JUST REMEDIES

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Abstract

This Article challenges the preference in takings law for remedial simplicity over remedial justice, and demonstrates why this preference—which is manifested by the application of a universal compensation standard—fails to fulfill the constitutional requirement of "just compensation." This failure exists at both the normative and positive levels. In a normative sense, the universal compensation mechanism is inadequate because it ignores important differences among owners, among types of property, and in the consequences of expropriation. Consequently, current takings law is at odds with the pluralistic nature of property ownership. In a positive sense, takings law is ill-equipped to assess the actual loss incurred by owners whose property is taken. Courts apply a universal compensation standard—the fair market value of the taken property—which makes compensation exclusively dependent on the market, imports the failures of the market to state action, ignores non-market values and losses incurred by owners, and excludes market values that are not directly linked with the property's price.

This Article does not argue that we must sacrifice simplicity in the law for the sake of justice, but suggests that we can have them both. By expanding the range of remedies available to owners subject to expropriation, this Article offers a normative rule-based remedial scheme in takings law. To avoid ad hoc adjudication and practical assessment difficulties, this Article proposes categorization of the different prototype failures that characterize current law. Each prototype category requires

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different treatment in the law of takings, including different remedies available to owners. A remedial scheme, which is sensitive to property types, owners' actual losses, and expropriation consequences, will restore a constitutional sense of justice to takings law.

I. INTRODUCTION

Current takings law is premised on two assumptions: first, the law assumes that the only workable and objective rule for determining compensation is the fair market value ("FMV") of the taken property. Second, the law assumes that providing all owners with the FMV of the taken property will satisfy the constitutional requirement of "just compensation."[1] This Article challenges both assumptions.

The FMV standard is blind to critical differences among property owners, types of property, and expropriations. As a result, the universal application of the FMV standard as a takings remedy undermines the three prominent goals of compensation: equality of property owners, efficiency in government expropriation decisions and property owners' investment strategies, and political fairness and transparency.

This Article challenges both the positive and the normative desirability of the existing compensation standard in takings law. Positively, this Article demonstrates how the FMV "monopoly" imports market failures into a governmental process, excludes certain market values, and ignores owners' subjective losses. Normatively, this Article suggests current law is incompatible with a pluralistic conception of property, as it fails to account for variability in the way takings affect differently situated property owners.

Taking both positive and normative arguments into account, courts' adherence to FMV as a universal compensation standard in takings law shows they abandoned the goal of justice in favor of a workable, objective rule. The current state of takings law reflects a preference for remedial simplicity over remedial justice. While simplicity in the law may be a worthy objective, the FMV standard fails to fulfill the constitutional requirement of "just compensation."

In view of the underlying aims of takings compensation (equality, efficiency, and political fairness), this Article argues for an expansion of the array of remedies available to property owners subject to takings. With a variety of remedies at its disposal, the government would be able to address inherent differences between owners, properties, and expropriations. Moreover, the proposed reform of takings law is

1. *See infra* note 2 and accompanying text.

consistent with a pluralistic conception of property, which recognizes property as a complex and dynamic set of institutions and values.

This Article introduces several different types of remedies, including both fixed and variable premiums, in-kind remedies designed to place the owner in his previous position (not only monetarily), and indirect remedies that provide a tailor-made solution in complicated situations. This Article also provides a roadmap for the use of these remedies because providing the government with a box of tools without instructions may lead to uninformed and harmful use of those tools. Such instructions are especially important for ex-post decision-making, which this Article addresses.

This Article proceeds in four parts. Part II presents the universal application of the FMV standard as a simplicity default. This Part confronts the courts' application of a universal compensation standard with the three prominent rationales for takings compensation, concluding that the preference for simplicity results in injustice. This Part continues with a positive and a normative argument against the current use of FMV as a universal compensation standard. Part III presents an array of remedies that together may fulfill the constitutional requirement of "just compensation." Part IV presents an institutional roadmap for the inclusion of different remedies within the law of takings. This Part addresses two major concerns regarding a remedial scheme in takings law where the form a remedy takes depends on the peculiar circumstances of the property owner: practical assessment difficulties and ad hoc decision-making. This Article offers a categorization of losses incurred in expropriations and proposes that courts allocate remedies while taking into account the rationale and the inherent deficiencies of each prototype category.

II. THE FAIR MARKET VALUE STANDARD

Under current law, owners whose property is taken receive compensation equal to the FMV of the property. Courts have repeatedly held that FMV compensation satisfies the constitutional requirement of providing "just compensation" for takings.[2] The decision to use the market value of the property as the standard for just compensation is

2. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see also* United States v. Cors, 337 U.S. 325, 332 (1949) (citing United States v. Miller, 317 U.S. 369, 374 (1943)); *Miller*, 317 U.S. at 374; Olson v. United States, 292 U.S. 246, 255 (1934) (defining just compensation as "the market value of the property at the time of the taking contemporaneously paid in money" (citing Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 306 (1923))).

somewhat surprising, as the government's use of its eminent domain authority often results from its inability to acquire the property in the market. Consequently, both courts and commentators have challenged the notion that FMV is a just standard of compensation for takings.[3] Courts have acknowledged the problems inherent in establishing a universal compensation standard, especially one that relies heavily on the market.[4] Nevertheless, they justify the use of a universal market-based compensation mechanism in terms of practicality, arguing that the task of assessing values unique to a specific property is difficult, and sometimes, impossible.[5]

Property scholars, on the other hand, regard the decision to base compensation on FMV as problematic for several reasons. Law and economics scholars have raised the concern that providing compensation according to a universal standard may negatively affect both owners' and the government's incentives for efficient expropriation.[6] Both law and economics and progressive property scholars argue that FMV ignores several important values that owners place on their property, thereby leading to undercompensation.[7] This common understanding of both

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3. *E.g.*, DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 170 (2002) ("Takings involve forced exchanges of unique property rights, typically rights in land, in circumstances where voluntary exchange has failed. So the fair market value standard is inherently problematic.").

4. *See, e.g.*, United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979).

> Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule. The Court therefore has employed the concept of fair market value to determine the condemnee's loss. Under this standard, the owner is entitled to receive "what a willing buyer would pay in cash to a willing seller" at the time of the taking.

Id. (citations omitted) (first citing *Miller*, 317 U.S. at 374; *Cors*, 337 U.S. at 332; and then quoting *Miller*, 317 U.S. at 374).

5. *Id.*

6. *E.g.*, Abraham Bell, *Not Just Compensation*, 13 J. CONTEMP. LEGAL ISSUES 29, 48 (2003); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 602 (1986) ("The basic economic framework suggests that, as a matter of economic efficiency, compensation is unwise."); *see generally* Lawrence Blume, Daniel L. Rubinfeld & Perry Shapiro, *The Taking of Land: When Should Compensation Be Paid?*, 99 Q.J. ECON. 71 (1984) (arguing that for efficiency reasons, compensation standards should vary).

7. *See* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 776–77 (2009); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 699–700 (1973); Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 963–64; James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 866 ("[F]air market value results in systematic under-compensation from the property owner's perspective . . . ."); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82–85 (1986); Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligation*s, 30 HARV. ENVTL. L. REV. 309, 315–16

courts and property scholars regarding the inherent injustice of the FMV compensation standard raises both positive and normative arguments against the continuation of the status quo.

The positive argument against the monopoly of the FMV compensation standard in takings law is that the use of this standard imports the deficiencies of the market into the law of takings, thereby subjecting owners to injustice when the market fails or non-market values are ignored. The normative argument posits that the use of a universal, market-oriented compensation standard fails to take into account the diverse characteristics of property owners and the plurality of values they attach to their properties.

In what follows, I will argue that both arguments require us to rethink takings law's fulfillment of the constitutional requirement of "just compensation." But before I elaborate on these two arguments, I will offer an explanation of why FMV was embraced as the sole, ultimate compensation standard in eminent domain cases. I will argue that adoption of the FMV standard reflected a desire for simplicity, but came at the expense of ensuring justice for property owners.

A. Market Value Standard: The Desire for Remedial Simplicity

In this Part, I argue that courts' adoption and application of the FMV standard is motivated by a preference for a simple, workable rule, rather than a goal of ensuring that property owners are justly compensated. When courts apply the FMV standard, they frequently admit that they cannot provide justice for owners or cover all of the owners' losses,[8] yet courts refuse to apply alternative compensation standards, such as restitution (value to the taker) or indemnification (value to the owner).[9]

(2006); Shai Stern, *Takings, Community, and Value: Reforming Takings Law to Fairly Compensate Common Interest Communities*, 23 J.L. & POL'Y 141, 191–93 (2014); Laura S. Underkuffler, *The Politics of Property and Need*, 20 CORNELL J.L. & PUB. POL'Y 363, 374–76 (2010).

8. *E.g.*, Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988) ("Compensation in the constitutional sense is therefore not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to *his* property. Many owners are 'intramarginal,' meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, they value their property at more than its market value (i.e., it is not 'for sale'). Such owners are hurt when the government takes their property and gives them just its market value in return.").

9. Language in some courts' decisions suggests an indemnification standard. *See, e.g.*, United States v. Reynolds, 397 U.S. 14, 16 (1970) ("The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." (citing United States v. New River Collieries Co., 262 U.S. 341, 343 (1923); Seaboard Air Line Ry.

Instead, courts declare that the FMV standard is the best means of determining compensation in eminent domain cases because it is *objective* and *workable*.[10] In other words, courts prefer remedial simplicity over remedial justice.[11] This preference is not necessarily problematic, as legal systems often strive for simplicity.[12] Nevertheless, it may be especially concerning in the case of eminent domain because the Constitution explicitly requires that compensation for takings be "just."[13]

But what is "just" compensation? This question has troubled both courts and property scholars. In trying to extract a meaningful conception of justice in the context of eminent domain, one should begin by exploring the theories behind the compensation requirement. Three such theories have been put forward. The first explains this requirement as part of the government's duty to treat all citizens equally—that is, the government has an obligation to restore owners whose property is taken to a position of parity with their fellow citizens.[14] The theory is that of a just share—the cost of government action should not fall disproportionately on certain citizens, i.e., those citizens who happen to be targets of the government's exercise of its eminent domain power.[15]

The second theory views the compensation requirement as an instrument to promote efficiency.[16] By providing compensation to

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Co. v. United States, 261 U.S. 299, 304 (1923))); *New River Collieries Co.*, 262 U.S. at 345 ("The owner was entitled to what it lost by the taking.").

10. *564.54 Acres of Land*, 441 U.S. at 511 (citing United States v. Miller, 317 U.S. 369, 374 (1943); United States v. Cors, 337 U.S. 325, 332 (1949)).

11. Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 874 (2007) (observing that "law has adopted fair market value as the compensation benchmark despite its tension with the goal of full compensation for purely practical reasons").

12. RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 21–36 (1995) (arguing the virtues of simplicity in legal systems).

13. U.S. CONST. amend. V.

14. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 587 (1972) ("We return, then, to the principle that compensation is designed to even the score when a given person has been required to give up property rights beyond his just share of the cost of government.").

15. *Id.*; *see also* Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."); William Michael Treanor, *The* Armstrong *Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151 (1997) (reviewing the effect of what Treanor terms the "*Armstrong* principle" in takings cases).

16. *See, e.g.*, DANA & MERRILL, *supra* note 3, at 42 ("By requiring the government to pay compensation for assets taken, the argument goes, we force government officials to compare the value of the resource in government hands to its value in private use. Presumably, officials will go forward with the taking only if they anticipate that the resource will

property owners, the government is incentivized to consider all costs involved in the implementation of a public project. Proponents of this theory view the compensation requirement as a means to prevent the government from falling prey to fiscal illusions.[17] The obligation to compensate property owners erects a barrier before financially irresponsible authorities, which forces them to internalize all costs of their actions.[18] The scale and scope of compensation may also affect the investment policy of owners.[19] As several commentators demonstrate, owners are incentivized to internalize the risks and costs of property investment differently depending on the amount of compensation they would receive in the event of a taking.[20] According to the efficiency justification for compensation, therefore, it is not only desirable to create incentives for the government to behave efficiently but also to create incentives for private parties to behave efficiently.[21]

The third justification for the compensation requirement is that such a requirement is necessary to avoid failures of the political process.[22] Political interest groups have unequal levels of power and influence; less powerful groups in society are more likely to lose their property via eminent domain.[23] An "objective" universally-applied compensation standard allegedly mitigates the impact of these disparities in that it leaves the government with little discretion over how to compensate

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produce greater value as part of the government project than the compensation the government must pay to obtain it.").

17. Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 999 (1999).

18. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 64 (5th ed. 1998); Bell & Parchomovsky, *supra* note 11, at 881–84; Jack L. Knetsch & Thomas E. Borcherding, *Expropriation of Private Property and the Basis for Compensation*, 29 U. TORONTO L.J. 237, 242–43 (1979).

19. *See* Kaplow, *supra* note 6, at 528–32; *see generally* Blume, Rubinfeld & Shapiro, *supra* note 6 (discussing the economic efficiency of compensation for takings under different sets of assumptions).

20. *See* Bell & Parchomovsky, *supra* note 11, at 882; Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 131–33 (2002).

21. Thomas J. Miceli, *Compensation for the Taking of Land Under Eminent Domain*, 147 J. INSTITUTIONAL & THEORETICAL ECON. 354, 356–59 (1991).

22. *See* Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 306–07 (1990) (suggesting that the victims of takings are unlikely to be well represented in the political process because they are an ad hoc group, thus lacking the advantages of repeat political players, particularly the ability to engage in logrolls). *But see* Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 130 (1992) ("If public choice theory has any one key finding, it is that small groups with high stakes have a disproportionately great influence on the political process.").

23. *See* DANA & MERRILL, *supra* note 3, at 46–52. There are several theories for why compensation for eminent domain reduces concerns of political inequality. *Id.*; Bell & Parchomovsky, *supra* note 11, at 884–85.

owners subject to takings. All owners, regardless of their position in society, receive an amount of money determined by reference to an objective measure of value.[24]

Taking into account these three justifications for the compensation requirement, we can identify three different conceptions of justice. According to the first justification, which I refer to as the "equality justification," compensation is "just" as long as it restores the owner to the same position he was in before the expropriation. According to the second justification, which I refer to as the "efficiency justification," compensation is "just" when it forces the government to incur the actual costs involved in the project. According to the third justification—the "political justification"—just compensation guards against the government's exercise of eminent domain in a manner that is biased against individuals with relatively little political influence.

These three justifications for the constitutional compensation requirement differ in terms of the purpose of compensation and the meaning of "just"; yet, they all share the notion that a universal compensation standard, which fails to take into account all of the actual, specific costs and losses suffered by owners in individual cases, cannot be regarded as "just." Consider the equality justification. If our goal in paying compensation is to spread equally the burdens of expropriation among all citizens, then we need to address the specific losses incurred by each citizen when his property is taken. If John and Ruth own properties with equal FMVs, but suffer different losses when the properties are subject to eminent domain (because they assign different levels of subjective value to their properties, for example), then merely paying John and Ruth FMV compensation would not result in equal outcomes. Inequality results from some people being placed closer to the position they occupied pre-taking than others.[25]

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24. *See* Barton H. Thompson, Jr., *A Comment on Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 141, 141 (1992) ("This difference in political strength can and does produce inefficient governmental actions. American political lore, for example, is rife with stories of highways being rerouted or other public projects relocated in seemingly inefficient ways solely to avoid politically effective communities and landholders. Of far greater concern than the efficiency loss, however, is the simple unfairness of this discriminatory pattern of takings. Such concerns strongly suggest that compensation should be constitutionally regulated." (footnote omitted)).

25. *See* ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS 177–78 (J.A.K. Thomson trans., Penguin Books 1976) (1953) ("And there will be the same equality between the shares as between the persons, because the shares will be in the same ratio to one another as the persons; for if the persons are not equal, they will not have equal shares . . . ."). This statement is not meant to carry any negative connotations. Instead, it simply recognizes that those with different circumstances should be treated fairly while considering those different circumstances.

The same logic also applies to the efficiency justification. If compensation is intended to provide efficient incentives to both owners and the government, it should address all of the actual costs and losses involved in the process, taking into account the specific circumstances of each case.[26] The political process justification also demands a compensation policy that does not apply an inflexible standard in all cases. This is because if compensation is justified on the basis of leveling the playing field in terms of citizens' access to power, then we need to maintain flexible enough mechanisms to prevent certain actors from manipulating the political process.

Another possibility is that using a simple standard for compensation is "just" precisely because of its simplicity. One might argue the courts' efforts to implement a simple standard appear to be just in two types of cases. First, such a standard may ensure justice in a comprehensive manner in certain cases. Although the individual owner whose property was taken may not be compensated fully for his losses, we might still regard the arrangement as just because it internalizes the interests of others and of society at large.[27] This may be the case when the needs of society require some sacrifices on behalf of the individual,[28] or when the costs and efforts to estimate the actual loss of the individual place too great a burden on society.[29] Second, we might also acknowledge that "full" justice—placing the property owner in the same position he was in

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26. *See, e.g.*, Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CALIF. L. REV. 75, 142 (2004) (discussing the effectiveness in compensating for communality loss).

27. *See, e.g.*, United States v. New River Collieries Co., 262 U.S. 341, 344 (1923) ("Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation. More would be unjust to the United States, and less would deny the owner what he is entitled to." (citations omitted) (citing L. Vogelstein & Co. v. United States, 262 U.S. 337, 339 (1923); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 81 (1913); Boom Co. v. Patterson, 98 U.S. 403, 407–08 (1878))).

28. *See, e.g.*, JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP 84 (2000); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 19–25 (2000); Alexander, *supra* note 7, at 757; Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 134 (2009); Hanoch Dagan, *Expropriatory Compensation, Distributive Justice, and the Rule of Law*, *in* RETHINKING EXPROPRIATION LAW I: RETHINKING PUBLIC INTEREST IN EXPROPRIATION LAW (B. Hoops et al. eds., forthcoming 2016) (manuscript at 18) (on file with author) ("One way of doing this is by drawing a distinction between expropriations of lots of land that benefit the public at large, and those benefitting the community to which the property owner belongs, so the latter lead to less than full compensation.").

29. *See* EPSTEIN, *supra* note 12, at 30–36 (discussing the tradeoff between administrative costs and incentive effects as a key for finding the proper extent of simplicity).

before the taking—is impossible, but implementation of a simple standard promotes justice to some extent and is the best available option. In the case of courts' implementation of the FMV standard, however, neither of these justifications apply.

Courts' adoption of the FMV standard was not designed to balance the interests of the individual vis-à-vis society. As several scholars have argued, the efficiency of the FMV standard is dubious with respect to the incentives it offers to both property owners and government officials.[30] But more importantly, courts do not justify the FMV standard on this basis, and they do not maintain that it actually is designed to achieve a comprehensive justice. While courts accept that the FMV standard fulfills the "just compensation" requirement, they nevertheless frequently observe that it fails to provide owners with the entire amount of compensation to which they are entitled.[31] By pointing out differences among owners and the values they place on their property—and yet, determining compensation according to a universal standard—courts can hardly claim this standard ensures justice. Therefore, although courts may have adopted the FMV standard for its simplicity, they nevertheless do not assert that its disregard of certain losses incurred by some owners promotes, or is consistent with, a comprehensive conception of justice.

What about the argument that the FMV standard is the "most just" solution? According to this argument, courts acknowledge the practical impossibility of "complete" justice and instead apply a compensation standard that places owners as close as possible to the position they were in before the taking.[32] The FMV standard is thus a second-best solution under the circumstances. To legitimize this argument, courts must demonstrate that: (a) FMV compensation indeed provides owners with a remedy that is as close to "just" as possible; and (b) it is better than all other available remedies. Courts, so I argue, fail to do so. While both courts and scholars argue that the FMV compensation is a practical compromise, there is no basis for claiming this standard promotes justice to a greater extent than other remedies—especially since alternative remedies have not been examined in depth.

The fact that the courts' preference for simplicity is not rooted in a broader attempt to ensure justice raises questions as to whether the FMV standard leads to just results. As mentioned earlier, two different arguments may be made against the monopoly of the FMV compensation

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30. *See* sources cited *supra* note 6.

31. *See, e.g.*, Olson v. United States, 292 U.S. 246, 255 (1934); Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988).

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

standard: a positive one and a normative one. These two arguments will be the core of the next Section.

B. The FMV Standard and Its Deficiencies

1. Positive Argument

The FMV standard makes the state action of eminent domain—which is designed primarily to overcome the impossibility of acquiring property in the market—dependent on market forces. This association is not natural or inevitable. Eminent domain is mostly used "in thin markets, where there is usually only one seller," making it difficult to determine market value.[33] Nevertheless, the use of the FMV standard imports the deficiencies of the market into the governmental act of eminent domain, in the absence of any real mechanisms to correct for those deficiencies. The universal application of the FMV standard prevents courts from dealing properly with these failures, which leads, in some cases, to injustice. In what follows, I present three prominent types of cases in which the application of market principles in the eminent domain context results in injustice.

a. The "Imagined Market" Failures

The FMV standard attempts to represent the "real" cost of the property transfer, as if the owner sold it in the free market. Yet this simulation of the free market often fails because it does not take into account the market as it actually exists and the ability of property owners to reenter the market and reestablish themselves post-taking. In such cases, the "imagined market" created by takings law fails, and courts' adherence to the FMV standard makes "just" compensation unlikely.

The most prominent example for these "imagined market" failures, which are not being fully addressed by courts, is blight condemnations. Blight condemnations often involve a largescale condemnation of private property for urban renewal purposes.[34] In such cases, which have become

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33. DANA & MERRILL, *supra* note 3, at 170.

34. *See, e.g.*, Parchomovsky & Siegelman, *supra* note 26, at 138–39 (describing the long history of largescale expropriations of private property for urban renewal); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 2–3 (2003) (describing the process of urban renewal and its implications on private property owners); David T. Beito & Ilya Somin, *Battle over Eminent Domain Is Another Civil Rights Issue*, KAN. CITY STAR (Apr. 27, 2008), http://

common all across the United States, owners hold properties in poor condition and, therefore, these properties have low market value. Nevertheless, these owners do have property, and even more important, they have a roof above their heads. When the government decides to renew a blighted area by expropriating properties, these owners lose their homes.

When the government compensates these owners according to the market value of their property, it ignores a market failure. The market may fail, in this case, to offer the displaced owners alternative housing or business property at the prices at which the government forcefully purchased theirs. Thus, if we rely on the market here, we actually leave owners in a substantially worse situation than they were in pre-taking. Although these owners are left with the amount of money equal to the price the market would place on their property, they nevertheless are put in a position that prevents them from becoming owners again.[35] Owners

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www.cato.org/publications/commentary/battle-over-eminent-domain-is-another-civil-rights-issue.

35. This is especially true regarding blight condemnation owners who attempt to purchase property in the newly built areas or close to those areas. *See* Terry J. Tondro, *Urban Renewal Relocation: Problems in Enforcement of Conditions on Federal Grants to Local Agencies*, 117 U. PA. L. REV. 183, 183 (1968) ("When the government acquires property for public use, the relocation of dispossessed residents normally presents no problem. Isolated acquisitions do not flood the housing market with home seekers, and a condemnation award will usually enable an owner to purchase a new dwelling. Because of its magnitude, however, the urban renewal program has been unable to avoid two problems: finding sufficient new housing, and enabling relocatees to establish themselves in that housing."); *see also* David A. Dana, *Exclusionary Eminent Domain*, 17 SUP. CT. ECON. REV. 7, 8 (2009) ("Exercises of what I am calling 'exclusionary eminent domain' are *doubly* exclusive because the displaced residents are unable to afford new housing in the same neighborhood or locality as their now-condemned, former homes. In exclusionary eminent domain, low-income[] households are excluded not only from their homes but also from their home neighborhood or locality.").

For a review of the condition of owners in the Brookline's Atlantic Yards project, see Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 URB. LAW. 287, 318–19 (2010) (demonstrating how, although the project dedicated half of the unit to affordable housing, "[a]s a practical result, many of the units that are labeled affordable will in fact be at or above market rate for Brooklyn, and out of the price range of many existing residents"); and Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 254–55 (2007) ("One category is out-of-pocket expenses that takees incur but that fair market value does not cover. These include . . . relocation costs, and the cost of replacing the expropriated property if that cost exceeds its fair market value."). *See generally* Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation*, 48 NOTRE DAME LAW. 765, 773 n.43 (1973) (criticizing courts' continuous refusal to grant business owners compensation for loss of good will, arguing that the common excuse "that it can be carried away by the displaced owner" is not more than an "unmitigated fiction" and that owners often cannot reestablish their businesses anew); Ilya Somin, *Let There Be*

lose, therefore, not only their property but also their status as owners.[36] One may argue these problems might be mitigated by the authorities' duty to provide owners with relocation assistance.[37] And indeed, relocation assistance, if taken seriously, may provide a solution to unjust situations like the one presented above. The problem with relocation assistance, however, is that it is limited in both scope and scale.[38]

Blight: Blight Condemnations in New York After Goldstein *and* Kaur, 38 FORDHAM URB. L.J. 1193 (2011).

Contrary to careless judicial assumptions that displaced businesses can readily relocate, *see, e.g.*, Kimball Laundry Co. v. United States, 338 U.S. 1, 12 (1949); *In re* Edward J. Jeffries Homes Hous. Project, 11 N.W.2d 272, 276 (Mich. 1943), recent investigations indicate persuasively that, in fact, businesses displaced by condemnation suffer a high mortality rate, and the smaller the business the higher such rate. *See* STAFF OF SELECT SUBCOMM. ON REAL PROP. ACQUISITION, H. COMM. ON PUB. WORKS, 88TH CONG., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS 484 (Comm. Print 1964); ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESSES DISPLACED BY GOVERNMENTS 54–57 (1965).

36. *See* Rachel D. Godsil & David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership*, 77 FORDHAM L. REV. 949, 969–75 (2008) (demonstrating the implications of losing ownership status). Moreover, the difficulties of finding new housing post-taking are not necessarily limited to owners in blighted areas. During oral argument in *Kelo v. City of New London*, Justice Breyer observed:

> [P]ut yourself in the position of the homeowner. I take it, if it's a forced sale, it's at the market value, the individual, let's say it's someone who has lived in his house his whole life. He bought the house for $50,000. It's worth half a million. He has [$]450,000 profit.
>
> He pays 30 percent to the government and the state in taxes, and then he has to live somewhere. Well, I mean, what's he supposed to do? He now has probably [$]350,000 to pay for a house. He gets half a house because that's all he is going to do, all he is going to get for that money after he paid the taxes, or whatever.
>
> And I mean, there are a lot of—and he has to move and so forth. So going back to Justice Kennedy's point, is there some way of assuring that the just compensation actually puts the person in the position he would be in if he didn't have to sell his house? Or is he inevitably worse off?

Transcript of Oral Argument at 48, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 529436.

37. 42 U.S.C. §§ 4621–4638 (2012); *see also* CAL. GOV'T CODE §§ 7260–7277 (West 2014); ILL. ADMIN. CODE tit. 92, §§ 518.10–.40 (2015); OHIO REV. CODE ANN. §§ 163.51–.62 (LexisNexis 2014).

38. *See* Kroger Co. v. Reg'l Airport Auth. of Louisville & Jefferson Cty., 286 F.3d 382, 389 (6th Cir. 2002); Vitale v. City of Kansas City, 678 F. Supp. 220, 222–23 (W.D. Mo. 1988). In *Kroger*, a grocery store was forced to move so that the county could build an airport. 286 F.3d at 385. Kroger requested roughly four million dollars in relocation benefits, but was only awarded $727,692. *Id.* Kroger appealed the Regional Airport Authority's ("RAA") award and sought reimbursement for additional expenses. *Id.* at 385–86. Kroger was not awarded expenses relating to obtaining permits for construction of its new facility. *Id.* at 389. However, the court noted that this expense would have been reimbursable under 49 C.F.R. § 24.304(a)(6) (2015), but Kroger had already reached its

Moreover, relocation assistance is not guaranteed for every taking.[39] Therefore, in light of the limited scope of relocation assistance, nothing guarantees displaced owners' ability to find alternative housing.[40]

Another category of market failures applicable to eminent domain compensation relates to the effect of time. One such failure, which also may feature in blight condemnations, results from the manner in which the FMV compensation standard ends the relationship between the government and displaced owners in a one-shot interaction. This one-shot interaction ignores any subsequent changes in the market. Therefore, even if the calculated FMV accurately reflects the value of the taken property on the date of determination, the owner's compensation may be insufficient to purchase a new home if the market subsequently changes. In this respect, even if owners are entitled to relocation assistance, such a claim takes additional time and may therefore place owners in an even worse position as the value of properties on the market increases.

Another temporal market failure results from the time that passes during the execution of eminent domain proceedings. As Gideon Kanner demonstrates, "[i]t rarely happens that proceedings for the condemnation of and for public use are instituted without months, years, and, in some instances, decades of time spent in preliminary discussion and in the

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$10,000 limit for reestablishment expenses. *Kroger*, 286 F.3d at 389 n.4. Kroger was also denied reimbursement for expenses for moving products and paying managers based almost exclusively on the RAA's expert opinions. *Id.* at 389–90.

The court in *Vitale* did not allow a restaurant owner to move large personal items and instead determined that these were an improvement to the realty. 678 F. Supp. at 222–23. The court assumed that the appraisal that determined the real estate's fair market value would consider these improvements, so moving expenses for these kitchen-related items were not warranted. *Id.*; *see generally* 49 C.F.R. § 24.302; Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs; Fixed Residential Moving Cost Schedule, 77 Fed. Reg. 33,549 (June 6, 2012).

39. *See Kroger*, 286 F.3d at 390–91 (denying Kroger reimbursement expenses based on failure to provide adequate documentation for trailer rental, equipment rental, telephone expenses, and consulting fees for engineers); *see also* Am. Dry Cleaners & Laundry, Inc. v. U.S. Dep't of Transp., 722 F.2d 70, 72–73 (4th Cir. 1983) (allowing the business to take the $10,000 standard relocation assistance, but ruling that the agency was not required to actually find a suitable location to relocate as long as it provided some assistance in attempting to find a suitable location). The burden is on the property owner to prove that the relocation expenses are not a part of the eminent domain claim. Wyman, *supra* note 35, at 254–55 ("One category is out-of-pocket expenses that takees incur but that fair market value does not cover. These include . . . relocation costs, and the cost of replacing the expropriated property if that cost exceeds its fair market value.").

40. In situations where the government is condemning houses because of neighborhood blight, the resident is given relocation funds for a "comparable replacement dwelling." 42 U.S.C. § 4623(a)(1)(A) (2012). However, in situations of neighborhood blight, a "comparable replacement dwelling" may be much more expensive because the value of the condemned property was significantly decreased by the blighted neighborhood.

making of tentative plans."[41] In the meantime, the value of the subject property decreases, leaving the owner with a property that has lost a significant extent of its actual, initial value when compensation is finally determined. In such a case, FMV compensation, which fails to offset the depreciation of the property caused by the eminent domain proceedings themselves, is insufficient and unjust.

b. Subjective Values

Reliance on FMV as the sole standard for compensation in eminent domain excludes non-market values from the remedial scheme. Courts have explicitly recognized this consequence, justifying it on the ground that measurement of non-market values is too difficult in practice. The Supreme Court, for example, has stated that "[b]ecause of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule."[42] The Court acknowledged the FMV standard is not comprehensive and is not necessarily an accurate measure of an owner's actual loss. Once again, the Court justified this unjust result by turning to practical reasons.

Many scholars have addressed the question of whether non-market values that owners place on their property should be considered when courts determine takings compensation.[43] Several scholars have criticized the ongoing injustice in compensation rulings,[44] while others argue that the assumption that owners are frequently undercompensated (in terms of non-market values) is misleading.[45]

In this Section, I argue that we first need to ask ourselves whether non-market values can be attached to property. If the answer is yes—that is, if we view property as an arena for competing values that are not necessarily reflected in a property's FMV, such as personhood,

41. Kanner, *supra* note 35, at 765.

42. United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) (citing United States v. Miller, 317 U.S. 369, 374 (1943); United States v. Cors, 337 U.S. 325, 332 (1949)).

43. *See, e.g.*, Knetsch & Borcherding, *supra* note 18, at 237–39; Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 991–1002 (1982) (discussing the "sanctity of the home").

44. *See, e.g.*, Robert Brauneis, Eastern Enterprises, Phillips, *Money, and the Limited Role of the Just Compensation Clause in Protecting Property "in Its Larger and Juster Meaning,"* 51 ALA. L. REV. 937, 937–42 (2000); Marisa Fegan, Note, *Just Compensation Standards and Eminent Domain Injustices: An Underexamined Connection and Opportunity for Reform*, 6 CONN. PUB. INT. L.J. 269, 283–92 (2007).

45. *See, e.g.*, Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 596–98 (2013).

community, liberty, and labor—then any compensation mechanism in takings law should not ignore these values. A standard which fails to account for these values not only leads to unjust results, but also undermines the essence of property ownership. As an illustration of these points, consider one non-market value that has been addressed in the literature: the loss of a home.

The loss of a residential home is often a complicated and devastating process. Regardless of the school of thought one subscribes to, it seems that losing a home entails greater difficulties than losing other property, especially where the owner has lived in the home for a long time.[46] Whether sentimental value should be addressed in property law generally, and in takings law in particular, is yet another question whose answer should depend on our conception of property. Margaret Radin introduced a theory that certain kinds of property, including homes, are constitutive of personhood.[47] If we accept that the connection of certain property with human personhood is in fact an important property value, then, as several other property scholars argue, the home should receive greater legal protection than other property.[48] The personhood theory is embraced by scholars in different schools of thought, including law and economics scholars who argue the government should consider supplementing the FMV standard to compensate for loss of sentimental value.[49]

Yet this theory, and its legal consequences in property law, have been criticized in two different ways. First, Stephanie Stern questions the empirical validity of the common assumption that homes are so intertwined with our personhood.[50] By relying on psychological, sociological, and demographic research, Stern argues that the mythology of the home in the American legal tradition is overstated, and risks

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46. *See, e.g.*, Ellickson, *supra* note 7, at 736 ("For example, a longtime owner of a single-family home in a stable residential area might not willingly part with his dwelling except at a substantial premium over the market price. His surplus would be based in part on experience in using this particular house and sentimental memories connected to it."); Radin, *supra* note 43, at 991–1002 (discussing the "sanctity of the home").

47. Radin, *supra* note 43, at 960 ("Once we admit that a person can be bound up with an external 'thing' in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that 'thing.' But here liberty follows from property for personhood; personhood is the basic concept, not liberty.").

48. *See, e.g.*, Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1100–05 (2009) (reviewing some of the extensive legal protections for the home).

49. Ellickson, *supra* note 7, at 736–37; Merrill, *supra* note 7, at 82–85.

50. Stern, *supra* note 48, at 1120.

placing additional unjust financial burdens on society.[51] The second line of criticism accepts the high sentimental value often attached to homes but rejects society's need to compensate individuals for loss of this value.[52] Brian Lee argues, for example, that compensation for "sentimental values" is unjust because it places a financial burden on society to accommodate particular citizens' idiosyncratic beliefs and attachments.[53]

Although these two criticisms contradict each other, they both question the desirability of compensating subjective losses. Yet, each criticism requires a different answer. Stern's argument that the home is overrated in traditional American sentiment requires us to revisit the characterization of the home as a property that is deeply intertwined with the owner's personhood. Stern is not questioning the need to compensate for subjective loss in eminent domain, but rather claiming that no such loss exists with respect to the home itself, obviating the need for additional compensation.[54]

Lee's argument, on the other hand, does not deny the reality of subjective losses, but rejects the need to compensate for them. Lee presents both positive and normative arguments. Lee's positive arguments suggest that most of the subjective value an owner assigns to his property is already reflected in the property's FMV.[55] Lee's normative argument is that any value omitted does not present a problem from the perspective of fairness.[56] While the correctness of Lee's positive argument may be determined empirically—like Stern's argument above—his normative argument requires a more in-depth response. Lee's normative argument is beyond the scope of this Section, which simply concerns values ignored by a market-based approach to takings compensation. The question of whether principles of fairness dictate compensation for any subjective losses in the first place will be addressed in the following Section.[57]

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51. *Id.* at 1109–20.
52. Lee, *supra* note 45, at 595.
53. *Id.* at 620.
54. We can see this as Stern argues that communal ties are important to homeowners. Stern, *supra* note 48, at 1120–21.
55. Lee, *supra* note 45, at 647.
56. *Id.* at 620–22; *see also* Fennell, *supra* note 7, at 978–79.
57. *See infra* Section II.B.2.

c. Ignored Monetary Losses

A third category of losses the FMV standard excludes are actually losses with measurable market values such as litigation costs, attorneys' and appraisal fees, business goodwill, and any other costs involved in the transfer of property in the context of eminent domain. While in some states such costs are compensable, in others—as well as at the federal level—they are disregarded.[58] The exclusion of losses with ascertainable market value from the compensation standard is unjustifiable because they are easy to assess and, equally important, inherent to the process of expropriation. Exclusion of these costs is not consistent with any of the justifications for compensation in takings law.[59] It may exacerbate inequality by requiring certain citizens to shoulder fully the costs of a coercive process rather than being able to share these costs with their fellow citizens. The efficiency justification for compensation also does not support exclusion of these costs because including them would force the government to internalize more fully the overall cost of its decision to take a property. Exclusion of these values cannot be explained by the third justification for takings compensation either, which concerns the biases and misconduct inherent to the political process in the context of eminent domain. Ignoring such costs only compounds the injustice and widens the gap between the politically strong and weak segments of society.[60] It is therefore clear that failing to compensate owners for losses that do have measurable monetary values—yet, are not part of the property's market value—is unjust.

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58. For example, in California, the Code of Civil Procedure section 1263.510 explicitly orders compensation for loss of business goodwill. CAL. CIV. PROC. CODE § 1263.510 (West 2007). In some states, such as Florida, the payment of attorneys' and litigation fees are codified. *See, e.g.*, FLA. STAT. § 73.092(1) (2009). Yet in other states, such costs are not reimbursed at all. *See* Crystal Genteman, Note, *Eminent Domain and Attorneys' Fees in Georgia: A Growing State's Need for a New Fee-Shifting Statute*, 27 GA. ST. U. L. REV. 829, 830–31 (2011) (explaining how the law in Georgia was changed and no longer entitles owners to litigation and attorneys' fees). At the federal level, costs and expenses are generally determined by the agency that is displacing the individual, but allowable reimbursements do not cover all of the potential costs, such as business goodwill. *See* 42 U.S.C. §§ 4622–4623 (2012).

59. *See supra* Part II.A.

60. This may happen in several ways. For example, if owners are not entitled to litigation costs or appraisal fees, poorer owners will have less ability and incentive to resist the taking of their property or litigate the issue of the amount of compensation. Additionally, because the government is let off the hook from fully compensating owners, it is further incentivized to target the economically and politically disadvantaged when exercising its power of eminent domain.

2. Normative Argument

The FMV standard is deficient as a mechanism for "just" compensation not only because of its failures as a purely market-based standard but also because of its universal application. The universal application of a single remedy to all property owners, regardless of their circumstances, raises the normative question of whether this use of a "one-size-fits-all" approach is inherently wrong and unjust.

Indeed, the simple payment of FMV compensation to all property owners subject to eminent domain disregards important differences among them. Although the amount of compensation obviously will differ from one owner to another (in correlation to the market value of each property), the exclusive use of the FMV standard nevertheless flattens any differences in the subjective values owners attach to their property and disregards the significance of owners' decisions to live in one residential configuration as opposed to another.

Consider, for example, John, who is an owner in a blighted area which the city is targeting as a zone of urban renewal. If John is forced to leave his home, then even if he receives the (very low) FMV of his home, he will have trouble trying to purchase a new home because his FMV payment will be insufficient to acquire a home in another area. Dan, on the other hand, whose average-value home the government expropriated for the construction of a highway, is not expected to be placed in such a condition because his FMV payment should be enough to purchase a new home nearby. Takings law's disregard of the circumstances of the expropriation therefore discriminates against certain owners by stripping them of the privilege of home ownership.

Now consider Ron, whose home is the one in which he and his children were born and raised. Ron therefore attaches great value to his home and suffers substantial loss due to its condemnation by the government. Paula, on the other hand, purchased her home just recently and regards her home essentially as a place to sleep at night and nothing more. Assuming the FMV of both houses is $50,000, the government is expected to pay each owner that exact amount as compensation. Yet, considering the background information regarding how Ron and Paula value their homes, are they both really getting back what they lost? Is the law's disregard of the differences in their attitudes toward their homes acceptable and just? This is not simply a positive question of if and how the additional loss suffered by Ron can be measured but rather a normative question regarding the state's obligation to address, within its legal rules, differences in the importance citizens attach to prominent values such as home ownership.

The application of a universal compensation standard raises normative issues in the context of commercial properties too. Consider two business owners whose commercial properties may be expropriated. If one business has gained a positive reputation (say as a result of the owners' years of hard work and dedication), and the other has failed to do so, it seems there is no way to normatively justify ignoring this difference in goodwill when compensation is determined. A universal compensation standard, therefore, blurs critical differences between property owners, different property types, and, equally important, the characteristics of the expropriation.

Recall Lee's normative argument, which concerns the fairness of addressing subjective values in eminent domain compensation. Lee's argument is premised on the assumption that the state should not be obligated to acknowledge "idiosyncratic" differences among owners (or citizens). In Lee's words, "[t]he conclusion that 'fairness' does not require compensation for such idiosyncratically large value is obvious."[61] This is because "landowners cannot receive compensation for losses suffered as a result of their idiosyncratically large sensitivity to the rest of the public's reasonable activities."[62] According to Lee, then, the state should not compensate owners for their unique values or preferences, since by doing so, it unjustifiably places too heavy a burden on the rest of society.[63]

While Lee's positive argument in favor of an exclusive FMV standard may be justified by empirical findings,[64] his normative argument goes to the roots of the constitutional "just compensation" requirement. As mentioned earlier, the constitutional requirement for compensation in eminent domain may be explained by three alternative justifications: equality, efficiency, and political fairness.[65] Each of these justifications may maintain a different sense of justice. Nevertheless, they all counsel against a universal mechanism of compensation tied to a single measure of value, because it fails in many cases to restore the individual owner to his previous condition. All three justifications for the compensation requirement require the government to address the specific circumstances of the expropriation to provide just compensation. Thus, for the purposes of this Article, it is unnecessary to embrace one

61. Lee, *supra* note 45, at 620.

62. *Id.* at 622.

63. *Id.* Lee also acknowledges that the market value does not include the loss of autonomy suffered by property owners as a result of their forced evictions. *Id.* at 635–36. However, this loss, to the extent it exists, is shared equally by all property owners who are subject to expropriation, and therefore, as Lee argues, there is no reason to compensate any individual condemnee differently on this basis. *Id.* at 635–45.

64. *See supra* Part II.B.1.b.

65. *See supra* notes 14–24 and accompanying text.

conception of justice or another. The FMV standard is unjust under all of them.

Elizabeth Anderson's pluralistic theory takes this understanding a step further and provides an explanation for why the abovementioned conceptions of justice reject a universal compensation standard which excludes certain values important to property owners. Anderson argues that since "[p]eople experience the world as infused with many different values," the state should be obligated to allow all people to live by their values through establishment of diverse social institutions people can use to promote these values.[66] Anderson therefore argues that the state has an obligation "to expand the range of significant opportunities open to its citizens by supporting institutions that enable them to govern themselves by the norms internal to the modes of valuation appropriate to different kinds of goods."[67]

Applying Anderson's insights to takings law, the state should be required not only to allow people to live in accordance with their values and beliefs, but also to provide them with the practical possibility to do so.[68] This pluralistic obligation requires the state to calibrate the remedy in a given taking to all of the relevant circumstances and characteristics of the owner and the losses they incur.

The three justifications for the constitutional "just compensation" requirement buttress Anderson's theory. All three justifications reject the application of a single, universally-applied compensation mechanism, which is antithetical to the notion that the state should provide people the opportunity to live according to their own values. Likewise, under a pluralistic conception of property, a universal standard, which disregards important differences in the effects of takings on displaced owners, cannot fulfill the "just compensation" requirement.

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66. ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 1, 149 (1993).

67. *Id.*

68. This obligation is primarily in place to ensure citizens' ability to realize and maintain their conception of the good. Therefore, in the case of communities, the state may be obligated to not only provide a one-time monetary compensation for expropriation, but assist with a community's resettlement. And in cases where the community's conception of the good is not threatened (since the expropriation does not uproot the entire community, for example), this obligation may still require the state, in some instances, to pay the individual property owner who loses her individual ability to cooperate with others additional compensation. In this sense, the state's pluralistic obligation has two dimensions: a collective one (in cases where the realization of community members' shared conception of the good is threatened) and an individualistic one (where an individual is no longer able to cooperate with her community to realize her conception of the good). *See generally* Stern, *supra* note 7.

III. REMEDIES

The different roles property plays in people's lives, and the different values owners attach to their property, call for deviation from the comfort zone of simplicity and uniformity in the context of takings remedies. A new remedial paradigm for eminent domain needs to be established. The first step should be to present alternatives to the FMV monopoly, and equally important, to establish a clear roadmap for the use of alternative remedies. Breaking the monopoly of the FMV standard—by incorporating other remedies—provides an answer to the normative argument against the FMV monopoly in takings law, according to which non-recognition of significant differences in owners' circumstances results in injustice. In what follows, I present several alternative remedies that the government can use in eminent domain cases. I address the advantages and disadvantages of each mechanism by focusing on their ability to address the failures of the FMV standard's exclusive application.

A. Premiums

Premiums—additional monetary compensation above the FMV of a property—have already been discussed in the literature on eminent domain.[69] Several scholars claim additional monetary compensation as a supplemental remedy can be used to account for owners' and properties' unique characteristics. Can premiums really make compensation "just"?

To answer this question, we should identify two types of premiums: fixed and variable. Most of the literature on premiums addresses the former. A fixed premium is an addition of a defined amount of money intended to supplement the FMV payment.[70] Fixed premiums may be useful when the FMV does not address certain values inherent in the taken property (such as subjective values) and when the market fails to place owners in the position they occupied pre-taking. The most prominent advantages of fixed premiums are that they provide certainty as to the costs of the public project and, equally important, they are quite easy and simple to apply. Because the premiums are fixed, the

69. *See The* Kelo *Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 122 (2005) [hereinafter *Hearing*] (statement of Thomas W. Merrill, Charles Keller Beekman Professor of Law, Columbia Law School); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 184 (1985); Ellickson, *supra* note 7, at 735–37; Lee, *supra* note 45, at 635–47; Parchomovsky & Siegelman, *supra* note 26, at 139; Nathan Burdsal, Note, *Just Compensation and the Seller's Paradox*, 20 BYU J. PUB. L. 79, 95–96 (2005).

70. *See, e.g.*, Ellickson, *supra* note 7, at 736–37; Lee, *supra* note 45, at 635–36.

expropriating authority is aware of their costs ex ante and courts have relatively little discretion when they rule on compensation. Yet this is also the fixed premium's prominent disadvantage.

Fixed premiums may not overcome the market failures and injustices of FMV compensation discussed in Part II. Consider a remedial scheme that grants fixed premiums to owners whose property is taken for purposes of urban renewal. For the purpose of this example, let us assume that if the expropriation is executed for reasons of urban renewal, each owner will be entitled to an additional ten percent of the property's FMV. John, an owner in a blighted area, which the city is targeting as a zone of urban renewal, is now entitled to receive the FMV of his home in addition to ten percent of the FMV. Even if John is among the lucky owners who can use this additional compensation to escape the failure of the market and purchase a new home, the additional compensation may be inadequate for other owners whose homes have a lower FMV than John's property. This problem remains if we set the premium as a fixed dollar amount for every owner rather than as a percentage of the property's FMV.[71] While in this case all owners receive the exact same amount of supplemental compensation—which reduces distributive concerns—many owners, especially the most economically disadvantaged, will be subject to a market failure and consequently will not occupy substantially the same position they held prior to the taking.

Can fixed premiums provide a solution for the FMV standard's exclusion of subjective (non-market) values? Although fixed premiums may signal some recognition of these values by the expropriating authority, they nevertheless may fail to give these values full expression. Consider a remedial paradigm in which an owner whose home is taken is entitled to receive FMV plus a fixed premium of $10,000. This remedy may indeed reflect the additional value owners attach to their homes, especially if such premiums are not available to owners of commercial property. Yet a fixed premium for certain losses, such as the loss of a home, still fails to incorporate differences *between* owners in the extent of those losses. In this sense, the normative critique against the FMV standard remains unanswered. Indeed, by granting fixed premiums, we find ourselves once again in a position that is blind to important differences among owners and the way they value their properties.

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71. *See* Lee, *supra* note 45, at 648 ("The more fundamental mistake in both the academics' proposals and the statutes is to award compensation for sentimental value as a percentage of the property's fair market value."). Lee is correct to argue that providing a premium as a percent of the FMV of the property does not fulfill any of the underlying rationales for awarding such premium.

Due to fixed premiums' inherent deficiencies, several scholars argue for the possibility of variable premiums as a supplemental remedy in eminent domain cases.[72] These premiums may be "variable" in two ways. First, they may vary among different types of expropriations and values. According to this meaning of "variability," each type of expropriation (for example, blight condemnations) or values (personhood, community, etc.) will provide all owners with an additional set of premiums. Yet these premiums may differ in scope for each value or expropriation type. Therefore, although both an owner whose property is condemned due to urban renewal and an owner who loses his community due to expropriation may be entitled to premiums, these premiums will not necessarily be equal. Nevertheless, there is another possible meaning of "variability" in this context, according to which owners receive premiums that vary depending on their specific circumstances. This type of variability would allow any owner in a blighted area to be entitled to additional compensation equal to an amount necessary to overcome the market failure inherent in blight condemnations. The amount would vary from person to person depending on their particular situation. Hence, while one owner may be satisfied with a modest supplement to find alternative housing, another will receive a larger amount.

These two forms of variability are also relevant to the case of non-market values. Non-market values are usually subjective in nature, and an attempt to address them in a fixed manner may miss the mark. Therefore, variable premiums may better address such losses. The first type of variability requires categorizing non-market values that may be affected by expropriation and attaching monetary price tags to these values. For example, we may find homes to be a type of property that entails greater values of personhood and therefore decide to set a particular premium for the expropriation of a home. The same is true for community and labor. Yet, while this categorization indeed provides certainty and simplicity, the ultimate goal of just compensation likely remains unfulfilled because of the inherently variable nature of subjective values.

For instance, the subjective or sentimental value a person places on his home varies among owners. The same is true for the value of

72. *See Hearing*, *supra* note 69, at 122 ("Congress could require that when occupied homes, businesses or farms are taken, the owner is entitled to a percentage bonus above fair market value, equal to one percentage point for each year the owner has continuously occupied the property."); Ellickson, *supra* note 7, at 736–37; John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 814–15 (2006); Merrill, *supra* note 7, at 82–85.

community.[73] Since not all communities are alike, and not all owners have the same relationship with their communities, the loss of community due to expropriation will have a widely disparate impact on different owners.[74] The second type of premium variability may answer this concern.

Here, Ron, who values his home highly, should be entitled to greater compensation than Paula, who attaches relatively low value to her home. This approach, however, entails three difficulties, which are not easily dismissed. The first is an "institutional problem," in that the burden of determining compensation shifts from the legislature to the courts.[75] Courts would need to exercise discretion in assessing the extent of the losses incurred by each owner, making decisions in an ad hoc manner.[76] The second issue with providing this type of variable premium compensation is the lack of certainty regarding compensation amounts—from the perspective of both the government and property owners. Finally, allowing courts to determine the extent of loss incurred by each owner raises commodification concerns. That is, placing different monetary price tags on losses—especially subjective losses related to an owner's personhood or community belonging—may exacerbate commodifying effects compared to a remedy scheme that compensates these losses through a fixed, uniform monetary premium or does not address them at all.[77]

B. In-Kind Remedies

In-kind remedies are another possibility. This type of remedy calls for a broadening of our understanding of the constitutional meaning of "just compensation," but it follows the same logic that has guided courts for many years—compensation should place an owner in the same position he would have held if his property had not been taken.[78] Although courts

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73. Shai Stern, *Taking Community Seriously: Lessons from the Israeli Disengagement Plan*, 47 ISR. L. REV. 149, 160, 163 (2014); Stern, *supra* note 7, at 161–62.

74. Stern, *supra* note 73, at 163.

75. Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1707–08 (1988).

76. *See generally id.* at 1697–702 (discussing the impact of ad hoc decisions by the courts in the area of regulatory takings).

77. For a discussion on the commodifying effects of eminent domain, see Stern, *supra* note 7, at 197. For a broader discussion about commodification in property, see MARGARET JANE RADIN, REINTERPRETING PROPERTY 33–34, 136–45, 201 (1993).

78. EPSTEIN, *supra* note 69, at 182. ("[T]he ideal solution is to leave the individual owner in a position of indifference between the taking by the government and retention of the property.").

refer specifically to an owner's previous financial position,[79] the goal of doing justice to owners need not be so limited.

Could an in-kind remedy that offers replacement or resettlement to owners constitute "just compensation"? As previously discussed, the FMV standard encounters difficulties in the face of market failures and subjective values for two fundamental reasons: (1) no single, universal standard can provide justice in all cases and (2) a market-based standard is inadequate in cases where the market fails.[80] A remedy that replaces the monetary, market-based standard with a mechanism, which provides a replacement property to owners, may overcome both types of difficulties.

Consider John and Ruth again. Both of their homes were taken as part of an urban renewal program, and they both need to search for new residences. As argued previously, the FMV standard would potentially leave both John and Ruth without the means to purchase new homes. We might mitigate this problem if we provide John and Ruth with premiums, moving them closer—financially speaking—to the amount of money needed to purchase new residences. Yet, as discussed earlier, premiums, whether they are fixed or variable, cannot guarantee John's and Ruth's ability to purchase a new home.

But what if we design a remedy that not only ends, in one shot, the interaction between the government and displaced owners, but also guarantees these owners will find new homes? The in-kind remedy is designed to achieve just that. The basic idea behind the replacement remedy is that when the government takes a home for a public project, it should be responsible for ensuring the displaced owners are not left homeless.[81] This remedy, therefore, is intended to place owners in substantially the same position (not only financially, but in a practical sense as well) they would have occupied if their property had not been taken.

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79. *See, e.g.*, United States v. Miller, 317 U.S. 369, 373 (1943) ("The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." (first citing Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893); and then citing Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 304 (1923); United States v. New River Collieries Co., 262 U.S. 341, 343 (1923))).

80. *See supra* Part II.B.

81. For a discussion of the problem of the government taking homes for public projects leading to homelessness, see Josh Blackman, *Equal Protection from Eminent Domain: Protecting the Home of Olech's Class of One*, 55 LOY. L. REV. 697, 701–02 (2009); Beito & Somin, *supra* note 34.

The replacement or resettlement remedy has been discussed, albeit briefly, in the literature on expropriation. Parchomovsky and Siegelman argue, for example, that in cases where an expropriation clears an entire residential community, the government should offer the community members the possibility to relocate and start afresh.[82] As they demonstrate, such a remedy was indeed executed in Valmeyer, Illinois "[a]fter floods repeatedly damaged the town."[83] Daphna Lewinsohn-Zamir argues for the need to consider in-kind remedies, as empirical data demonstrates that people often prefer such remedies over monetary compensation.[84]

Although resettlement of individual property owners or entire communities may overcome the failures of the FMV standard, this in-kind remedy entails difficulties of its own, which raise doubts about its ability to provide "just compensation." The first is an institutional problem—it is not clear how courts or legislatures should make the determination of which individual owners and communities are entitled to resettlement. The second is the certainty problem—in contrast to FMV compensation, the costs of a replacement remedy cannot be estimated easily, as they require the government to provide actual housing as opposed to just the monetary value of the taken property. The problem of cost uncertainty may even be exacerbated to the extent the replacement remedy requires the government and owners to engage in a long, ongoing, and unpredictable interaction. Finally, the replacement remedy may incentivize the government to use its eminent domain power more readily and frequently because of a perception that displaced owners are well compensated and actually being placed in their pre-taking position.[85]

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82. Parchomovsky & Siegelman, *supra* note 26, at 140–41.

83. *Id.* at 141; *see also* Isabel Wilkerson, *350 Feet Above Flood Ruins, a River Town Plots Rebirth*, N.Y. TIMES (Oct. 31, 1993), http://www.nytimes.com/1993/10/31/us/350-feet-above-flood-ruins-a-river-town-plots-rebirth.html. For the application of in-kind remedies in the Israeli disengagement plan, see Stern, *supra* note 73, at 163.

84. Daphna Lewinsohn-Zamir, *Can't Buy Me Love: Monetary Versus In-Kind Remedies*, 2013 U. ILL. L. REV. 151, 155–56.

85. This cognitive barrier may be explained both in behavioral terms and in economic terms. Assume that a state is planning to build a hospital and has located two potential plots to build on. Plot A serves a residential community that we may assume, for the sake of this example, maintains constitutive cooperation. Plot B, on the other hand, is home to an abandoned factory. In both cases, the market value of the property equals $500,000. The cognitive barrier is expected to lead the government actor to prefer to expropriate plot B since full compensation will be possible. Although a decision to expropriate plot A would also require payment of only $500,000, it would leave the owners undercompensated. Recognition of this barrier recalls the famous study by Uri Gneezy and Aldo Rustichini, which found that imposing fines on parents for being late to pick their children up from a day care center, surprisingly, resulted in an increase in the number of late arrivals. Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 1–3 (2000). As Gneezy

In light of these issues, I believe the use of in-kind remedies, especially those that place a heavy burden on the government, should be carefully decided. These remedies should be granted only in cases where it is unlikely that any other compensation mechanism will provide "just compensation." We should identify types of expropriations in which FMV compensation, even if coupled with premiums, will fail to place owners in the same position they were in pre-taking. It is unnecessary to provide in-kind remedies in every case where a person loses his home due to expropriation. On the other hand, in cases where the owner incurs losses that cannot be readily monetized, such as his belonging to a community or status as a homeowner, such remedies should be considered. A physical house can be replaced, but the sense of belonging and camaraderie that comes with living in a particular community often cannot be replicated.

By limiting the implementation of in-kind remedies, we might overcome the three problems presented above. The institutional problem is solvable as long as we carefully delineate the scope and scale of these in-kind remedies through legislation, or, alternatively, provide narrow discretion to courts. Such discretion should be limited by the owner's ability to prove that his loss cannot be adequately remedied in a different way. For example, an owner of a home in a blight condemnation should have the burden of proving that FMV compensation, even if coupled with a premium, will not enable him to procure new housing anywhere near his former residence. The same is true for loss of community. When an expropriation clears an entire community, the owners should bear the burden of proving their inability to reestablish their community anew without in-kind assistance from the government. Placing the burden of proof on the owners will tend to mitigate, although not entirely solve, the institutional problem. The uncertainty concern is also mitigated by a carefully limited application of in-kind remedies, which allows the government to be aware of the circumstances in which such remedies will be implemented.[86]

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and Rustichini show, the fine was a kind of price put on being late, which may have made the parents view their tardiness as less socially unacceptable. *See id.* at 10–11, 14. Thus, the cognitive barrier against arriving late was broken. In economic terms, the decision of the government to expropriate plot B could be explained by its desire to avoid additional costs, not included in the market value of the property, that could arise from the undercompensation of plot A's owners, such as increased demoralization costs and litigation costs.

86. The government's awareness of the types of expropriations in which in-kind remedies should be provided to owners, as well as the values that justify the award of such remedies, will be discussed at length in Part IV below.

Finally, the potential of in-kind remedies to incentivize the government to more readily expropriate property is mitigated by the higher costs involved in implementing such remedies. Applying different remedies in takings law, especially in-kind remedies, entails additional costs that exceed those imposed on the state under current law. While these additional costs may be justified to fulfill the state's pluralistic obligation, they nevertheless serve as a barrier to state actors when they consider expropriations. Therefore, while applying in-kind remedies may break the behavioral barrier to expropriations that entail undercompensation, a new economic barrier—based on the higher costs of the remedies offered by the proposed reform—may mitigate the fear of increased expropriation.

C. Indirect Remedies

Compared to the premium mechanisms and the in-kind replacement remedies, indirect assistance remedies are much more controversial and problematic. "Indirect remedies" is a general term for a set of mechanisms and instruments the government may use to compensate owners subject to eminent domain, such as grants, low-interest loans, building permits, and reduction of bureaucratic obstacles. The positive side of indirect remedies is that they may be tailored to the needs and losses of each owner or to the circumstances of a given expropriation. Indirect remedies may thus overcome some of the inherent deficiencies of the FMV standard through recognition of significant differences among owners and types of properties. A remedy closely tailored to the expropriation's unique circumstances resolves concerns of coarse uniformity and unaccounted-for losses. Equally important, indirect remedies may provide a balanced measure of compensation, which will not require the government to make very large public expenditures. In this sense, indirect remedies may be the best instrument for achieving remedial justice, preventing both overcompensation and undercompensation.

Consider again the case of blight condemnations. Now assume that John's home has a significantly higher FMV than Ruth's home. John may be restored to substantially the same position pre-taking with FMV compensation and a supplemental premium. With respect to Ruth, "just compensation" may not require the expensive and comprehensive remedy of replacement (which should be limited to cases where no other remedy will suffice), but partial, indirect assistance may be sufficient. This assistance may take the form of grants or low-interest loans that will assist her in purchasing a new home. Providing owners, such as Ruth, flexible financial assistance in procuring new housing does not require

the government engage in a long and continuous process of resettlement. At the same time, the government does not leave owners completely at the mercy of market failures.

Do indirect remedies provide "just compensation" with respect to subjective losses? The variability of these remedies, as well as their indirect attachment to the market, may indeed allow the government to better address subjective values that owners attribute to their property. Consider, for example, an expropriation that uproots an entire residential community. Paying owners only the FMV of their homes may be unjust because it ignores the value of community some owners attach to their property. Loss of community may be remedied by the payment of premiums or, in severe cases, by granting community members the in-kind remedy of reestablishing their community in another location.[87] Yet, each of these remedies carries the inherent risk of owners being either overcompensated (in the case of resettlement) or undercompensated (in the case of premiums).[88] In such cases, therefore, indirect remedies offer a tailored solution with the power to remedy losses in a more precise way. If the community does not require a direct resettlement remedy to reestablish itself anew, the government may provide the community with assistance in the form of building permits or planning easements that may facilitate the process. In this manner, the government will not spend more public money than necessary to provide justice, and the community still receives the remedy it needs to reestablish itself.

If indirect remedies are so beneficial and flexible, why are they used relatively infrequently? Recall the three justifications for eminent domain.[89] The use of indirect remedies entails a significant institutional problem. By providing an umbrella of mechanisms and instruments the government may use to compensate owners for takings, the government and the courts have almost unlimited discretion to determine the remedies in a given case. This unlimited discretion would result in ad hoc decision-making by courts and increase the risk that courts will give preference to relatively powerful and influential owners.

These same characteristics of indirect remedies also raise the issue of cost uncertainty. Although the use of various indirect remedies may provide the government with greater budgetary control over the execution of a public project, they nevertheless lack the cost certainty that characterizes mechanisms such as FMV compensation and fixed premiums. This lack of certainty is even more acute with respect to

87. Parchomovsky & Siegelman, *supra* note 26, at 140–41; Stern, *supra* note 73, at 163–65.

88. *See* Stern, *supra* note 73, at 161–71.

89. *See supra* notes 14–24 and accompanying text.

owners. Property owners, who cannot predict the type or extent of compensation they will receive if their property is taken through eminent domain, may lack proper incentives for investment. For all its faults, the FMV standard allows owners to make a more informed risk assessment when investing in property.

Finally, the wide variety of potential indirect remedies—as well as these remedies' ambiguous value—may result in a lack of transparency and make it difficult to trace the different benefits received by different owners or communities. Such lack of transparency raises the political process concern that the government will manipulate the process and favor those who are close to power by providing them indirect remedies that exceed the losses they suffer due to the expropriation.

IV. INSTITUTIONAL IMPLEMENTATION: KEEPING TAKINGS COMPENSATION SIMPLE AND ADMINISTRABLE

Alternative takings remedies may indeed promote justice. As described above, the ability of the government to choose the proper remedy among several different remedies provides it with instruments to overcome the deficiencies inherent in the application of a universal, monetary, and market-based compensation standard. The expansion of the array of remedies available to the government, therefore, contributes significantly to the normative quest for justice, as it is consistent with the pluralistic conception of property.[90] Having derived our normative prescriptions, the next step is to determine generally how these remedies should be allocated. That is, what is the preferable institutional mechanism for implementing this reform of takings law? Although establishing various classes of remedies may promote justice, the real challenge is figuring out how courts can implement this remedial scheme in a simple and practical manner. Any standard should not only provide true "just compensation" but also should be workable in practice. It is possible to implement a new remedial scheme, which secures the constitutional rights of property owners, without completely sacrificing the value of simplicity.

A. Workable Objective Rules: Assessment Problems and Ad Hoc Determination of Remedies

The mission of establishing a proper institutional implementation of the variety of remedies discussed above should begin by acknowledging

90. *See supra* Part II.B.2.

that institutional concerns stood at the core of courts' adoption of the FMV standard as the sole compensation mechanism in eminent domain cases. As discussed, courts acknowledge the deficiencies of a universal remedy that aims for FMV compensation in all cases.[91] They nevertheless justify the use of the FMV standard by citing "serious practical difficulties in assessing the worth an individual places on particular property at a given time."[92] The adoption of the FMV standard was therefore an attempt by the courts to establish rules that are both *workable* and *objective*. In doing so, courts point to two institutional obstacles that prevent expansion of the array of takings remedies: the assessment problem and ad hoc decision-making.

1. Practical Difficulties in Assessing Subjective Values

The courts' preference for a workable rule to determine compensation in eminent domain cases is based on the perceived difficulty of measuring different values that owners place on their property. The most obvious assessment problems relate to subjective values owners attach to their property—values dependent on personal preferences that cannot be objectively quantified. Relying solely on the property owner's assessment of his or her subjective losses is also problematic because it exposes courts (and society at large) to inflated assessments. Indeed, owners have every incentive to exaggerate the extent of the subjective losses they incur.[93] Several property scholars have proposed different mechanisms to solve the inherent problem of self-assessment.[94] Nevertheless, it is questionable whether embracing any of these mechanisms is practical or

91. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) ("Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule. The Court therefore has employed the concept of fair market value to determine the condemnee's loss." (citation omitted) (citing United States v. Miller, 317 U.S. 369, 374 (1943); United States v. Cors, 337 U.S. 325, 332 (1949))).

92. *Id.* (citing *Miller*, 317 U.S. at 374; *Cors*, 337 U.S. at 332); *see also Cors*, 337 U.S. at 332; *Miller*, 317 U.S. at 373–74.

93. Bell & Parchomovsky, *supra* note 11, at 891; Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1419 (2005). For more information about practices of self-assessment in different branches of law, see generally Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771 (1982).

94. *See* Bell & Parchomovsky, *supra* note 11, at 891–95 (offering a self-assessment mechanism to solve the undercompensation conundrum); Levmore, *supra* note 93, at 778–88.

would even fulfill the primary goal of determining the actual value of the taken property.[95]

Against this background, is it possible to establish an institutional framework that will address the inherent assessment difficulties and at the same time ensure "just compensation"? I believe the answer is yes, with the caveat that in certain cases an accurate estimation of value is not possible, and in others it is not desirable. As discussed above, a given result may be considered "just" even if it does not reflect the full extent of an owner's loss.[96] This may be the case when there are external considerations (such as third party interests) that require less than full compensation or when it is impossible to accurately estimate the full extent of the losses. Courts justify the universal FMV standard based on the latter argument, i.e., the practical difficulties of assessing the worth an individual places on a particular property are too great.[97] Although courts are right to recognize that their inability to accurately assess subjective losses should release them from the need to invest unlimited resources in this insurmountable task, they mistakenly assume this requires them to set (or even normatively justifies) a single, universal compensation standard that eschews any consideration of non-market values—one does not lead to the other. While the impossibility of quantifying all losses may require settling for a second-best conception of justice, the courts' adoption of the FMV standard seems to reflect their preference for simplicity at the expense of justice.

The difficulty of accurately measuring owners' subjective losses should not free the courts from any obligation to address these losses and how they differ from owner to owner, even where FMV is held constant. Recall that a pluralistic conception of property requires a remedial scheme in takings law which takes into account the different values that owners attribute to their property.[98] Therefore, while a perfectly accurate estimation of loss may be impossible or unnecessary, a pluralistic conception of property requires *some* expression (even if partial) of these values in an owner's remedy for a taking.[99]

This may be possible if we embrace an array of potential remedies for takings, as presented above. Incorporating multiple remedies into

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95. *See* Yun-chien Chang, *Self-Assessment of Takings Compensation: An Empirical Study*, 28 J.L. ECON. & ORG. 265, 280 (2012); *see generally* Lee, *supra* note 45, at 620–25 (questioning the normative desirability of entrusting the assessment of property values to owners).

96. *See supra* Part II.A.

97. *See 564.54 Acres of Land*, 441 U.S. at 511.

98. *See supra* Part II.B.2.

99. For the commodifying effects of full and partial compensation, see Stern, *supra* note 7, at 193–97.

takings law provides courts with alternative and superior instruments for ensuring remedial justice in eminent domain cases. These remedies would expand the flexibility of courts when they are confronted with the unique circumstances of each eminent domain case, providing courts with a variety of options to address different types of losses incurred by owners.

Still, this type of remedial scheme raises the concern that courts will engage in ad hoc decision-making in a way that threatens the fundamental purpose of compensation. In what follows, I will address this concern and its threat to the goal of ensuring justice in takings law. After that, I will present a remedial scheme that takes into account both assessment difficulties and concerns over ad hoc decision-making.

2. Ad Hoc Decision-Making

The second concern that led courts to embrace FMV as the compensation standard for eminent domain is their desire to base compensation on an objective rule, rather than on judicial ad hoc decision-making. The establishment of a "workable objective rule"[100] demonstrates the will of courts to limit their discretion in determining compensation. Courts rightly attempt to protect against arbitrary ad hoc decision-making, which can undermine the rule of law and citizens' (and other government branches') reliance on the stability and certainty of the legal system. Rule-based adjudication is advantageous both because it may provide stability and predictability for owners (and the government) and because it may prevent courts' abuse of power.[101] By providing a proper array of incentives to owners and the government, rule-based adjudication fulfills the three justifications for compensation in eminent domain cases discussed earlier.[102] By providing guidance,[103] rule-based adjudication increases predictability and therefore allows both owners and the government to act on stable ground, taking into account their interests and incentives properly. Such a policy allows for efficient

100. *See 564.54 Acres of Land*, 441 U.S. at 511; United States v. Cors, 337 U.S. 325, 337 (1949); United States v. Miller, 317 U.S. 369, 374 (1943); *see also* Melinda Haag, *Something for Nothing: Just Compensation After* United States v. 50 Acres of Land, 13 ECOLOGY L.Q. 673, 681 (1986).

101. *See* HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 201–23 (2013).

102. *See supra* notes 14–24 and accompanying text.

103. For the view of the rule of law as guidance, see JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 218 (1979) ("[L]aw should be capable of providing effective guidance.") and DAGAN, *supra* note 101, at 201–11.

decision-making with respect to owners' investment decisions and breaks the government's fiscal illusion. By placing constraints on the government,[104] rule-based adjudication prevents arbitrary abuse of power and therefore is consistent with the equality and political process justifications for eminent domain compensation. Nevertheless, does rule-based adjudication necessarily disable courts from implementing the remedial scheme proposed in this Article? In other words, can courts conduct rule-based adjudication while at the same time treating different cases differently? I believe the answer is yes. In what follows, I argue that rule-based adjudication still allows the implementation of a remedial scheme which contains an array of remedies and, equally important, provides owners with just compensation.

B. In Praise of Categorization: Classification as an Instrument for a Rule-Based Adjudication

Breaking the FMV standard's monopoly on takings compensation requires the establishment of an institutional mechanism which will provide courts with practical and well-defined rules to determine which remedy to grant in a given case. In other words, the institutional mechanism should expand the discretion granted to courts for determining takings remedies for expropriation, while at the same time preserving rule-based adjudication. It should be sensitive to the specific circumstances of a given taking, yet remain solid and clear enough to prevent ad hoc decision-making. It should adapt to changes in social meanings and values, yet provide certainty and predictability to both owners and the government. In what follows, I argue that such a complex judicial mechanism is possible through establishment of categories of losses that are currently excluded from the law of takings.

There are several distinct and conflicting theories of categorization. One prominent theory is "classical categorization," which is attributed to Plato and Aristotle and claims that categories are discrete entities characterized by a set of properties shared by all of their members.[105] The second theory of categorization is the one that was developed by Eleanor Rosch.[106] It rejects the objectivity of the classical categorization and calls

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104. *See* DAGAN, *supra* note 101, at 211–14.

105. For a comprehensive review of categorization according to Plato and Aristotle, see Paul Studtmann, *Aristotle's Categories*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/entries/aristotle-categories/ (last updated Nov. 5, 2013).

106. *See, e.g.*, Eleanor Rosch, *Principles of Categorization*, *in* COGNITION AND CATEGORIZATION 27 (Eleanor Rosch & Barbara B. Lloyd eds., 1978) [hereinafter Rosch, *Principles of Categorization*]; Eleanor Rosch, *Prototype Classification and Logical*

for a more cognitive approach, which accepts that natural categories are graded (that is, they tend to be fuzzy at their boundaries) and inconstant in the status of their constituent members.[107]

The differences between these two prominent categorization theories are beyond the scope of this Article. Yet, to provide a balanced institutional mechanism which will expand the discretion granted to courts for determining takings remedies while at the same time preserving rule-based adjudication, the cognitive theory of categorization is more applicable.[108] Recall the positive argument against the application of a universal takings compensation standard.[109] This argument addresses a variety of deficiencies of the FMV standard (e.g., market failures and exclusion of subjective losses), but we can create separate categories that encompass certain arguments against the FMV standard with similar, though not identical, characteristics.

Classifying values and losses into prototype categories may guard against untethered ad hoc decision-making, while at the same time allowing courts and lawyers to address significant differences in the circumstances of divergent cases. It also leaves room for careful change that keeps the law in tune with prevailing insights regarding our social values. In other words, categorization allows for a sensitive, rule-based legal regime.

In the context of takings law, categorization means we should identify those values or types of expropriation that courts should consider when they determine remedies. Blight condemnations, for example, raise concerns of market failures that are the result of the inability of owners to use FMV compensation to preserve their status as homeowners. As mentioned above, this concern may be based on several different reasons, such as the low market value of property in blight areas (especially in relation to the high value of property in the renewed area) and the factor of time.[110] Yet, all of these reasons raise a similar concern—the individual's loss of homeowner status—and they require certain remedies to allow the owner to maintain his status.

Injustice arising from takings law's disregard of loss of ownership status or loss of community calls for an entirely different approach. The

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Classification: The Two Systems, *in* NEW TRENDS IN CONCEPTUAL REPRESENTATION: CHALLENGES TO PIAGET'S THEORY? 73–74 (Ellin Kofsky Scholnick ed., 1983). For the application of prototype categories within law, see Leora Bilsky, *Naming and Re-Categorization in the Law*, 5 INT'L J. CHILD. RTS. 147, 152–57 (1997).

107. Rosch, *Principles of Categorization*, *supra* note 106, at 29.

108. *Id.*

109. *See supra* Part II.B.1.

110. *See supra* Part II.B.1.a.

positive argument against the monopoly of the FMV standard is that it ignores losses without market value. This type of loss is distinct from the loss of status homeowners incur in, for example, blight condemnations, where the goal of the remedy should be to preserve the owner's status. The remedies that a just remedial scheme should offer in cases where owners incur subjective losses should give expression to these overlooked losses.

Another set of remedies should be available to overcome the deficiencies that arise from the FMV standard's disregard of certain quantifiable financial losses, such as litigation costs, attorneys' and appraisal fees, and business goodwill. In such cases, remedial justice should not be focused on the owner's ability to maintain his ownership status or on subjective or sentimental losses. To the contrary, these types of losses share a prominent feature—they all have a market value that can be determined relatively easily. The remedies in these cases should therefore have the goal of indemnifying the owner for losses and expenditures he incurred that the FMV standard unjustly ignores.

Identifying different categories of losses and harms that the FMV standard fails to compensate allows us to focus on how to resolve these losses and harms. Not all losses and harms excluded from the existing takings compensation scheme require the same response. At the same time, we may classify these losses into distinct and clear enough categories to avoid ad hoc decision-making. This understanding will allow us to begin to sketch a scheme that will ensure remedial justice in takings law.

C. How Should Remedies Be Determined?

In the second Part of this Article, I presented several deficiencies of the FMV standard that prevent it from ensuring owners receive "just compensation." As demonstrated above, these deficiencies, though they entail different features, may be classified into three prototype categories: (a) loss of status; (b) subjective losses; and (c) monetary losses excluded from the FMV standard.[111] These prototype categories differ not only in their content but also, and maybe as a consequence, in the instruments—that is the remedies—through which a just result may be achieved. In this Part, I will sketch the outlines of a remedial scheme for takings law that is sensitive enough to currently excluded values, yet clear and definite enough to allow for a rule-based regime. For that purpose, I argue that it is necessary to define the categories as precisely

111. *See supra* Part II.B.

as possible. The ability of decision makers to determine the proper remedy for a given expropriation would depend on their ability to place each expropriation in the proper category.

The first prototype category is the loss of status, i.e., all of the cases where owners lose not only their property but their ability to own a new home. In this category, we should include cases in which the owners cannot find a replacement residence or business as a result of (1) the high prices of such replacement or (2) diminution of the taken property's FMV attributable to the government's expressed intention to take the property. These cases share several characteristics to varying degrees: First, it is impossible to predict whether these failures will occur and how severe they will be if they occur. Second, these cases cannot all be resolved under a universal standard of compensation. And finally, they all heavily rely on the market value of other properties. Yet these cases all share one prominent feature under existing law: the possibility that the owner may lose not only his home or business but also his ability to maintain his status as an owner at all.

Therefore, when a given expropriation threatens a market failure—mainly, the loss of ownership status—owners should be entitled to in-kind remedies in the form of replacement or resettlement. This may be achieved by providing owners with alternative housing (or a new business location) or by adding the necessary amount of monetary compensation to enable the purchase of a new property. By ensuring owners' preservation of their ownership status, even when the FMV of the taken property is insufficient, the law addresses and respects the unique circumstances of each owner. The decision of which remedy is necessary to return the owner to his position pre-taking should be reserved to the appropriating authority or to the courts, and the determination whether to provide owners with an in-kind remedy of alternative housing or to pay a premium should be decided in accordance with the circumstances of the expropriation (also taking into account the real estate market).

Another possibility is the use of indirect remedies, such as grants, low-interest loans, and the removal of bureaucratic obstacles (i.e., changing zoning restrictions to allow a greater number of residential units and to encourage entrepreneurs to offer solutions such as alternative housing for the evacuated owners). However, this discretion should be limited to mitigate concerns regarding lack of transparency, public scrutiny, and bias toward powerful and influential property owners.[112] The market value of the replacement residence or business can

112. *See supra* Part III.C.

itself serve to limit courts' discretion. When the appropriating authority or the court places a value on the residence or business, they are still making an assessment that can be criticized and reviewed objectively with reference to the market.

The second prototype category deals with subjective losses and should include all of the non-market values that owners attribute to their property. The most prominent subjective values, which courts ignore, are personhood (as reflected in the sentimental meaning individuals attach to their homes or to their familial businesses) and community (the value an individual places on being part of the social fabric of his community). These values share two prominent characteristics: First, they are subjective and almost entirely depend on individual preferences. Second, they are impossible to measure precisely. Subjective losses, however, differ in the ease with which they can be remedied post-taking. While the loss of memories and sentimental attachment to the home one was born and raised in cannot be repaired even if the owner receives resettlement assistance, the loss of community—which is the loss of one's ability to cooperate with others for the fulfilment of their shared goal or conception of the good—may indeed be repaired if the court or appropriating authority enables the entire community to move to an alternative location. That being said, we should also consider that not all owners maintain sentimental attachment to their homes and not all communities are alike in the extent they provide their members a framework for meaningful coexistence and cooperation.

This fragmentation of subjective losses threatens the possibility of establishing a suitable remedial scheme which will overcome the deficiencies of the FMV standard while at the same time preventing ad hoc adjudication. In addition, we should keep in mind Stephanie Stern's call for empirical verification of subjective losses.[113]

To offer owners "just compensation" for subjective losses, and especially for the loss of the home, we should consider compensation that is expressive in nature. Since most subjective losses are not directly remediable (such as the loss of sentimental value attached to one's home or the loss of a familial business that was managed by the family for generations) and cannot be quantified accurately (even by the owners themselves), the remedies available for these losses should exclude in-kind replacement, and we should not make any pretense of placing accurate price tags on subjective losses. However, the remedy should express society's recognition of subjective losses, even in an imprecise way, by providing the owner with a premium.

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113. Stern, *supra* note 48, at 1109–20.

Indeed, justice may sometimes require us to use second-best solutions such as premium payments.[114] The premiums may be fixed to restrict courts' discretion, or they may be variable in the sense that courts may develop proxies to determine the size of the additional payment. Ellickson's proxies, which are focused on the length of time the owner has lived in the home and the nature of the owner's property rights,[115] may provide courts with sufficient leeway to create a range of variable premiums. To conclude, although subjective losses are, by their nature, irreplaceable and difficult to assess accurately, takings law should address them. Yet, these characteristics of subjective losses make in-kind remedies inappropriate and render the amount of any additional compensation somewhat arbitrary. Nevertheless, in an attempt to fulfill a pluralistic conception of property, these losses should be settled with premiums—whether fixed or variable (depending on the development of proxies that will reflect the extent of the loss).

Should the loss of community be treated equally to other subjective losses? In another paper, I offered a comprehensive remedial scheme for compensating owners for loss of community.[116] This scheme is based on four components that strike a balance between the roles that cooperation plays in community members' fulfillment of their shared conception of the good; the social legitimacy of the community; the political and economic strength of the community; and the expropriation's effect on the community's ability to continue functioning.[117] By considering these four components, it is possible to establish a remedial scheme that is sensitive to loss of community, and in some instances, supports community members' goal of community reestablishment.

This thorough examination of loss of community, however, reveals that what is often termed in the literature as "communality loss" actually includes two different losses. One loss indeed includes the features of the subjective losses prototype, which is the loss of the sentimental attachment to and sense of belonging that one had in his residential community. Another loss, which is relevant only in communities that provide their members with the ability to maintain meaningful cooperation, goes beyond sentimental attachment—it is the greater loss of the owner's ability to continue to realize his preferred conception of the good. Indeed, when meaningful communities are uprooted due to expropriation, their members lose their ability to fulfill their shared set of values and beliefs. In other words, members of such communities lose

114. *See supra* Part III.A.
115. Ellickson, *supra* note 7, at 736–37.
116. *See generally* Stern, *supra* note 7.
117. *Id.* at 160–83.

their ability to flourish via cooperation and collaboration. This harm resembles the "loss of status" harm in the first prototype category. Unlike other subjective losses, however, loss of community is in fact reparable. Reestablishment of a community may prevent community members from losing their status and allow them to continue to cooperate for the realization of their shared goals.

Therefore, the allocation of remedies for the loss of community should be determined in accordance with the characteristics of the community as described above. In meaningful cooperative communities, courts should strive to grant owners an in-kind replacement remedy or additional monetary compensation to allow the community to reestablish itself. In less meaningful communities, the remedy should reflect the intangible, subjective loss that occurs when community ties are severed. In these cases, a premium payment that expresses this loss would be adequate.

The third prototype category is financial losses outside of the property's FMV, such as attorneys' and appraisal fees, litigation costs, and businesses' goodwill. What is common to all of these losses is they all entail market values that are easily quantified. Although these costs may differ from one case to another, it is easy to estimate them with reference to the market. These losses should therefore be compensated with premium payments that reflect their market value. This would require the court to evaluate the reasons for any differences between the market value and the actual expenses incurred by the owner. Where the actual expense is higher than the market value, but this difference is attributable to the owner's position, or the nature of the expropriation,[118] the premium should cover this difference.

The following table summarizes the three prototype categories:

118. Economically disadvantaged owners may be required to pay increased attorneys' fees as a result of the scope of their lawsuit, as well as their vulnerability. In such cases, where the actual expenses are higher than the market value of such services because of the owners' unique characteristics or position, the courts should consider indemnifying owners for these additional costs by ordering the payment of premiums.

Table 1: Categories of Excluded Values and Costs

	Loss of status	**Subjective losses**	**Excluded market values**
Rationale	To overcome the loss of ownership status	To reflect the losses that lack market value	To compensate objective market-based losses excluded from the FMV standard
Characteristics of appropriate remedies	Preserves ownership status	Dependent on owners' subjective evaluation; prone to commodifi-cation concerns	Dependent on external, easily quantifiable data
Appropriate remedies	Remedies designated to provide owners with alternative residence, business, or meaningful community In-kind remedies (alternative housing); premiums that cover the gap in the real estate market prices; indirect remedies that encourage entrepreneurs to offer alternative housing to owners	Payment of fixed or variable expressive premiums	Reasonable market value of losses and costs Exact loss—if greater than reasonable market value—paid if the owner's position, or the nature of the expropriation, is to blame for the gap

V. CONCLUSION

This Article calls for a change in takings law's adherence to the FMV of the taken property as the universal standard for compensation. As I demonstrated, universal application of the FMV standard undermines all three prominent justifications for compensation in takings and, equally important, cannot fulfill the constitutional requirement of "just compensation" set forth in the Fifth Amendment.

This Article proposes a novel remedial scheme, which can bring about just results without completely sacrificing the qualities of simplicity and workability that attracted courts to the idea of FMV compensation. This Article also provides instruments for establishing a new remedial scheme in the law of takings by suggesting the inclusion of a range of remedies including premium payments, in-kind direct remedies (such as resettlement or replacement), and a variety of indirect remedies. To mitigate concerns over ad hoc decision-making and the practical difficulties of assessing subjective losses, this Article provides a roadmap—which consists of several prototype categories—to guide the appropriate allocation of the alternative remedies. In this way, takings law can ensure owners receive "just compensation" when they are subject to eminent domain through an institutional mechanism that preserves the principles of simple, rule-based adjudication.