

# **Subordinate or Fundamental Rights in Property? Special Benefits and Givings Recapture in Determining Just Compensation**

## I. INTRODUCTION

This essay examines the historical development of takings, and asks whether the more recent trend diminishing constitutionally required compensation through “givings recapture” is consistent with the function or purpose of the Takings Clause. To help define this inquiry, Section II first looks to the history of the Takings Clause to identify an origin and purpose behind the compensation requirement. The inquiry next follows the development of takings jurisprudence by the U.S. Supreme Court.

Section III similarly traces the historical and theoretical background of givings recapture. This section defines the various incarnations of givings from windfalls, betterments, and benefit offset to average reciprocity of advantage. Next, a givings scheme adopted in post-war England demonstrates a practical application of how attempts to recapture givings have succeeded. This historical program allows for a comparison of three current proposals to implement a givings recapture scheme in the U.S.

Part IV examines givings as they currently operate within takings law. Givings, in the form of special and or general benefits, are charged against property owners to decrease compensation for governmental takings. In determining the fair market value (“FMV”) of condemned property and the severance value of any remainder property, state courts routinely discount compensation owed by the benefit conferred. This survey demonstrates the capricious nature of givings taxes.

Finally, this essay suggests the capricious application of givings is both without historical precedent or logical justification. Instead, this article argues that givings, while clearly beyond any original understanding of the Takings Clause, may comport with the fairness and justice ideals underlying the Takings Clause. But to do so, givings, much like current takings jurisprudence, must be rationalized in application and theory.

## II. TAKINGS

The inquiry into whether givings recapture is consistent with the function and purpose of the Takings Clause necessitates first understanding its origins and purpose. This section surveys the historical origins of the Takings Clause, specifically searching for the earliest examples of the right to compensation for physical and or regulatory takings. Section A is a survey of eminent domain powers and limitations, traced from medieval English law through the Magna Carta, Blackstone and early state constitutions. Section B analyzes the political theories that informed ideas of rights in property vis-à-vis the police and eminent domain powers of the state. Section C examines the changing definitions, within the takings jurisprudence of the Supreme Court, of just compensation. The result reveals a fluid and changing understanding of the relationship between the sovereign power of the State and an individual’s rights in his property.

### A. Historical Development of the Takings Clause of the Fifth Amendment of the U.S. Constitution

The Takings Clause of the Fifth Amendment of the United States Constitution (“Takings Clause”) prohibits the federal government from taking private property for public use without the

payment of just compensation,<sup>1</sup> and is applicable to the States through the Fourteenth Amendment.<sup>2</sup> In attempting to discern the requirements of the Taking Clause, the Supreme Court and legal scholars have invoked its historical origins to argue that landowners historically had the right to “use their land freely as long as they cause[d] no harm to others.”<sup>3</sup>

However, the origins of the Takings Clause are none too clear. Prior to Magna Carta, under English law, all land was held subject to a series of feudal obligations culminating in the sovereign.<sup>4</sup> Under this regime, nobles could dictate which crops were grown on land held by their subordinates,<sup>5</sup> as well as require the construction of sea walls, flood control projects, and drainage systems.<sup>6</sup> The noble or sovereign ultimately could seize any lands not complying with the required use, because land was held subject to the pleasure of the person of superior rank.<sup>7</sup>

Magna Carta limited this unfettered right to seize land: “No freeman shall be arrested, or detained in prison, or deprived of his freehold, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.”<sup>8</sup> Magna Carta required no compensation for such a deprivation. This “law of the land” limitation evolved by the 17th Century as a Parliamentary (and later legislative) limitation in defense of private property rights against a sovereign (later governmental) taking.<sup>9</sup> The right to regulate land, however, was exercised with great discretion and was apparently not linked to the new protection against takings of property.<sup>10</sup>

Early American colonists certainly acquired and held their land subject to a wide variety of regulation and threats of seizure by the colonial governments.<sup>11</sup> Property was routinely taken without compensation, commonly for road construction. Timber was taken for naval masts. Even poor quality tobacco was seized to protect a colony’s reputation for high quality tobacco.<sup>12</sup> Undeveloped land, which was in great supply, could be taken without compensation.<sup>13</sup> Although some scholars argue that limitations on the seizure of property were procedural,<sup>14</sup> others contend

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<sup>1</sup> U.S. CONST. amend. V.

<sup>2</sup> Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226 (1897).

<sup>3</sup> See, e.g., John F. Hart, Colonial Land Use Law and its Significance for Modern Takings Doctrine, 109 HARV. L. REV. 1252 (1996).

<sup>4</sup> FRED BOSSELMAN, DAVID CALLIES & JOHN BANTA, THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL AUTHORITY TO REGULATE THE USE OF PRIVATELY- OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS 53 (1973)[hereinafter THE TAKING ISSUE].

<sup>5</sup> THE TAKING ISSUE at 61.

<sup>6</sup> Id. at 69.

<sup>7</sup> Id. at 53.

<sup>8</sup> Id. at 56.

<sup>9</sup> Id. at 80.

<sup>10</sup> Id. at 65, 68, 76, 78. Examples of what may now seem surprisingly aggressive regulation include a ban on all new housing construction within three miles of London, a ban on construction for lots under four acres, and a ban on construction of floors until the saltpetre had been removed and taken by the King. Id.

<sup>11</sup> William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 COLUM. L. REV. 782, 783 (1995); Steven J. Eagle, Environmental Amenities, Private Property, and Public Policy, 44 NAT. RESOURCES J. 425, 439 (2004).

<sup>12</sup> Treanor at 787-89.

<sup>13</sup> THE TAKING ISSUE at 85-86.

<sup>14</sup> Treanor at 786.

that compensation was paid when land was “taken, used . . . or damaged pursuant to government authorization.”<sup>15</sup>

Colonial regulation of land was severe and uncompensated. Massachusetts, the Plymouth colony, New Netherlands, and New York all had statutes requiring land be either inhabited, cultivated, or else be forfeit.<sup>16</sup> Other regulations required landowners to put their land to the highest or best use, or else the land was forfeit. For instance, in the Plymouth colony, the government could appoint a person to mine a landowner’s property if he failed to mine it within one year.<sup>17</sup> Other colonies required landowners to plant shade trees, drain wetlands, and sell their land in entire plots rather than piece-meal.<sup>18</sup> There is apparently no record of landowners requesting compensation for such regulation.<sup>19</sup>

From this history, the Takings Clause and its requirements of both a public purpose and just compensation appear, seemingly without precedent, in the Fifth Amendment. Scholars have credited the ideas of Sirs Edwin Coke and Blackstone with this innovation. Coke “melded the ancient concept of due process with the revival of the Magna Carta to promote a theory of parliamentary supremacy – neither judge nor king could contradict ‘the law of the land’ as made by parliament.”<sup>20</sup> Blackstone’s Commentaries went further, arguing on the basis of natural law that even when properly exercising eminent domain, the government must pay a landowner just compensation.<sup>21</sup> However, the eminent domain clauses of most early state constitutions followed the revitalized Magna Carta and did not require compensation.<sup>22</sup>

In the revolutionary period, the first mention of just compensation for takings appeared in the 1777 Constitution of Vermont, later ratified in 1786. This constitution provided, “[t]hat private property ought to be subservient to public uses when necessity requires it; nevertheless, whenever any particular man’s property is taken for the use of the public, the owner ought to receive an equivalent in money.”<sup>23</sup> Massachusetts included a similar compensation clause in its constitution,<sup>24</sup> and James Madison famously slipped the just compensation requirement into the Takings Clause of the Fifth Amendment. However, “[t]here is a conspicuous absence of historical data that might enable one to determine why Madison added the just compensation language to the Fifth Amendment.”<sup>25</sup> Scholars conjecture that Madison intended the just compensation requirement to prevent political factions from freely acquiring private property through legislative mandate.

## B. The Source of Property Rights under the U.S. Constitution—Fundamental or Subordinate to the State?

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<sup>15</sup> Hart at 1284.

<sup>16</sup> Id. at 1260.

<sup>17</sup> Id. at 1265.

<sup>18</sup> Id.

<sup>19</sup> Id. at 1253.

<sup>20</sup> THE TAKING ISSUE at 89.

<sup>21</sup> Id. at 101-03 (emphasis added). Hugo Grotius also advocated that eminent domain could only be properly exercised when limited by a public utility and compensation. James S. Burling, Implications of Palazzolo on Eminent Domain, SG059 ALI-ABA 351, 360 (2002).

<sup>22</sup> Treanor at 789; THE TAKING ISSUE at 94.

<sup>23</sup> THE TAKING ISSUE at 94 (emphasis added).

<sup>24</sup> THE TAKING ISSUE at 95.

<sup>25</sup> THE TAKING ISSUE at 99-100.

This murky history of the Takings Clause does little to illuminate the political challenges it has engendered in modern takings jurisprudence. The fundamental rights of private property owners seem to conflict with the eminent domain powers of the states to take land. Some scholars read this history to prove that land was privately held subordinate to the government's right to regulate for a public good that exceeded the bounds of the police power.<sup>26</sup> Others argue that property rights were fundamental, and, irrespective of a valid exercise of eminent domain, could not be subordinated to the public good without compensation to the injured property owner.<sup>27</sup>

The Supreme Court recently took sides in this dispute in the context of a zoning regulation challenged as going "too far" and affecting a taking.<sup>28</sup> Justice Kennedy wrote that, "[p]roperty rights are created by the State," but also that the State may not deny compensation simply because a landowner had notice of a regulation when he acquired title. "The State may not put so potent a Hobbesian stick into the Lockean bundle."<sup>29</sup> The reference endorses Locke's contention that men did not surrender "their liberty and property when they joined together to form a government for their mutual benefit and protection."<sup>30</sup> Under a Hobbesian view of property, conversely, the government determined "what rights men may hold and under what conditions."<sup>31</sup>

The discussion seems esoteric until one attempts to value land that is subject to regulation, as the Supreme Court did in Palazzolo v. Rhode Island.<sup>32</sup> If applying a Lockean view, the property should be valued without regard to government restrictions on the land, as though the property owner could develop the land in any way he liked. Under a Hobbesian scheme, in contrast, since all rights in property are granted by the state, any value flowing from the property is attributable to the state's grant of development rights. Therefore, the removal of such rights does not constitute a taking but rather the withdraw of an uncompensated windfall. Despite Justice Kennedy's opinion in Palazzolo, the question of how to determine a baseline for just compensation continues to plague state and federal courts.

### C. Modern Takings Jurisprudence of the U.S. Supreme Court

One may well wonder how modern takings jurisprudence arrived at this conundrum, given its history of compensating for physical takings only sporadically, and for partial physical and regulatory takings not at all. This section briefly outlines the development of modern takings jurisprudence, from the development of partial physical takings, to regulatory takings, through limitations on development and exaction conditions.

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<sup>26</sup> Hart at 1291.

<sup>27</sup> See, e.g., James S. Burling, Implications of Palazzolo on Eminent Domain, SG059 ALI-ABA 351(2002); Gideon Kanner, Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in its Effort to Formulate Coherent Regulatory Takings Law? 30 URB. LAW. 307 (1998).

<sup>28</sup> Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

<sup>29</sup> Burling at 358, citing Palazzolo, 533 U.S. at 627 (2001).

<sup>30</sup> Burling at 358-59, citing Locke, TWO TREATISE ON GOVERNMENT, SECOND TREATISE, § 123.

<sup>31</sup> Burling at 359.

<sup>32</sup> Palazzolo, 533 U.S. 606 (2001).

Prior to the U.S. Civil War, takings were litigated mostly in state courts.<sup>33</sup> They “consistently held that state regulation pursuant to the police power did not give rise to a compensation requirement . . . .”<sup>34</sup> The Supreme Court rarely addressed takings prior to the late 19<sup>th</sup> Century.<sup>35</sup> When it did so, it held the Takings Clause applied only to physical takings. “Indirect and consequential injuries to property, whether resulting from the acquisition and use of other property or from police power regulations,” were explicitly excluded from the compensation requirement of the Takings Clause.<sup>36</sup>

Mugler v. Kansas<sup>37</sup> represents the zenith of this categorical rule that valid exercise of the police power “could never be deemed a taking,” thus forestalling compulsory compensation.<sup>38</sup> In that case, a statute prohibiting the manufacture of liquor rendered Mugler’s brewery defunct.<sup>39</sup> The Court held the restriction was “only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests.”<sup>40</sup>

From this clear rule, the Court reversed course in 1922 and held that regulation under the police power could constitute a taking requiring compensation. Justice Holmes held in Pennsylvania Coal v. Mahon,<sup>41</sup> “if regulation goes too far it will be recognized as a taking.”<sup>42</sup> Just six years later, the Court held that zoning regulations could constitute a taking as applied, if the regulation did not bear a “substantial relation” to the police power.<sup>43</sup>

In Penn Central Transportation Co. v. City of New York,<sup>44</sup> the Court admitted its difficulty in articulating a rule for regulatory takings.

While this Court has recognized that the “Fifth Amendment’s guarantee . . . (is) designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” this Court, quite simply, has been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.<sup>45</sup>

Nevertheless, the Court proceeded to create a fact intensive factor test, balancing the extent to which the regulation interferes with the landowner’s distinct, investment backed expectations,

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<sup>33</sup> THE TAKING ISSUE at 106.

<sup>34</sup> Treanor at 792-93 (emphasis added).

<sup>35</sup> Treanor at 795.

<sup>36</sup> Id. at 106.

<sup>37</sup> 123 U.S. 623 (1887).

<sup>38</sup> THE TAKING ISSUE at 120.

<sup>39</sup> Mugler v. Kansas, 123 U.S. 623, 623 (1887).

<sup>40</sup> Mugler, 123 U.S. at 667-68 (emphasis added).

<sup>41</sup> 260 U.S. 393 (1922).

<sup>42</sup> Pennsylvania Coal, 260 U.S. 393, 413 (1922).

<sup>43</sup> Nectow v. City of Cambridge, 277 US 183 (1928) (holding “The governmental power to interfere by zoning regulations with the general rights of the land owner . . . is not unlimited, and . . . such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.” Id. at 188. See David L. Callies, Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts Are Doing about It, 28 STETSON L. REV. 523, 525 (1999).

<sup>44</sup> 438 U.S. 104 (1978)

<sup>45</sup> Penn Central, 438 U.S. at 123-23, citing Armstrong v. U.S., 264 US 40, 49 (1960); see Callies at 531-32.

the character of the government action, and the character of the taking, where a physical invasion is more likely to effect a taking.<sup>46</sup>

Under current case law, physical takings and invasions are per se takings requiring just compensation.<sup>47</sup> Partial and de minimis takings are also compensable.<sup>48</sup> Physical takings require compensation if the regulation, “does not advance a legitimate state interest or denies the landowner economically viable use of his land.”<sup>49</sup> This standard has ensnared the Court in the vexing question of how to determine the baseline valuation of the relevant property, so that the value of the remaining property may be measured against the pre-condemnation value, or the “denominator issue.”<sup>50</sup> To enable such valuations in partial regulatory takings claims, the Court has erected a ripeness barrier;<sup>51</sup> the claimant must first obtain a final decision from the agency regulating the use of his land.<sup>52</sup> This final determination of allowable use enables the Court to determine the highest and best use of the remainder, and thus, the value of the remaining use or parcel.

The Court has also held that land development conditions must have an “essential nexus”<sup>53</sup> to the proposed burdens arising from the development, and must be roughly proportional.<sup>54</sup> If they fail the nexus and proportionality tests, exactions and development conditions may also constitute compensable takings. Finally, a regulation may constitute a per se taking if the regulation permanently deprives the landowner of “all economically beneficial or productive use,”<sup>55</sup> with exceptions for “background principles of property law” and “nuisance.”

In *Palazzolo*,<sup>56</sup> the Court returned to the valuation and denominator issue, this time spreading more confusion than clarity. The case arose when Mr. Palazzolo acquired wetlands already subject to development restrictions. The Supreme Court held, *inter alia*, that a regulatory taking claim is not categorically barred simply because the enactment of the regulation predates the claimant’s acquisition of the property.<sup>57</sup> Acknowledging its conflicting holdings on the denominator issue, the Court said:

Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole . . . but we have at times expressed discomfort with the logic of this rule . . . a sentiment echoed by some commentators . . . . Whatever the merits of these criticisms, we will not explore the point here.<sup>58</sup>

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<sup>46</sup> Callies at 532.

<sup>47</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *see* Callies at 535-36.

<sup>48</sup> David L. Callies, *Takings, An Introduction and Overview*, 24 HAWAII L. REV. 441, 442 (2002).

<sup>49</sup> *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

<sup>50</sup> *Id.* at 525, *citing* *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 499, n.27 (1987)(holding that where there is no physical appropriation, the taken property may not be segmented to show a complete taking of economic value).

<sup>51</sup> Callies, *supra* note 48, at 444.

<sup>52</sup> *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

<sup>53</sup> *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987); *see* Callies, *supra* note 42, at 525.

<sup>54</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *see* Callies, *supra* note 42, at 525.

<sup>55</sup> *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003, 1015 (1992); *see* Callies, *supra* note 42, at 574-75.

<sup>56</sup> 533 U.S. 606 (2001)

<sup>57</sup> *Id.* at 627-630.

<sup>58</sup> *Id.* at 2465 (internal citations omitted)(emphasis added).

The Court thus tantalizingly acknowledged the problem, yet because the issue was not raised below, provide no guidance.

The crux of the issue, highlighted by the references to Hobbes and Locke, is “to what degree, if any, property derives its use and value from government.”<sup>59</sup> If the development value of Palazzolo’s wetland is derived from the government, e.g., the provision of infrastructure, roads, and amenities,<sup>60</sup> then the regulation limiting its development may be the government retracting a benefit conferred arbitrarily on Palazzolo – in other words – a windfall. Alternatively, if Palazzolo acquired the regulated property at a value discounted for the development limitations, then compensating Palazzolo for that diminution in value would also amount to a windfall (as “double dip” compensation).<sup>61</sup>

On the other hand, if rights in property are fundamental, then all state regulation (subject of course to the Lucas exceptions of nuisance and background principles of property law) may be seen as compensable takings. Justice Souter, writing separately, wondered where to locate the starting point for determining the value of the property.<sup>62</sup> “[I]f rights to land use pass from owner to owner like that, how far back does the chain go? I mean it seems to me there’s no logical stopping place until you get back to Roger Williams and the 17th Century settlement. So where do we draw the line?”<sup>63</sup> The issue is further complicated by the spectre of incremental regulations affecting a compensable taking piece-meal and thus avoiding payment of compensation.<sup>64</sup> If allowed, incremental takings would undermine the Takings Clause requirement of just compensation, and thus constitute a windfall for the government.

### III. GIVINGS

This section presents a historical overview of the origins of givings and their relationship to changes in takings jurisprudence. Part A traces the history of givings recapture from early English common law to the current incarnation of givings recapture, special and general benefits that offset condemnation awards. Part B examines the English attempt to use givings recapture in a bold plan to nationalize development rights. Part C surveys contemporary proposals for implementing givings recapture schemes in the U.S. Part D advocates the adoption of a takings recapture scheme for landowners, to compensate above the FMV of taken property.

#### A. Historical Development of Windfall Recapture Schemes

Just as there is no mention of regulatory takings in the colonial, revolutionary, antebellum, and early industrial periods, justifications for givings charges are similarly stretched thin if based solely on framer’s intent or original understanding interpretations of the Constitution. Instead, to understand the origins of givings recapture and its place in takings jurisprudence, it seems helpful to examine the origins of the English common law on windfalls. Under English law, windfalls evolved into the concepts of betterments and worsenments. In the United States, the idea of betterments evolved into legal recognition of givings, first through the benefit offset principle which by necessity applied only to physical takings as regulatory takings

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<sup>59</sup> Burling, supra note 22, at 361.

<sup>60</sup> Id.

<sup>61</sup> Id. at 358.

<sup>62</sup> Id. at 363.

<sup>63</sup> Id.

<sup>64</sup> Id. at 362.

did not yet exist. Later, these concepts were applied to regulatory takings through the average reciprocity of advantage. In its current manifestation, givings are recaptured through offset of special and or general benefits of condemnation and or severance damages.

### 1. Windfalls, betterments, and worsenments

The term windfall derived from medieval English custom allowing commoners to take any wood felled by the wind, as opposed to the usual prescription against taking timber from a noble's land.<sup>65</sup> The term has become synonymous with any unearned benefit or acquisition.<sup>66</sup> In the context of takings, givings are windfalls flowing from government action. Under a series of English planning laws in the early 20th Century, landowners could claim compensation for worsenments (diminutions in property value flowing from government action), which the government could reduce by the amount of betterments (increases in value similarly flowing from government action).<sup>67</sup>

### 2. The benefit offset principle

In the 19th Century, U.S. courts sought to reduce compensation for condemnations by the amount of benefit arising from the government action, usually the project for which the property was taken.<sup>68</sup> This benefit offset principle applied only to physical takings, could only reduce compensation, and could never give rise to an independent givings charge against a landowner.<sup>69</sup> Nevertheless, this principle recognized for the first time in the U.S. that landowners could be charged for benefits flowing from the government's exercise of its eminent domain powers. Proponents of this principle accepted the theory of charging landowners for those benefits, even though this recognition was limited only to decreasing compensation otherwise due.

### 3. The average reciprocity of advantage

Justice Holmes first articulated the average reciprocity of advantage rule in Jackman v. Rosenbaum Co.,<sup>70</sup> and later in Mahon, in which the "wealth enhancing" and "wealth diminishing" consequences of a regulatory taking are aggregated.<sup>71</sup> Average reciprocity of advantage carves out a "subset of benefit-conferring regulations that do not rise to the level of a compensable taking: those that provide reciprocal benefits to the regulated parties."<sup>72</sup> As

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<sup>65</sup> Eric Kades, Windfalls, YALE L.J. 1489, 1489 (1999).

<sup>66</sup> Id.

<sup>67</sup> Donald Hagman, Betterment for Worsenment: The English 1909 Act and its Progeny, in WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION, 491 (Donald Hagman & Dean Misczynski eds., 1978)[hereinafter WINDFALLS FOR WIPEOUTS].

<sup>68</sup> Abraham Bell & Gideon Parchomovsky, Givings, 111 Yale L.J. 547, 597 (2001).

<sup>69</sup> Id. at 598.

<sup>70</sup> 260 U.S. 22 (1922).

<sup>71</sup> Bell & Parchomovsky, supra note 70, at 597.

<sup>72</sup> Lynda J. Oswald, The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis, 50 VAND. L. REV. 1449, 1452 (1997). Oswald argues the crucial distinction in average reciprocity of advantage is between benefit conferring regulations(arising under the eminent domain power) and harm preventing regulations (arising under the police power). Id. at 1452, 1458, 1460. First adopted in Mugler, harm benefit analysis was briefly rejected in Lucas but was revived just two years later in Dolan. Id.

discussed below, the average reciprocity of advantage created a further conundrum: how to identify and quantify the benefit conferred by regulation.

## B. The English Experiment: The Uthwatt Report and the Town and Country Planning Act of 1947

After World War II, English lawmakers decided to undertake long-overdue revitalization and urban planning.

London was ripe for reconstruction before the war; obsolescence, bad and unsuitable housing, inchoate communities, uncorrelated road systems, industrial congestion, a low level of urban design, inequality in the distribution of open spaces, increasing congestion of dismal journeys to work – all of these and more clamored for improvement before the enemy’s efforts to smash us by air attack stiffened our resistance and intensified our zeal for reconstruction.<sup>73</sup>

Fueled by this reconstructionist zeal, the Uthwatt Commission in 1942 proposed, first through the Uthwatt Report and later in the 1947 Town and Country Planning Act, to bring all future development under regulatory control while simultaneously taming the “compensation bogey.”<sup>74</sup>

The compensation bogey – how to subject almost all development in the nation to regulation while averting prohibitive compensation charges against the government – had proved the undoing of both the 1909 and 1932 Town and Country Planning Acts. Those Acts “allowed [the government] to claim, first 50 per cent, and then (in the later Act) 75 per cent, of the amount by which any property increased in value as the result of the operation of a planning scheme.”<sup>75</sup> The Uthwatt Committee determined these prior Acts failed in part because of the difficulty of determining what increase in value was attributable to the “planning scheme.”<sup>76</sup>

This difficulty was overcome by ingeniously uncoupling the government’s right to take increased property value from the planning scheme. Instead, all increases in value “not directly attributable to owner improvements” were subject to a seventy-five percent windfall tax.<sup>77</sup> Implicit in this plan is the assumption that all increases in value were bestowed by the government and could therefore be reclaimed without compensating property owners. This proposal was rejected in favor of a more sweeping plan which nationalized all future development rights.

The mechanics of valuation under this plan provide useful comparisons for similar proposals in the U.S. Under this plan, landowners could charge the government for development rights taken. When landowners later sought to develop land beyond its existing use, they were

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<sup>73</sup> J. B. CULLINGWORTH, TOWN AND COUNTRY PLANNING IN BRITAIN 13 (George Allen & Unwin Ltd. 8th ed. 1982).

<sup>74</sup> Id. at 16.

<sup>75</sup> Id. at 172.

<sup>76</sup> Id. at 172. In fact, the Report documented that betterment fees were collected in only three instances before the 1932 Act instituted a deferment of the charge until the betterment was realized. Id.

<sup>77</sup> Abraham Bell & Gideon Parchomovsky, Givings, 111 YALE L.J. 547, 611-12 (2001). Under this first proposal, “annual existing use value was to be assessed every five years” and any increase from the initial valuation would be taxed. And the next five year increase would again be taxed, not from the level five-years previous, but again from the initial year of assessment. Donald Hagman & Dean Mischzynski, Executive Summary, in WINDFALLS FOR WIPEOUTS at xxxix.

required to repurchase their development rights.<sup>78</sup> The government thus captured any increase in value. The compensation bogey was tamed because future development rights were deemed categorically too speculative to merit compensation.<sup>79</sup>

The Act was not a success. Public uncertainty and distrust slowed development.<sup>80</sup> The Act spawned a dual property market, in which prices for land acquired by the government at the existing use value varied significantly from land acquired in private transactions at market rates.<sup>81</sup> Planning permits became so rare that a “scarcity value” inflated costs, further slowing reconstruction.<sup>82</sup> By 1959, the government abandoned the scheme and resumed compensating landowners for compulsory acquisitions at market values.<sup>83</sup>

### C. Competing Theories of Givings: Property Rights, Environmental Protection, and Regulated Industries

In their seminal work Windfalls for Wipeouts, Hagman and Misczynski proposed the U.S. adopt a comprehensive government windfall recapture scheme. They advocated a windfall tax on any increase in property values, exclusive of increases attributable to either general inflation or owner improvements. Notably, they suggested owner improvements be assessed at cost rather than by value added.<sup>84</sup> Hagman and Misczynski identified special assessments, reclamation taxes, development exactions, impact taxes, transferable development rights, land value taxes, and transfer taxes as examples of commendable, but insufficient, windfall recapture techniques.<sup>85</sup> Thus they argued a specific tax on windfalls was necessary because these other taxes failed to adequately recapture betterments bestowed by the government or its action.

In 2001, Bell and Parchomovsky proposed a reformation of takings jurisprudence based on recognition of government givings, defined as “government distributions of property.”<sup>86</sup> On the basis of economic efficiency, they argue that just compensation valuations are skewed because the value of givings are ignored. “Givings are ever present and yet not discussed.”<sup>87</sup>

They locate constitutional legitimacy for reading givings into the Takings Clause by delving into the psyche of James Madison. In this polemic, Madison was motivated to insert the just compensation requirement into the Takings Clause by a fear of factionalism and a desire to protect against “unfettered givings” to those factions.<sup>88</sup> The original intent of the Fifth

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<sup>78</sup> Cullingworth, supra note 73, at 172-73. Landowners also bore the burden to bring a claim and prove values. They were required to first submit a claim for “loss of development value,” which resulted from “the difference between the ‘unrestricted value’ (the market value without the restrictions . . . ) and the ‘existing use value’ (the value subject to these restrictions).” If a landowner failed to file the claim, no compensation was paid. Id.

<sup>79</sup> Id. at 173.

<sup>80</sup> Id. 177. Payment to the government for development claims was due immediately, while payment from the government for the acquired development rights was deferred until the property owner suffered harm.

<sup>81</sup> Id. at 178-79.

<sup>82</sup> Id. at 174.

<sup>83</sup> Id. at 180.

<sup>84</sup> Donald Hagman & Dean Misczynski, Recommendations, in WINDFALLS FOR WIPEOUTS at 40-41.

<sup>85</sup> Id.

<sup>86</sup> Bell and Parchomovsky, supra note 77, at 549 (emphasis added).

<sup>87</sup> Id. at 550.

<sup>88</sup> Id. at 553.

Amendment is thus construed as a protection against “predation” in the form of either a giving or a taking, when the government exercises its eminent domain power for the advancement of a faction.<sup>89</sup>

Under Bell and Parchimovsky’s proposal, givings, like takings, fall into three categories: physical, regulatory, and derivative.<sup>90</sup> Whether a giving is compensable or not is determined by a four factor test, balancing the “reversibility of the act, identifiability of the recipient, proximity of the act to a taking, and refusability of the benefit.”<sup>91</sup> As to the valuation bogey, Bell and Parchomovsky advocate “relative wealth” as a baseline instead of “absolute wealth.”<sup>92</sup> Thus, the proposed givings tax would recognize that failure to confer a benefit on one landowner, while conferring that same benefit on surrounding properties, may constitute both a taking from that one and a giving to surrounding landowners.<sup>93</sup> In terms of relative wealth, the landowner deprived of the giving has become poorer than his neighbors. Therefore, unlike the 19th Century benefit offset principle, Bell and Parchomovsky argue all benefiting landowners should be taxed.

In the context of farmland preservation,<sup>94</sup> Mark Cordes advocates a more radical givings-based valuation of property.<sup>95</sup> Under this scheme, all property value is created by the government,<sup>96</sup> and is therefore a windfall waiting in reserve to offset any future taking. A landowner bringing a regulatory takings claim erroneously “presumes that the entire profit potential of the private property has somehow been earned by the landowner.”<sup>97</sup> This rationale is closely linked to Hobbes’s idea that property is held subordinate to the state. Second, Cordes argues such a landowner has no right to compensation because his property is generally benefited by other regulations, offsetting any particular harm.<sup>98</sup> Here, Cordes’ rationale follows the average reciprocity of advantage, where the harm to the particular landowner is off set by the aggregate benefits derived from the general scheme of regulations which supports all property values in a community.

From this overview, it is clear that historically, the Takings Clause contained no implied or explicit requirement that givings be recaptured. When first developed, givings, in the form of benefits, could diminish compensation for a physical taking. Only later, in the context of regulatory takings, did the concept of average reciprocity of advantage develop. One may argue that givings are either consistent with goals of the Takings Clause or not. But in either case, givings charges should be applied uniformly to reduce all compensation awards where a benefit may accrue from government action, or else be uniformly rejected. The current state of affairs, as discussed supra, is neither rational nor based on compelling historical precedent.

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<sup>89</sup> Id. at 553.

<sup>90</sup> Id. at 551.

<sup>91</sup> Id. at 557.

<sup>92</sup> Id. at 552.

<sup>93</sup> Id. at 552.

<sup>94</sup> See, e.g., J. Gregory Sidak & Daniel F. Spulber, Givings, Takings and the Fallacy of Forward-Looking Costs, 72 N.Y.U.L. REV. 168 (1997)(arguing in the context of FCC deregulation, the limits, and appropriate valuation, of setoffs for deregulatory givings).

<sup>95</sup> Mark Cordes, Takings, Fairness, and Farmland Preservation, 60 OHIO ST. L.J. 1033 (1990).

<sup>96</sup> Id. at 1037.

<sup>97</sup> Id. at 1072.

<sup>98</sup> Id. at 1072.

#### D. Compensation for the Uncompensated Increment

At the other end of the theoretical spectrum, Lee Anne Fennell has argued that compensating only for FMV is unjust.<sup>99</sup> She identifies an “uncompensated increment,” which includes: “(1) the increment by which the property owner’s subjective value exceeds FMV; (2) the chance of reaping a surplus from trade (that is, obtaining an amount larger than one’s own true subjective valuation); and (3) the autonomy of choosing for oneself when to sell.”<sup>100</sup> Because the subjective premium is non-transferable, the state’s failure to compensate for it leads to economic waste.<sup>101</sup> In addition, the subjective premium is not entirely subjective; it includes improvements that may not increase a property’s FMV but nonetheless add value for the owner.<sup>102</sup>

Fennell notes that the current rule compensating only for FMV assigns all excess surplus to the condemnor rather than to the property owner. Therefore, far from receiving a double dip of compensation, landowners are instead hit with a double whammy. They are uncompensated both for the subjective value of their property and for chance that their property may sell above FMV.<sup>103</sup> She argues that valuing taken property at some amount over FMV, while still inadequate, will more closely approximate just compensation.

This focus on the uncompensated increment accords with the Australian practice of paying landowners “solatium,” an amount up to ten percent above the FMV for land taken through eminent domain.<sup>104</sup> Solatium compensates for “intangible and non-pecuniary disadvantages resulting from the acquisition.”<sup>105</sup> The amount of the solatium award varies based on “the length of time the claimant . . . occupied the land, the age of the claimant, and the number, age and circumstances of any other people living with the claimant where the land is the claimant’s principal place of residence.”<sup>106</sup>

Australia’s solatium award and Fennell’s uncompensated increment recognize that to be just, compensation for a compulsory acquisition of property should not be limited to a property’s FMV. As Fennell argues, if a property owner felt FMV were a good trade for his land, then a condemning agency would never be forced to exercise its eminent domain powers. Thus, compensating either for solatium or for the uncompensated increment would further the goal of providing just compensation.

#### IV. GIVINGS, FAIR MARKET VALUES, AND JUST COMPENSATION

A prototypical condemnation suit in the U.S. involves a government exercise of eminent domain to take land for the creation or expansion of a highway. As discussed supra, in the colonial era, road construction was a valid public purpose, and not uniformly subject to a compensation award. In partial physical takings, compensation was required for the taken

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<sup>99</sup> Lee Anne Fennell, Taking Eminent Domain Apart, MICH. ST. L. REV. 957 (2004).

<sup>100</sup> Id. at 958-59.

<sup>101</sup> Id. at 964.

<sup>102</sup> Id. at 963.

<sup>103</sup> Id. at 966.

<sup>104</sup> Murray J. Raff, Planning Law and Compulsory Acquisition in Australia, in, TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES, 44 (Tsuyoshi Kotaka and David L. Callies eds., 2002) [hereinafter TAKING LAND].

<sup>105</sup> Id.

<sup>106</sup> Id.

property and severance damages were required for the diminution, if any, in the value of the remainder property. This section examines givings surcharges as they are applied everyday in condemnation and inverse condemnation actions across the country. The mechanics of valuation generally start with a straightforward statement of FMV but rapidly devolve into subjective disputes over whether a benefit or injury is special or general or both.

State law governs the valuation of property for the purposes of meeting the just compensation requirement of the Takings Clause. This section surveys state eminent domain laws, which are grouped by valuation methodologies. Part A examines states which permit benefits to the remainder to offset both compensation for the property taken and severance damages to the remainder. Part B focuses on those states that never allow benefits to the remainder to offset compensation or severance damages. Part C discusses those states that permit benefits to the remainder to offset only severance damages to the remainder. These states are further divided into three categories according to whether the benefit offset rule derives from case law, statutes, or court mandated interpretation of statutory language.

As a rule, the Supreme Court does not review these valuation determinations because they present factual rather than legal issues. This survey demonstrates, however, that the mechanics of valuation – messy though they be – involve legal issues and presumptions directly linked to whether one views rights in property as subordinate to the state or on a par with other fundamental, enumerated constitutional rights.

A. Benefits to the remainder property may offset both compensation for the property taken and severance damages to the remainder.

Seven states<sup>107</sup>—Arkansas, Colorado, Illinois, Minnesota, New Hampshire, South Carolina and Wisconsin—allow any increase in value due to the project for which land was taken to offset both the compensation for the taken land and any severance damages to the remainder land.<sup>108</sup> Of these, Arkansas and Colorado by statute allow the direct compensation to be reduced by only fifty-percent, although the statutes apply only if property is taken for the purpose of highway construction.<sup>109</sup>

In E-470 Public Highway Authority v. Revenig,<sup>110</sup> the Supreme Court of Colorado addressed en banc the constitutionality of its benefit offset statute and affirmed.<sup>111</sup> The court first limited the definition of just compensation to “the value of what [the landowner] has been deprived of, and nothing more”.<sup>112</sup> Next they limited the goal of just compensation to returning the landowner to “as good a position pecuniarily” as before the taking.<sup>113</sup> Despite acknowledging

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<sup>107</sup> See Table One.

<sup>108</sup> See Red Top Farms v. Dep’t of Transp., 503 N.W.2d 354 (Wis. App. 1993); State v. 3M Nat. Advert. Co., Inc., 653 A.2d 1092 (N.H. 1995); Lebanon Hous. Auth. v. Nat’l Bank of Lebanon, 301 A.2d 337 (N.H. 1973); Minnesota Hwy. Comm’ser v. Frederick, 194 N.W.2d 574 (Minn. 1972); Illinois Toll Hwy. Auth’y v. Humphrey Estate, 379 N.E.2d 626 (Ill. 1978); E-470 Pub. Hwy. Auth. v. Revenig, 91 P.3d 1038, 1039 (Colo., 2004); Property Owners Improvement District v. Williford, 843 S.W.2d 862 (1992); State Hwy. Dep’t v. Bolt, 131 S.E.2d 264 (S.C. 1963) and Lindsey v. Forrest City, 536 S.W.2d 305 (Ark. 1976).

<sup>109</sup> Ark. Code Ann. § 27-67-316(f); Colo. Rev. Stat. § 38-1-114(2)(d).

<sup>110</sup> 91 P.3d 1038 (Colo. 2004).

<sup>111</sup> Id. at 1046.

<sup>112</sup> Id. at 1041 (emphasis added).

<sup>113</sup> Id. at 1042.

that since 1883, in Colorado only special benefits could offset only the remainder property, the court held the new statute constitutional because the statute aimed to “balance” the interests of the public and the landowner.<sup>114</sup>

The dissent raised three compelling arguments against the constitutionality of the statute. First, “nothing in the constitution . . . suggests a condemnation award should balance the interests of the individual landowner whose property is taken against the interests of the tax paying public. Just compensation is not a sliding scale.”<sup>115</sup> In addition, the dissent noted that the highway-specific statute arbitrarily creates unfair outcomes by making compensation, which should reflect FMV, dependent instead on the purpose for which the property is taken.<sup>116</sup> Finally, the dissent argued that compensation for the property taken should never be reduced because “[t]here is and can be no special benefit that accrues to the parcel of property being condemned. That property provides no benefit at all to the landowner—indeed, the landowner will no longer own it . . . .”<sup>117</sup> The cases surveyed below demonstrate that the conflicting views within the Colorado Supreme Court are typical of the split among and within other jurisdictions.

B. Benefits to the remainder may never offset compensation or severance damages.

Iowa and Mississippi<sup>118</sup> never permit benefits to a landowner’s remainder property to be offset against either compensation for the property taken or severance damages to the remainder.<sup>119</sup> In Mississippi, this rule is provided by statute.<sup>120</sup>

In determining damages, if any, to the remainder if less than the whole of a defendant's interest in property is taken, nothing shall be deducted therefrom on account of the supposed benefits incident to the public use for which the petitioner seeks to acquire the property.<sup>121</sup>

In Mississippi Transp. Comm’n v. Bridgforth,<sup>122</sup> the state supreme court found the state offered no “merit or authority” to support reducing severance damages by special benefits, except an “apparent desire to pay less than [FMV] for properties taken.”<sup>123</sup>

In Iowa, the state supreme court recently reaffirmed that the state constitution prohibits consideration of “any advantages that may result to [the] owner on account of the improvement for which it is taken” when valuing condemned property.<sup>124</sup> The court notably found that the before and after rule, used to determine FMV in a partial taking, did not necessitate including any increase in development potential of the remaining land in the after value.<sup>125</sup> The rule in

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<sup>114</sup> Id. at 1043.

<sup>115</sup> Id. at 1049 (J. Kourlis, dissenting).

<sup>116</sup> Id.

<sup>117</sup> Id. at 1048.

<sup>118</sup> See Table Two.

<sup>119</sup> Mississippi Hwy. Comm’n v. Hancock, 309 So.2d 867 (Miss. 1975), reaffirmed in Mississippi Transp. Comm’n v. Bridgforth, 709 So.2d 430 (Miss. 1998); Danamere Farms, Inc. v. Iowa Dep’t of Transp., 567 N.W.2d 231 (Iowa 1997).

<sup>120</sup> Miss. Code Ann. § 11-27-21.

<sup>121</sup> Id. (emphasis added).

<sup>122</sup> 709 So.2d 430 (Miss. 1998).

<sup>123</sup> Id. at 441.

<sup>124</sup> Danamere Farms, 567 N.W.2d at 233.

<sup>125</sup> Id. at 234.

Iowa demonstrates that adoption of the before and after rule does not require aggregating special and general benefits.

C. Benefits to the remainder may offset only severance damages to the remainder.

In most states severance damages may only be reduced by benefits special to the remainder property. However, there remains substantial disparity in the application of this simple rule. New York, Virginia and Michigan always allow general and special benefits to be offset;<sup>126</sup> four states only allow benefits to offset damages where the property is taken for a highway.<sup>127</sup> North Carolina usually permits landowners a choice between two compensation valuations, but makes an exception for highways, in which case both general and special benefits must be offset.<sup>128</sup>

Some states<sup>129</sup> define the type of benefit that may offset severance damages by statute, other states<sup>130</sup> follow common law. Where legislatures have adopted statutes allowing the offset of “benefits” without specifying general or special, state courts<sup>131</sup> have predictably reached different interpretations of what “benefit” means. Sample cases from each of these categories are briefly discussed to demonstrate the conflicting definitions of what constitutes a “just” award of compensation when the remainder property benefits from the taking.

1. Both general and special benefits may be offset.

In the landmark decision Chiesa v. State,<sup>132</sup> the Court of Appeals of New York refused to allow the benefits accruing to a landowner’s remaining land to reduce compensation owed for the property taken. The dispute arose when the State Department of Transportation (“DOT”) took twenty-two acres of Chiesa’s 193 acre parcel. In an act of “official chutzpah,”<sup>133</sup> the state argued Chiesa deserved zero compensation for twenty-two appropriated acres, because the remainder was benefited over and above the value of the taken land. In rejecting this argument, the court stated:

[W]e are also mindful of the fact that claimant’s adjoining and neighboring property owners have likewise been benefited by the public improvement without having been compelled to contribute any of their property and without having been specially assessed for the public improvement. Thus, offsetting the

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<sup>126</sup> See Chiesa v. State, 324 N.E.2d 329 (N.Y. Ct. App. 1988); Hwy. & Transp. Comm’ner v. Linsly, 290 S.E.2d 834 (Va. 1982); and Campbell v. Hwy. Comm’ner, 165 S.E.2d 281 (Va. 1969). Michigan does not acknowledge a difference between special and general benefits, effectively offsetting both. See Michigan Hwy. Comm’n v. Frederick, 188 N.W.2d 193 (1971).

<sup>127</sup> See Adams v. State, 279 So.2d 488 (Ala. 1973); Dep’t of Transp. & Development v. Lanier, 564 So.2d 791 (La. App. 2 Cir. 1990); Dep’t of Hwys. v. Snider, 276 So.2d 401 (La. App. 2 Cir. 1973); Mainer v. Canal Auth. of State, 467 So.2d 989 (Fla. 1985); and Boober v. Towne, 143 A. 176 (Me. 1928).

<sup>128</sup> Dep’t of Transp. v. Rowe, 549 S.E.2d 203 (N.C. 2001).

<sup>129</sup> See Table Three.

<sup>130</sup> See Table Four.

<sup>131</sup> See Table Five.

<sup>132</sup> 324 N.E.2d 329 (NY 1974).

<sup>133</sup> M. Robert Goldstein & Michael J. Goldstein, Deduction of General and Special Benefits, N.Y.L.J. 3, 3 (1998).

general and special benefits to the claimant's remainder against the value of the 22 acres actually taken from her would be, in effect, an arbitrary and discriminatory exercise of the State's power of taxation . . . .<sup>134</sup>

Indeed, the court's reasoning applies equally well to the offset of general benefits, which by definition are shared by neighboring properties. If no land is taken from those neighbors, and no benefits are assessed, then they obtain a windfall from the government. Chiesa, on the other hand, receives a double whammy. She becomes both poorer relative to her lucky neighbors, and objectively poorer when her severance damages are reduced by general and special benefits. Nonetheless, Chiesa remains the rule in New York; both general and special benefits are offset against severance damages.

2. General and special benefits must be offset only if property is taken for highway expansion.

In Department of Transportation v. Rowe,<sup>135</sup> the North Carolina Supreme Court upheld offsetting both general and special benefits against severance damages if the acquisition is for highway purposes. The dispute arose when the state DOT condemned over eleven acres of Rowe's eighteen-acre parcel for highway expansion. Just compensation in North Carolina is defined by the general eminent domain statute as either the difference between the before and after value of the remainder property, or compensation only for the taken property with no severance damages.<sup>136</sup> But when property is condemned for highway purposes, N.C. Gen. Stat. § 136-112(1) mandates consideration of "the difference between the [FMV] of the entire tract immediately prior to said taking and the [FMV] of the remainder immediately after . . . with consideration being given to any special or general benefits resulting from the utilization of the part taken . . . ." <sup>137</sup> The state court of appeals held that mandatory deduction of general benefits "allo[w] a compensation which is unjust to the condemnee."<sup>138</sup>

The state supreme court supported the legislation and reversed, finding support for the statute in federal precedent and "the purposes underlying the requirement of just compensation."<sup>139</sup> The federal precedent was McCoy v. Union Elevated R.R. Co.,<sup>140</sup> a 1918 Supreme Court case predating Pennsylvania Coal, which upheld offsetting general benefits, [W]e are unable to say [a property owner] suffers deprivation of any fundamental right when a state . . . permits consideration of the actual benefits - enhancement in market value - flowing directly from a public work, although all in the neighborhood receive like advantages.<sup>141</sup>

The state supreme court also identified the underlying purpose of just compensation to be indemnification of financial loss.<sup>142</sup> The court conspicuously did not invoke Armstrong's fairness

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<sup>134</sup> 324 N.E.2d 329, 332.

<sup>135</sup> 549 S.E.2d 203 (N.C. 2001).

<sup>136</sup> Id. at 211, citing N.C. Gen. Stat. § 40A-64(b) (1999)

<sup>137</sup> Id. at 208-209, citing N.C. Gen. Stat. § 136-112(1) (1999).

<sup>138</sup> 549 S.E.2d at 209.

<sup>139</sup> Id. at 209.

<sup>140</sup> McCoy v. Union Elevated R.R. Co., 247 U.S. 354 (1918).

<sup>141</sup> Pennsylvania Coal, 549 S.E.2d at 209, citing McCoy, 247 U.S. 354, 366 (1918)(emphasis added).

<sup>142</sup> Id. at 210.

and justice touchstone that the Fifth Amendment 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.”<sup>143</sup>

3. Only special benefits may offset severance damages.

Seventeen states have statutes limiting the reduction of severance damages to special benefits.<sup>144</sup> Under the Texas Property Code, for example, compensation for partial takings is based on both the “injury and benefit” flowing from the condemnation and includes the severance damage to the remainder property.<sup>145</sup> Severance damages are calculated under the before and after test, based on changes in the FMV.<sup>146</sup> However, the Code explicitly prohibits consideration of general benefits in the after value.<sup>147</sup>

In nine states,<sup>148</sup> the same result is reached under common law. The standards of valuation articulated by the supreme court of Delaware in Acierno v. State<sup>149</sup> are typical. In order to reduce severance damages to a landowner’s remainder property, special benefits may not be “so remote, uncertain or speculative that they are incapable of being estimated in monetary value.”<sup>150</sup> And “prospective benefits” may only be counted if they are reasonably certain.<sup>151</sup> The court acknowledged that the distinction between special and general benefits is unclear and must

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<sup>143</sup> Armstrong v. U.S., 264 U.S. 40, 49 (1960); see James S. Burling, Implications of Palazzolo on Eminent Domain, SG059 ALI-ABA 351 (2002).

<sup>144</sup> Seventeen states follow this rule by statute. See State v. Lewis, 785 P.2d 24, 26 (Alaska 1990); In re. Cohen, 166 A. 747 (Conn. 1933); Mainer v. Canal Auth. of State, 467 So.2d 989 (Fla. 1985); Hawaii Hous. Auth. v. Midkiff, 516 P.2d 1250 (Haw. 1973); Orofino v. Swayne, 504 P.2d 398 (Idaho 1972); Elkhart v. No-Bi Corp., 428 N.E.2d 43 (Ind. App. 1981); Hero Intern. Corp. v. Com., 618 N.E.2d 1386 (Mass. App. Ct. 1993); Boober v. Towne, 143 A. 176 (Me. 1928); Johnson v. Consolidated Gas, Elec., Light & Power Co. of Baltimore, 50 A.2d 918 (Md. 1947); Griffith v. Montgomery County, 470 A.2d 840 (Md. App. 1984); Madison v. Elford, 661 P.2d 1266 (Mont. 1983); Gallatin Valley Elec. Ry. v. Neible, 186 P. 689 (Mont. 1919); M & R Inv. Co., Inc. v. State ex rel. Dep’t of Transp., 744 P.2d 531 (Nev. 1987); Hultberg v. Hjelle, 286 N.W.2d 448 (N.D. 1979); Lineburg v. Sandven, 21 N.W.2d 808 (N.D. 1946); In Re. Philadelphia Elec. Co., 580 A.2d 424 (Pa. 1990); Maryville Hous. Auth. v. Williams, 478 S.W.2d 66 (Tenn. App. 1971); Brookside Mills, Inc. v. Moulton, 404 S.W.2d 258 (Tenn. App. 1965); Interstate Northborough P’ship v. State, 66 S.W.3d 213 (Tex. 2001); State v. Green, 578 P.2d 855 (Wash. 1978); State v. Teuscher, 761 P.2d 49 (Wash. 1988); and West Virginia Dep’t of Hwys. v. Bartlett, 194 S.E.2d 383, (W.Va. 1973).

<sup>145</sup> Id. at 218, citing Tex. Prop. Code Ann. § 21.042(c).

<sup>146</sup> Id. at 218.

<sup>147</sup> Tex. Prop. Code Ann. § 21-042(d).

<sup>148</sup> See Acierno v. State, 643 A.2d 1328 (Del. 1994); State v. Botluck, 200 A.2d 424 (Del.Sup. 1964); Commonwealth v. Sherrod, 367 SW2d 844 (Ky. 1963); Branson v. Estate of Lafavre, 9 S.W.3d 755 (Mo. App. S.D. 2000); New Jersey Tpk. Auth. v. Herrontown Woods, Inc., 367 A.2d 893 (N.J. Super. A.D. 1976); Richley v. Bowling, 299 N.E.2d 288 (Ohio App. 1972); Williams Natural Gas v. Perkins, 952 P.2d 483 (Okla. 1997); State ex rel. Dep’t of Transp. v. Fullerton, 34 P.3d 1180 (Or. App. 2001); Whitcomb v. State Hwy. Bd., 346 A.2d 187 (Vt. 1975); Howe v. State Hwy. Bd., 187 A.2d 342 (Vt. 1963); and Capital Properties, Inc. v. State, 636 A.2d 319 (R.I. 1994).

<sup>149</sup> 643 A.2d 1328 (Del. 1994).

<sup>150</sup> Id. at 1332.

<sup>151</sup> Id.

be based on factual inquiry.<sup>152</sup> In addition, when attempting to reduce its constitutional duty to compensate, the state bears the burden to prove any benefits are special.<sup>153</sup>

In eight states,<sup>154</sup> the eminent domain statute does not distinguish between special and general benefits, but the courts have interpreted the statutory language to allow only special benefits to reduce severance damages. In State Highway Commission v. Emry,<sup>155</sup> for example, the Supreme Court of South Dakota held that the just compensation requirement of the state constitution precluded interpreting “benefits” to include general benefits.<sup>156</sup>

The court acknowledged that its holding created a conflict between offsetting only special benefits and other statutes instructing juries to award “lump sum” damages.<sup>157</sup> To resolve this conflict, the court recommended the legislature change those statutes mandating lump sums. Instead, the court suggested the legislature adopt either the Hawai‘i or North Dakota models.<sup>158</sup> This conflict between the state’s supreme court and legislature is typical of the contradictory norms governing offset of benefits in valuations of remainder property.

In summary, this section has surveyed state eminent domain laws to examine the contemporary application of givings recapture. Part A examined the rule in states which permit benefits to the remainder to offset both compensation for the property taken and severance damages to the remainder. Part B focused on those states that never allow benefits to the remainder to offset compensation or severance damages. Part C focused on the majority rule, which permits benefits to the remainder to offset only severance damages to the remainder.

This survey demonstrates first that benefits may be, and often are, charged arbitrarily by a condemning agency seeking to limit its costs. Standards for such charges vary greatly from state to state. Indeed, if any theoretical or historical justifications supported these standards in the past, they are no longer evident in contemporary cases.

If some state action, whether the entire regulatory scheme (as suggested by Cordes) or one highway improvement project (as in the cases above), bestows an unearned increase in value on a property owner, logically, that increase in value belongs to either the property owner or the state. If the increase belongs to the property owner, existing taxation should sufficiently recapture the value. Offsetting benefits is therefore superfluous. If one adopts the Hobbesian view that all increases in property value emanate from the state, then no compensation should be required when that uncompensated windfall is recaptured by the state. The states may realize the tenuous nature of such a proposal may not withstand public scrutiny. Thus, offsets of benefits are safely hidden in the expert hands of FMV appraisers.<sup>159</sup>

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<sup>152</sup> Id. at 1333.

<sup>153</sup> Id.

<sup>154</sup> See Arizona v. Filler, 812 P.2d 620 (Ariz. 1991); Taylor v. State ex rel. Harman, 467 P.2d 251 (Ariz. App. 1970); San Diego v. Rancho Penasquitos P’ship, 105 Cal. App. 4th 1013 (Cal. App. 2003); Williams v. State Hwy. Dep’t, 185 S.E.2d 616 (Ga. 1971); Dep’t of Transp. v. Kirk, 225 S.E.781 (Ga. App. 1976); Wichita v. May’s Co., Inc., 510 P.2d 184 (Kan. 1973); Moyer v. Nebraska City Airport Auth., 655 N.W.2d 855 (Neb. 2003); State Hwy. Comm’n ex rel. State v. Emry, 244 N.W.2d 91 (S.D. 1976); Automotive Products Corp. v. Provo City Corp., 502 P.2d 568 (Utah 1972); and State Hwy. Comm’n v. Rollins, 471 P.2d 324 (Wyo. 1970).

<sup>155</sup> 244 N.W.2d 91 (1976).

<sup>156</sup> Id. at 96.

<sup>157</sup> Id.

<sup>158</sup> Id.

<sup>159</sup> Callies, supra note 48, at 442.

This survey has further shown that benefit offsets as applied in the U.S. operate much like the Uthwatt Proposal, a theory devised solely to lessen the state's compensation burden to enable development. Current law is both facially and as applied unfair and arbitrary, because it sometimes finds the benefit belongs to the state, but other times finds the benefit belongs to the property owner. Even if benefits were offset uniformly, landowners would nonetheless remain under-compensated as long as compensation remains limited to pecuniary, FMV determinations.

## V. Conclusion

This essay asks whether the recent trend diminishing constitutionally required compensation through "givings recapture" is consistent with the function or purpose of the Takings Clause. To help define this inquiry, Section II looked to the history of the Takings Clause to identify an origin and purpose behind the compensation requirement as well as the development of takings jurisprudence by the U.S. Supreme Court. Section III similarly traced the historical and theoretical background of givings recapture. By surveying precedent in colonial, revolutionary and early modern U.S. law, this section sought historical precedents for a givings recapture scheme. While early colonial law sometimes allowed for physical and regulatory takings without compensation, there is ultimately no historical justification for offsetting general benefits from compensation awards. Such offsets create unfair outcomes, where the very landowner whose land is taken is also required to pay for benefits accruing to the community at large.

Part IV looked at givings recapture as currently operating within the states' eminent domain law. In determining the FMV of condemned property and the severance value of any remainder property, the overwhelming majority of states routinely reduce severance damages owed by the benefit conferred. The disparity both among the states, as well as within a state's takings jurisprudence, demonstrates the arbitrary application of benefit offset.

In addition, by limiting compensation only to pecuniary value, the states ignore the fairness rationale that has historically been interpreted into the Takings Clause. Where state courts reduce compensation by general benefits, their reasoning does not evince a Hobbesian determination that all property value is a windfall from the state. Instead, the decision to reduce compensation appears motivated by a simple desire to tame the compensation bogey, as was the case in post-war England. Such deductions are arbitrary. Not only does such a reduction in compensation reduce what is owed under the current demands of FMV, it also exacerbates the failure to pay for the uncompensated increment advocated by Fennell.

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May 30, 2005