, the subsidy thesis remains problematic. To place this matter in economic perspective, one must remember that, in addition to eminent domain, states showered benefits in the form of tax exemptions, monopoly privileges, direct financial aid, and land grants on transportation enterprises. These forms of assistance dwarfed offsets in eminent domain proceedings.

By the end of the nineteenth century, moreover, state and local governments undertook more complex projects, such as creating urban parks[124] and establishing municipal utility services.[125] They increasingly eclipsed private transportation companies as the prime beneficiaries of benefit offsets. The most common exercise of eminent domain by public agencies, of course, involved opening roads[126]

121. Scheiber, *supra* note 113, at 236–37.

122. Freyer, *supra* note 119, at 1285.

123. *See, e.g.*, White v. Charlotte & S.C. R.R. Co., 40 S.C.L. 47, 48–50 (Ct. App.1852).

124. Attorney General v. Williams, 174 Mass. 478, 479, 55 N.E. 77, 78 (1899) ("It is only within a few years that lands have been taken in this country for public parks. Now the right to take land for this purpose is generally recognized and frequently exercised.").

125. LEWIS, *supra* note 7, at 535–37.

126. Trosper v. Bd. of Comm'rs of Saline Cnty., 27 Kan. 391, 394 (1882) (value of special

and widening city streets.[127] Both raised the question of offsets. Any balancing benefits against damages in these instances, of course, had the effect of reducing the cost of public projects to the taxpayers while placing the burden disproportionally on individual property owners.[128]

VI. TOWARD THE FUTURE

Doctrines set in the nineteenth century regarding the determination of "just compensation" have continued to cast a long shadow in eminent domain proceedings to the present. "The problem of undercompensation," Gideon Kanner has explained, "is rooted in long-standing doctrinal and moral deficiencies in decisional law." He criticized judicial failure to "modify outmoded, largely nineteenth century rules of 'just compensation' law."[129] Three areas warrant further discussion.

A. Fair Market Value

The fair market value unquestionably remains the norm when an entire piece of property is acquired by eminent domain. Yet the inadequacy of this standard has been convincingly demonstrated. Unlike items which are the subject of frequent market transactions, establishing the value of a unique parcel of land is more complicated. Sales of comparable properties are not always available. Even the most conscientious appraisal is still ultimately an educated guess.[130] Moreover, the fair market standard as currently understood does not consider highly relevant factors, such as relocation costs, loss of

---

benefits may be deducted from special damages sustained by establishing highway); Newby v. Platte Cnty., 23 Mo. 258, 273–76 (1857) (offset of special benefits in calculating damages from opening of road); Beekman v. Jackson Cnty., 18 Or. 283, 287–89, 22 P. 1074 (1890) (offset of special damages against damages for opening county road).

127. Lewis v. City of Seattle, 5 Wash. 741, 754–57, 32 P.794, 798–99 (1893) (special benefits for widening street may be offset against damages to owner).

128. A change of street grade could injure abutting property without a taking. Many state statutes therefore allowed an award of damages to abutting owner who suffered a loss because of the new grade. As with analogous cases involving acquisition of property by eminent domain, special benefits could be considered in reduction of damages. LEWIS, *supra* note 42, at 1305–08. *See also* Chase v. City of Portland, 86 Me. 367, 29 A. 1104, 1106–07 (1894); Dayton v. City of Lincoln, 39 Neb. 74, 57 N.W. 754, 757 (1894).

129. Gideon Kanner, *"Fairness and Equity," or Judicial Bait-And-Switch? It's Time to Reform the Law of "Just" Compensation*, 4 ALB. GOV'T L. REV. 38, 40 (2011).

130. Miller v. United States, 317 U.S. 369, 375 (1943) (stating that "the application of this concept involves, at best, a guess by informed persons").

business goodwill, and litigation expenses.[131] Thomas W. Merrill has cogently concluded: "The most striking feature of American compensation law—even in the context of formal condemnation or expropriation—is that just compensation means incomplete compensation."[132] Put bluntly, the fair market value falls well short of the "full indemnification and equivalent for the injury" set forth by Blackstone.

B. Benefit Offsets

The balance of supposed benefits against damages remains a vexing dimension in eminent domain proceedings. The constitutionality of allowing states to offset benefits appears well settled. In *McCoy v. Union Elevated Railroad Co.* (1918), the U.S. Supreme Court rejected a contention that by allowing offset benefits a state deprived the owner of property without due process of law in violation of the Fourteenth Amendment. "It is almost universally held," the Court explained, "that in arriving at the amount of damage to property not taken allowance should be made for peculiar and individual benefits conferred upon it; compensation to the owner in this form is permissible."[133] In 1943, the Supreme Court simply remarked, with respect to a partial taking, that "if the taking has in fact benefited the remainder the benefit may be set off against the value of the land taken."[134]

In many respects, the debate over offsetting has not moved far from its nineteenth century roots. Most courts adhere to the special/general benefit dichotomy fashioned in the nineteenth century, and allow only special benefits to be offset in condemnation proceedings.[135] Hence, the Supreme Court of Texas explained: "The theory

131. Gideon Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W.L. REV. 57 (1969).

132. Thomas Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENV'T L.J. 110, 111 (2002). *See also* Lucas J. Asper, *The Fair Market Value Method of Property Valuation in Eminent Domain: "Just Compensation" or Just Barely Compensating?*, 58 S.C.L. REV. 489, 498–508 (2007) (arguing that current method of determining fair market value is inadequate and proposing revisions).

133. McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 365–66 (1918).

134. *Miller*, 317 U.S. at 375.

135. Note, *From Railroads to Sand Dunes: An Examination of the Offsetting Doctrine in Partial Takings,* 83 FORDHAM L. REV. 1539, 1561–65 (2014) [hereinafter Note, *From Railroads to Sand Dunes*].

underlying the distinction between special and general benefits is that the landowner's recovery should not be reduced by benefits that arise from the condemnation itself and that inure to the community at large, rather than only to the landowner."[136] Yet the difference still perplexes courts. "In practical application," a Missouri appellate court lamented, "the distinction between special benefits and general benefits is shadowy at best." It added that "the question of whether there are special benefits and the extent of them is a jury question."[137] Generally speaking, then, courts have not provided fresh analysis or broken new ground regarding the practice of offsetting.

In sharp contrast, two states have junked the long-standing separation of general and special benefits. The Supreme Court of California in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) adopted a rule permitting the offset "of all reasonably certain, immediate and nonspeculative benefits" against severance damages. It concluded that "in determining a landowner's entitlement to severance damages, the factfinder henceforth shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value, insofar as such evidence is neither conjectural nor speculative."[138] The Supreme Court of New Jersey adhered to the same view. Asserting that "the terms special and general benefits do more to obscure than illuminate" the calculation of just compensation, it held that "reasonably calculable benefits—regardless of whether those benefits are enjoyed to some lesser or greater degree by others in the community—that increase the value of property at the time of the taking should be discounted from the condemnation award."[139] To date, no other jurisdiction has adopted this approach.

This sweeping alteration of the rule for ascertaining just compensation in the case of partial takings is troublesome. It is a departure from the prevailing rule in the United States and marks a return to a consideration of general benefits widely rejected in the nineteenth century. It will likely result in the undercompensation of owners.[140]

---

136. Taub v. City of Deer Park, 882 S.W.2d 824, 828 (Tex. 1994) (holding that benefits at issue were general in nature and could not be used to offset damages to remainder).

137. State *ex rel.* State Highway Comm'n v. Koziatek, 639 S.W.2d 86, 88 (Mo. App. Div. 2 1982).

138. L.A. Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809, 824 (Cal. 1997).

139. Borough of Harvey Cedars v. Karan, 70 A.3d 524, 539–43 (N.J. 2013).

140. For a different assessment of this new rule, see Note, *From Railroads to Sand Dunes*,

Moreover, as one of the dissenting judges in *Los Angeles County* charged, the new formula opened the door to a grievously wrongful outcome in which neighbors enjoy similar advantages while suffering no pecuniary loss.[141] Justice Joyce L. Kennard persuasively explained:

> When a parcel of property is severed by a government taking, any damages to the remainder are part of the injury the landowner suffers. To refuse to compensate the landowner for those damages by offsetting against them the general benefits that all in the vicinity of the project receive unfairly forces the landowner to pay for benefits that others receive for free. Limiting offsets only to special benefits more equitably distributes among the entire community the benefits and burdens of the project.[142]

What would have prompted these courts to take such a radical and retrograde step? The opinions offer clues. Both the California and New Jersey courts assert that the separation of special from general benefits originated in the context of railroad expansion.[143] Hence, this division of benefits was pictured as an effort to curtail claimed offsets by private railroad companies exercising eminent domain power. "The historical reasons that gave rise to the development of the doctrine of general and special benefits," the New Jersey Supreme Court maintained, "no longer have resonance today."[144] The unspoken assumption was that governmental agencies, which initiate nearly all condemnation proceedings in modern times, should receive more favorable treatment than private transportation companies. Indeed, the Supreme Court of California in *Los Angeles County* made explicit its desire to hold down the cost of public projects through more generous offsets, declaring:

> One general principle relevant to this determination is that taxpayers should not be required to pay more than reasonably necessary for public works projects. Stated another way, compensation for taking or damage to property must be just to the

---

supra note 135, at 1566–75 (arguing that the distinction between special and general benefits should be rejected because "public policy concerns of the twenty-first century public are different," and maintaining that the offset of all nonspeculative benefits is fair to landowners).

141. *L.A. Cnty. Metro. Transp. Auth.*, 941 P.2d at 830 (citing *Lewis*, *Cooley*, and *Nichols*).

142. *Id.* at 836.

143. *Id.* at 816; *Borough of Harvey Cedars*, 70 A.3d. at 536, 542–43.

144. Borough of Harvey Cedars v. Karan, 70 A.3d. 524, 542 (N.J. 2013).

> public as well as to the landowner. A rule permitting offset against severance damages of all reasonably certain and nonspeculative benefits minimizes the cost of public works projects in two respects: Certain offsets would be permitted that presently are disallowed, and transaction costs would be reduced due to the new rule's greater clarity and certainty.[145]

Justice Marvin R. Baxter, in dissent, cast a critical eye on this revised rule, which minimized expense to governmental agencies by reducing monetary compensation to individuals whose property was taken. "For the first time in modern California history," he complained, "a public agency that condemns part of a larger parcel may reduce its monetary liability for severance damages by 'setting off' benefits to the remainder which are widely shared by condemned and noncondemned parcels alike." Baxter warned against abandoning a formula which "for nearly a century, has justly protected the rights of California property owners against abuse of the awesome sovereign power of eminent domain."[146]

No doubt the dichotomy between special and general benefits has long bedeviled courts. In practice, however, this distinction serves to safeguard, even if imperfectly, the rights of property owners by limiting the extent of benefit offsets. By eliminating this traditional division, the California and New Jersey courts signal that their primary concern is to shield government from financial liability. Yet one might well ponder whether, if the differentiation between special and general benefits is so vexing, courts should reject all offsets and, following the lead of Justice Paterson, hold that the constitutional requirement of "just compensation" contemplates payment in money. Arguably this approach would better effectuate the protective function of the compensation mandate.[147]

C. Troublesome Legacy of Undercompensation

Inadequate compensation for persons whose property has been taken by eminent domain has been a persistent theme originating in the nineteenth century. Despite brave words about "full and just

---

145. L.A. Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809, 823 (Cal. 1997).

146. *Id.* at 837.

147. *See* EPSTEIN, *supra* note 48, at 190 ("The state can always compensate with cash, so its unilateral decision to pay with nonstandard coinage properly invites heightened judicial scrutiny.").

equivalent," the actual performance by courts has too often fallen short of this goal. The fair market standard, as applied, simply did not put the owner in as good a position as before the taking of a parcel.[148] From the beginning of the nineteenth century, moreover, legislators mandated and courts broadly sustained the offset of supposed benefits in lieu of monetary compensation for partial takings.

Why did courts that extolled the importance of private property dilute the promise of just compensation when property was taken? Policy considerations bulk large in the continued deliberations over how much compensation should be payable in eminent domain proceedings. As one scholar has pointed out: "Yet behind the façade of those seeming clear legal standards lurks an underlying division between those who would require the government to provide a more generous measure of compensation and those who would require the government to pay less."[149] One line of thinking views just compensation as a bulwark against eminent domain abuse and an affirmation of the critical place of private property in the constitutional order. Another sees just compensation as a potential barrier to desired governmental action and thus favors a less fulsome measure of compensation. This is a variation on the ongoing debate over what governmental actions amount to a taking of property, with proponents of regulation and public projects supporting a narrow understanding of a taking.[150]

Although the pattern of decisions was uneven, we have seen that many courts in the nineteenth century devised formulas to hold down monetary compensation awards in order to promote transportation projects. This pattern continued into the twentieth century, but then the beneficiaries were largely governmental agencies pursuing a variety of expansive projects. Further, jurisprudential changes reinforced the weakening of the just compensation requirement. The Progressive movement of the early twentieth century downplayed claims of individual rights and expressed faith in government to reshape society. Progressives displayed little patience with constitutional doctrines which confined the reach of government. In particular, they challenged the central place of property rights in

148. THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTION TO U.S. LAW: PROPERTY 249–50 (2010).

149. Lunney, *supra* note 41, at 722.

150. RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 359–60 (2014).

the constitutional order. The political triumph of the New Deal in the 1930s brought this trend to fruition.[151] Distinguishing between the rights of property owners and other individual liberties, New Deal Constitutionalism afforded property rights a greatly reduced level of constitutional protection.[152] This was a radical departure, because neither the language of the Constitution and Bill of Rights nor the views of the framers draw any dichotomy between different categories of rights.[153] The effect, of course, was to strengthen governmental control over private property.[154] As signs of this profound change, the once-potent contract clause was virtually eviscerated[155] and the "public use" clause of the Fifth Amendment was drained of efficacy at the federal level.[156]

In this new constitutional climate of privileging governmental action, it was not surprising that the "just compensation" clause would be construed as narrowly as possible. In 1943, the Supreme Court pictured the measure of just compensation as the subject of a trade-off. Speaking for the Court, Justice William O. Douglas opined: "The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner."[157] Not only is this a highly simplistic rendering of eminent domain history, but it intimates that adequate compensation to persons whose property is taken is somehow antagonistic to public projects.[158] The Supreme Court of California was more explicit

---

151. James W. Ely, Jr., *The Progressive Era Assault on Individualism and Property Rights*, 29 SOC. PHIL. & POL'Y 255 (2012). *See generally* RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006).

152. *See, e.g.*, United States v. Carolene Products Co., 303 U.S. 144 (1938) (placing the rights of property owners in a subordinate category entitled to a lesser degree of protection under the due process norm).

153. Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, CATO SUP. CT. REV. 9, 19 (2003–2004) ("Economic rights, property rights, and personal rights have been joined, appropriately, since the time of the founding.").

154. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 123–41 (3d ed. 2008). *See also* Dellinger, *supra* note 153.

155. JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 216–37 (2016).

156. James W. Ely, Jr., *'Poor Relation' Once More: The Supreme Court and the Vanishing Rights of Property Owners,* CATO SUP. CT. REV. 39, 53–65 (2004–2005) (tracing Supreme Court decisions that gutted the "public use" clause). *See also* ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 55–60 (2015).

157. United States *ex rel*. Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 280 (1943).

158. Kanner, *supra* note 129, at 60–63 (analyzing *Powelson* and criticizing judicial assumption that full compensation would hamper public projects).

in articulating its policy preference favoring public projects. In a remarkable but disturbing opinion, the court insisted in 1960 that it had a duty to minimize the size of condemnation awards. Otherwise, it fretted, the cost of public improvements would increase and "impose a severe burden on the public treasury."[159] The court was more concerned with an imagined impact on government than with the constitutional right of an individual to receive a full indemnity. This bizarre reasoning entirely inverts the purpose of the just compensation norm to prevent government from singling out a few individuals to bear the cost of providing social goods. Indeed, it strongly indicates a dismissive attitude that the just compensation requirement is an unwelcome obstacle to be circumvented to the greatest extent possible.

Equally problematic, skimpy compensation awards encourage more aggressive use of eminent domain by government. Yet with the erosion of the "public use" limitation on the exercise of eminent domain, the "just compensation" requirement is the only meaningful check on governmental abuse. One authority has cogently observed: "Efficient just compensation should provide the significant legal check on the use of eminent domain that is now lacking. As long as the Court chooses not to permit meaningful review of public use claims, just compensation is the only effective constitutional check on governmental exercises of eminent domain."[160]

The melancholy trend of denying full compensation in eminent domain proceedings has continued. For example, in *Bay Point Properties, Inc v. Mississippi Transportation Commission* (2016), the Supreme Court of Mississippi upheld a jury verdict that a state agency effected a taking of land by exceeding the terms of an express easement for highway purposes in order to construct a park.[161] Generally, when an easement is created for a specific purpose, it terminates upon the cessation of that purpose and the land reverts to the landowner

159. People *ex rel.* Dept. of Pub. Works v. Symons, 357 P.2d 451 (Cal. 1960).

160. James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain,* 69 MINN. L. REV. 1277, 1312 (1985). *See also* MERRILL & SMITH, *supra* note 148, at 250–51 (pointing out the formulation of a "just compensation" standard "aimed at providing more complete compensation would enhance the security of property rights and would be consistent with a general objective of promoting governmental forbearance").

161. Bay Point Props., Inc. v. Miss. Transp. Comm'n, 201 So.3d 1048, 1051 (Miss. 2016), *cert. denied*, 137 S. Ct. 2002 (2017). I joined an amicus brief in *Bay Point* supporting the petitioner's request for a writ of *certiorari*.

free of the burden of the easement.[162] However, the majority incredibly ruled that because of a state statute requiring release of highway easements on the books of the transportation commission the easement was still in effect despite being converted to a very different use. Therefore, it denied just compensation for the unencumbered value of the land despite the taking for a park and upheld a nominal award.[163] The two dissenters charged that the state statute did not bar recovery of compensation for unencumbered property and that the outcome violated Bay Point's federal and state constitutional right to just compensation for the value of the land without the easement.[164] The United States Supreme Court declined review, but Justices Neil Gorsuch and Clarence Thomas separately stated:

> When a state negotiates an easement limited to one purpose but later uses the land for an entirely different purpose, can the State limit, by operation of statute, the compensation it must pay for that new taking? The Mississippi Supreme Court held that it may do just that. But this decision seems difficult to square with the teachings of this Court's cases holding that legislatures generally cannot limit the compensation due under the Takings Clause of the Constitution.[165]

In *Bay Point*, the Supreme Court of Mississippi in effect endorsed the taking of property without just compensation. One must be careful about generalizing from a single case, but the outcome does not bode well for judicial willingness to insist upon sufficient compensation when property is taken.

Nineteenth century courts, of course, cannot be held responsible for the dismissive attitude of the post–New Deal legal culture toward the rights of property owners. In many respects courts in the

---

162. JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 10:8 (2d ed. 2020).

163. *Bay Point Props. Inc*, 201 So.3d at 1055–57.

164. *Id.* at 1059–63. *See* Steven J. Eagle, *Land Use Regulation and Good Intentions,* 33 J. LAND USE & ENV'T L. 87, 140 (2017) (picturing *Bay Point* as an example of courts permitting state government to "reconfigure infrastructure more inexpensively by disregarding property rights"); Note, *Parks and Separation: How the Mississippi Legislature Decided Just Compensation in* Bay Point Properties, Inc .v. Mississippi Transportation Commission, 38 MISS. C.L. REV. 49, 68 (2019) (asserting that the state statute "put the state's financial interests ahead of private property rights," and that this "appears to be nothing more than a clever avoidance of just compensation").

165. Bay Point Props., Inc. v. Miss. Transp. Comm'n, 137 S. Ct. 2002 (2017).

nineteenth century were far more protective of property owners than is the norm today. For example, they upheld contracts against attempted impairment by state legislatures,[166] looked skeptically upon confiscation schemes,[167] and began to fashion a doctrine of regulatory takings.[168] In many states, starting with Illinois in 1870, constitution-makers strengthened the state's taking clause by requiring compensation when property was "taken or damaged for public use."[169] Still, the courts in the nineteenth century fell short of requiring adequate compensation when property was acquired by eminent domain, and this doleful legacy haunts us today.

166. ELY, *supra* note 155, at 30–191.

167. *See generally* DANIEL W. HAMILTON, THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND CONFEDERACY DURING THE CIVIL WAR (2007).

168. David J. Brewer, *The Protection of Private Property from Public Attack*, 55 NEW ENGLANDER & YALE REV. 97, 102–05 (1891) ("Property is as certainly destroyed when the use of that which is the subject of property is taken away, as if the thing itself was appropriated, for that which gives value to property is its capacity for use."); Bent v. Emery, 173 Mass. 495, 496, 53 N.E. 910 (1899) (Holmes, J.) ("It would open to argument at least that an owner might be stripped of his rights so far as to amount to a taking without any physical interference with his land."). *See also* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1259 (observing that "numerous state courts recognized devaluative takings to be compensable at an early stage. Both regulatory takings and consequential takings were acknowledged").

169. LEWIS, *supra* note 7, at 627–28. *See also* Chicago v. Taylor, 125 U.S. 161, 166 (1888) (Harlan, J.) (observing that state constitution framers added language to give greater security to private property).