

Givings

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I. INTRODUCTION

Eclipsed by their celebrated twin, takings, givings occupy a crucial yet barely visible role in the universe of constitutional property law. While takings—government seizures of property—have been the subject of an elaborate body of scholarship,¹ givings—government distributions of property²—have been largely overlooked by the legal academy.³ Givings

1. Among the many famous examinations of takings are RICHARD A. EPSTEIN, *TAKINGS* (1985); WILLIAM A. FISCHER, *REGULATORY TAKINGS* (1995); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); and Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). For a historical overview of takings, see William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

2. We do not intend "distributions of property" to be a precise definition of givings any more than we mean "seizures of property" to be a precise definition of takings. Rather, we seek to present a broad depiction of the concept of givings. As we discuss throughout the Article, one of our chief goals is to distinguish between those givings for which a charge should be assessed, which we call "chargeable givings," and other distributions of wealth by the government that do not require the assessment of charge, and need not, for convenience's sake, even be referred to as givings. In this sense, we note that the takings literature often describes the concept of takings broadly, while employing a narrower definition of takings (referring only to compensable takings) where the context so demands. The broad definition helps define the outer boundaries of the concept, while the narrower use of the term helps guide the finer application of the law. In general, we acknowledge that the term "giving" necessarily partakes of much of the ambiguity of the term "taking."

3. Within the mainstream of legal literature, givings generally have been noticed only in very narrow contexts such as unconstitutional conditions, RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 3-12 (1993), and offsets, J. Gregory Sidak & Daniel F. Spulber, *Givings, Takings, and the Fallacy of Forward-Looking Costs*, 72 N.Y.U. L. REV. 1068 (1997).

There are three notable exceptions. First, Donald Hagman and Dean Misczynski undertook a landmark study of windfalls (givings) and wipeouts (takings) in 1978, collecting various studies of and articles about windfall recapture schemes in the United States, Great Britain, Australia, Canada, and New Zealand. WINDFALLS FOR WIPEOUTS (Donald G. Hagman & Dean J. Misczynski eds., 1978). *Windfalls for Wipeouts* owes an intellectual debt of gratitude to Henry George's single tax scheme for taxing away unimproved land value. HENRY GEORGE, *PROGRESS AND POVERTY* (Robert Schalkenbach Found. 1929) (1879). Hagman and Misczynski's work precedes the revolution in takings law wrought by cases such as *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and focuses more on practical land planning schemes than theoretical analysis. Nonetheless, *Windfalls for Wipeouts* provides an important touchstone for our work, and we incorporate many of its insights throughout our Article. Using Hagman and Misczynski's terminology, Eric Kades engaged in a more extensive analysis of windfalls, concerning himself with "economic gains independent of work, planning, or other productive activities that society wishes to reward," rather than specifically with government action. Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1491 (1999). A more extensive literature about taxing windfall gains exists in the field of taxation. *E.g.*, ACRS "Windfall" Recapture Proposal, 27 TAX NOTES 1172 (1985); Alan D. Viard, *The Implementation and Rationale of Windfall Recapture*, 28 TAX NOTES 1384 (1985).

Second, Louis Kaplow undertook a broader analysis of all government action affecting wealth—negatively or positively. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986). Kaplow thus places the givings and takings question in the broader context of gain and loss resulting from uncertainty about government action. Kaplow's insights are incorporated into our analysis in Part III.

Third, C. Ford Runge and several associates have analyzed "givings" and argued for their importance in examining takings. C. FORD RUNGE ET AL., *GOVERNMENT ACTIONS AFFECTING*

are ever-present and yet not discussed. They can be found in almost every field of government endeavor related to property. Every time the government “upzones,” or changes a zoning ordinance to the benefit of certain property owners, it has executed a giving.⁴ Similarly, when the government relaxes environmental regulations, a giving occurs.⁵ The same occurs when the government grants a license to engage in a certain business or transfers title to land or a lesser property interest to a private actor.⁶ Other examples are legion.⁷

Like a reflection in a mirror, the massive universe of takings is everywhere accompanied by givings. For every type of taking, there exists a corresponding type of giving. In a recent article,⁸ we argued that takings come in three varieties: physical takings, regulatory takings, and derivative takings. A physical taking occurs when the state seizes a property interest in order to put it to public use. A regulatory taking occurs when the state does not seize the property interest, but regulates its use in a manner that unduly diminishes its value. A derivative taking occurs when a taking (or a giving) diminishes the value of surrounding property.⁹ In the same manner, givings

LAND AND PROPERTY VALUES: AN EMPIRICAL REVIEW OF TAKINGS AND GIVINGS (Lincoln Inst. of Land Policy, Working Paper No. WP96CR1, 1996).

4. The taking analogue is downzoning, which may be a compensable taking if it goes “too far.” Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see also* Lucas, 505 U.S. at 1014 (citing Mahon, 260 U.S. at 415); *infra* Sections II.C, II.D. Upzoning and downzoning are sometimes defined differently in different contexts. WILLIAM A. FISCHER, THE ECONOMICS OF ZONING LAWS 22 (1985).

5. *Cf.* Lucas, 505 U.S. at 1027 (concluding that environmental regulations depriving land of “all economically beneficial use” effect a taking); Dooley v. Town of Fairfield, 197 A.2d 770, 772 (Conn. 1964) (finding that declaration of an area as a flood plain zone was a taking because “the use of the plaintiffs’ land [had] been, for all practical purposes, rendered impossible”); State v. Johnson, 265 A.2d 711, 716 (Me. 1970) (invalidating a wetland protection statute because the benefit it effected on harmed property owners “[was] so disproportionate to their deprivation of reasonable use that such exercise of the State’s police power [was] unreasonable”); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 193 A.2d 232 (N.J. 1963) (holding a local wetland ordinance unconstitutional because it deprived the landowner of any reasonable use of the land). More recent cases have taken a more favorable stand on environmental regulation. *See, e.g.*, Graham v. Estuary Props., Inc., 399 So. 2d 1374 (Fla. 1981) (sustaining wetland regulations); Claridge v. N.H. Wetlands Bd., 485 A.2d 287 (N.H. 1984) (sustaining restrictive wetland regulations).

6. Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990 (1989) (noting the role of government in distributing license frequencies and arguing for privatization on First Amendment grounds); Krystilyn Corbett, Note, *The Rise of Private Property Rights in the Broadcast Spectrum*, 46 DUKE L.J. 611 (1996) (discussing the property treatment of frequencies in Telecommunications Act of 1996); *cf.* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (discussing the expanded role of government in creating property and wealth).

7. We discuss many other examples throughout the Article. *Infra* Parts III, IV.

8. Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277 (2001).

9. In *Takings Reassessed*, we defined derivative takings:

[Derivative takings are] a hybrid of their more familiar close cousins. They resemble regulatory takings in that they reduce the value of property without physically appropriating it. Yet, they are distinct from regulatory takings in that they may arise as

come in three varieties.¹⁰ A physical giving occurs when the state grants a property interest to a private actor, such as when it grants broadcasting rights¹¹ or easements to cable and cellular phone companies.¹² In a regulatory giving, the state uses its regulatory power to enhance the value of certain private properties. This occurs, for instance, when the state eliminates development restrictions in wetlands.¹³ Finally, a derivative giving is present whenever the state indirectly increases the value of property by engaging in a physical or regulatory giving or taking. Instances of derivative givings include the building of a park or the shutting down of a power plant in a residential area.¹⁴ In both of these cases, the value of nearby property increases as a result of the government action, even though the government action had no direct physical or regulatory effect on the nearby property.

Given their importance and ubiquity, how have givings eluded scholarly attention? To the textualist, the answer is straightforward. The Fifth Amendment bars only uncompensated takings;¹⁵ there is no “Givings Clause.” But the textualist’s answer cannot carry the day.¹⁶

the result of a physical taking. And, unlike its cousins, the derivative taking may never appear alone; it must always be preceded by a physical or regulatory taking.

Id. at 280-81. The existence of cognizable givings, as established in this Article, mandates a slight amendment to the concept of derivative takings to incorporate the possibility of derivative takings being created by an underlying giving. *See id.* at 281 n.14.

10. *Infra* Section II.B.

11. *See, e.g.*, Charles W. Logan, *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687 (1997); Cass R. Sunstein, *The Effects of Regional Land Use Control in Oregon: A Theoretical and Empirical Review*, 18 REV. REGIONAL STUD. 37 (1988); George R. Parsons, *The Effect of Coastal Land Use Restrictions on Housing Prices: A Repeat Sale Analysis*, 22 J. ENVTL. ECON. & MGMT. 25 (1992).

12. *See, e.g.*, Jill K. Pearson, Note, *Balancing Private Property Rights with Public Interests: Compensating Landowners for the Use of Railroad Corridors for Fiber-Optic Technology*, 84 MINN. L. REV. 1769 (2000).

13. *See* Steven W. Watkins, Note, *Congressional Attempts To Amend the Clean Water Act: American Wetlands Under Attack*, 72 N.D. L. REV. 125 (1996) (describing recent federal attempts at reducing wetlands restrictions on private property).

14. Various studies have shown that “greenbelt” regulations enhance property values. *E.g.*, Mark R. Correll et al., *The Effects of Greenbelts on Residential Property Values: Some Findings on the Political Economy of Open Space*, 54 LAND ECON. 207 (1978); G.J. Knapp & A.C. Nelson, *The Effects of Regional Land Use Control in Oregon: A Theoretical and Empirical Review*, 18 REV. REGIONAL STUD. 37 (1988); George R. Parsons, *The Effect of Coastal Land Use Restrictions on Housing Prices: A Repeat Sale Analysis*, 22 J. ENVTL. ECON. & MGMT. 25 (1992).

15. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

16. While we argue that a law of givings is necessary, we do not opine on whether it should be viewed as a branch of constitutional law, nor on what branch of government should be responsible for instituting the law of givings. Together, Article I, Section 8, Clause 1 and Article IV, Section 3, Clause 2 of the Constitution clearly give the federal government the power both to give and to take; the states already have both powers, without reference to the Federal Constitution. The Takings Clause of the Fifth Amendment explicitly limits the federal takings power, and, as incorporated by the Fourteenth Amendment (and interpreted by the Supreme Court), the state takings power as well. It is not evident, however, that the Takings Clause does not imply a similar limitation on the federal and state givings power. Indeed, given our claim that the law of givings is a necessary accompaniment of the law of takings, one might argue that the

First, takings and givings are so inextricably related that one cannot have a coherent takings jurisprudence without an attendant givings jurisprudence. Consider the seminal takings case of *Poletown Neighborhood Council v. City of Detroit*.¹⁷ The City of Detroit seized a number of private lots in order to transfer them to General Motors for building a new factory. The court's decision focused on the question of whether the seizure satisfied the public use requirement of the Takings Clause.¹⁸ Lacking any background understanding of the role of the state in givings, the court preferred effectively to read the public use requirement out of the Takings Clause.¹⁹ One imagines, however, that the court's decision would have been quite different had it been able to call on a body of givings law. Instead of dealing solely with the question of whether landowners' property could be seized, the court could have addressed the question of whether the government's action could properly be seen as a giving and whether General Motors would properly be required to pay for the giving.

Second, once one recognizes that relative wealth is a potentially relevant baseline for examining state actions vis-à-vis property, one realizes that the barrier between givings and takings is far from clear.²⁰ When the state takes from Jane Smith, it has made her poorer relative to the rest of the world. When the state gives to everyone but Jane Smith, it has similarly made Jane Smith poorer. Yet, current takings jurisprudence is predicated on the assumption that the relevant baseline against which the government action is measured is absolute wealth rather than relative wealth; only diminutions in property value in absolute terms trigger compensation. Once relative wealth is considered, there is no longer any justification for continuing to ignore givings. Indeed, in the area of unconstitutional conditions, constitutional law already recognizes that failure to confer a benefit may be functionally equivalent to taking away a right.²¹

Takings Clause implicitly limits both the state and federal power to give. These and opposing arguments can only be made in reference to broader theories of constitutional interpretation that are beyond the scope of this Article. In any event, we see no limitation on legislative implementation of a law of givings.

17. 304 N.W.2d 455 (Mich. 1981).

18. *Id.* at 457.

19. *See id.* (defining "public use" broadly).

20. We do not endorse this conception of the Takings Clause on normative grounds. Nonetheless, relative wealth is a possible baseline for measuring takings, and various studies suggest that relative wealth is an important determinant of welfare. *E.g.*, ROBERT H. FRANK, CHOOSING THE RIGHT POND 28-35 (1985); FRED HIRSCH, SOCIAL LIMITS TO GROWTH 27-31 (1976) (developing the concept of positional goods); THORSTEIN VEBLÉN, THE THEORY OF THE LEISURE CLASS 26-34 (Random House 1934) (1899); Richard A. Easterlin, *Does Economic Growth Improve the Human Lot? Some Empirical Evidence*, in NATIONS AND HOUSEHOLDS IN ECONOMIC GROWTH 89 (Paul A. David & Melvin W. Reder eds., 1974); Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 18-21 (1992).

21. The Court has indicated:

Third, the same vices of the political system that give rise to constitutional protection for property in the Takings Clause also require protection against unfettered givings. The Takings Clause is meant, at least in part, to ensure that an organized “faction,” in the Madisonian sense,²² does not use its power to enrich itself at the expense of the unorganized public.²³ In the context of takings, the principal concern is that the faction will enrich itself by converting the private property of unorganized property owners and bringing it into the public domain.²⁴ In the context of givings, the major concern is that the faction will enrich itself from the public purse at the expense of the unorganized public.²⁵ Whether the faction organizes a taking or a giving, there is reason to worry about the public’s ability to defend itself from the faction’s predations.

Finally, fairness and efficiency, the concerns animating takings jurisprudence,²⁶ mandate a givings jurisprudence as well. The efficiency rationale for the Takings Clause is to ensure that the state exercises its eminent domain power only when the aggregate benefit exceeds the aggregate cost.²⁷ Compensation for takings, on this view, forces the state to

[E]ven though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests

Perry v. Sindermann, 408 U.S. 593, 597 (1972). *But see* Rust v. Sullivan, 500 U.S. 173 (1991) (permitting restrictions on speech about abortion in clinics receiving federal funding). *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (discussing the unconstitutional conditions doctrine); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990) (noting the limitations of the current unconstitutional conditions doctrine).

22. THE FEDERALIST NO. 10 (James Madison).

23. *See, e.g.*, Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690 (1984) (describing the Takings Clause as one of several clauses aimed at curbing “naked preferences” of faction); Treanor, *supra* note 1, at 836-55 (discussing the importance of Madisonian political analysis in the drafting of the Takings Clause); *infra* Section III.C. *But see* Daryl J. Levinson, *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 373-77 (2000) (questioning whether modern public choice theory supports compensation for takings).

24. Michelman, *supra* note 1, at 1178; *see also* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 853-57 (1983) (using Madisonian analysis for local land-use decisions).

25. *See infra* Section III.C.

26. Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 408 (2000) (“Takings doctrine is complex and multifaceted; some say chaotic. If there is some measure of coherence or consensus in this vast and diverse body of judicial opinions and scholarly commentary, it is that the purposes of just compensation are essentially two: efficiency and distributive justice.” (citations omitted)).

27. *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 58 (4th ed. 1992) (“The simplest economic explanation for the requirement of just compensation is that it prevents the government from overusing the taking power.”); William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of “Just Compensation” Law*, 17 J. LEGAL STUD. 269, 269-70 (1988) (noting that the compensation requirement

take into account the cost of its actions.²⁸ However, the efficiency rationale for takings compensation also dictates that the state properly measure the benefits of its actions. Just as the state's failure to internalize the cost of takings creates fiscal illusion and inefficiency, the state's failure to internalize the benefit of givings creates fiscal illusion and inefficiency.²⁹ Takings, when uncompensated, generate negative externalities; givings, when unaccounted for, generate positive externalities. From an economic standpoint, neither type of externality should remain outside the state's calculus.³⁰

The fairness principle embodied in the Takings Clause is that it is inequitable to "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."³¹ By the same token, it is inequitable to bestow a benefit upon some people that, in all fairness and justice, should be given to the public as a whole. In a giving, a small group is able to force the public as a whole to subsidize the group's preferential treatment. For example, when the state permits logging companies to chop down trees in national forests for lumber, it is forcing the public as a whole to surrender natural resources for the private profit of the logging companies.³²

Like current takings jurisprudence, a givings jurisprudence must focus primarily on two questions. First, when does a giving occur? And second, when must the state collect a "fair charge" in exchange for the giving? This two-step inquiry parallels the two cardinal questions of takings jurisprudence. Translating the concept of givings into a coherent law thus requires many of the same compromises as the law of takings. Just as not every "taking" in the broadest sense is legally cognizable as such, not every "giving" need enter the law of givings.

In this Article, we sketch out a framework for analyzing givings. Rather than shoehorn all givings into a uniform regime, we devise four conceptual

"disciplin[es] the power of the state, which would otherwise overexpand unless made to pay for the resources that it consumes").

28. Kaplow, *supra* note 3, at 567-70 (describing the fiscal illusion justification for takings compensation).

29. *See id.* at 567-68.

30. *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347-57 (1967) (arguing that property rights arise to effect internalization of externalities, both positive and negative).

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

32. *E.g.*, Michael Axline, *Forest Health and the Politics of Expediency*, 26 ENVTL. L. 613 (1996) (exploring the negative impact of logging on natural resources and taxpayers); Paul Stanton Kibel, *Reconstructing the Marketplace: The International Timber Trade and Forest Protection*, 5 N.Y.U. ENVTL. L.J. 735, 744-54 (1996) (explaining the cost of native forest destruction, and discussing the possibility of a government-logging interest collusion); R. Brent Walton, *Ellickson's Paradox: It's Suicide To Maximize Welfare*, 7 N.Y.U. ENVTL. L.J. 153, 155 (1999) ("The timber industry has destroyed millions of acres of America's silva."); *cf.* Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (describing the difficulty of preventing overuse of public resources).

clusters—each embodying a distinct aspect of the givings jurisprudence we seek to develop. These criteria may be applied by policymakers in determining whether a giving has occurred and which givings must be accompanied by a charge to the recipient. We list our proposed criteria by the order in which the inquiry should proceed.

First, policymakers must determine whether the government act that bestows a benefit (and potentially constitutes a giving) could be characterized as a taking were it reversed. For example, if a downzoning of a certain magnitude would not have been considered a regulatory taking, an upzoning of the same magnitude should not be seen as a giving. Similarly, if a demand for a certain amount of funds from a given sector would be considered a tax or a penalty, rather than a compensable taking, the rebate of funds in the same amount should be considered a nonchargeable subsidy or a prize, rather than a chargeable giving.³³ Since wealth redistribution is often seen as a legitimate goal of government³⁴ and constitutes the cornerstone of programs such as unemployment benefits, it would not be proper to see all cash distributions as properly chargeable givings.

Second, policymakers must determine the extent to which the recipients of the giving constitute a readily identifiable group and the degree to which the giving is available to the public at large. Here, too, the givings analysis can echo the takings analysis. The provision of public land and subsidized use of a public arena to a professional sports franchise in a for-profit, oligopolistic sports league looks very much like a giving.³⁵ The provision of public education to the public at large on equal terms looks much less like a giving.

Third, policymakers must determine whether the giving can be clearly associated with a taking. When, as in *Poletown*, property is taken specifically for the purpose of executing a giving, the state should require the potential beneficiary of the giving to account for a “private taking,” in which the beneficiary directly compensates the owners of property taken.³⁶ This rule would lead to a modified application of a nineteenth-century

33. The line between takings and taxes or penalties is not an easy one to draw. *Infra* Section IV.A.

34. See, e.g., Michelman, *supra* note 1, at 1168, 1182; Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907, 918 (1993) (“Properly understood, the defense of property rights is a defense of programs of redistribution as well.”); cf. Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) (discussing the role of legal rules and taxation in the redistribution of income). *But see* EPSTEIN, *supra* note 1, at 298-99, 314-24 (disallowing redistribution as a public purpose).

35. See, e.g., Raymond J. Keating, *It’s Time To Get the Government Out of the Sports Business*, USA TODAY MAG., Mar. 1, 2000, at 28.

36. Cf. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (allowing private takings by tenant farmers); *infra* Section IV.C (discussing the proximity between givings and takings).

takings rule called the “benefit-offset” principle.³⁷ The analysis might also be tied to the infrequently invoked modern doctrine of average reciprocity of advantage.³⁸

Fourth, policymakers must determine whether the recipient of the giving can refuse the benefit bestowed upon her. For example, if the giving consists of an increase in the permissible floor-area ratio,³⁹ or a similar exercise of upzoning, the recipient property owner can refuse the benefit by refraining from building according to the new permissive zoning rules. On the other hand, where the state builds a park, individual owners lack the ability to refrain from enjoying the benefits of being in the proximity of the greenery.⁴⁰ When owners have the option to refuse the benefit of the giving, the state should demand immediate payment of a charge for the giving. Anyone not wishing to pay the charge has the option of refusing to accept the giving. Conversely, where the giving is not refusable, it looks very much like a put option, or a government right to force the property owner to purchase.⁴¹ To the extent that such a government power is seen as objectionable, the sting may be avoided by deferring assessment of the charge until a later event, such as the receipt of future government compensation for a taking that may be requested by the giving beneficiary. For example, owners claiming compensation for a taking occasioned by

37. The “benefit-offset” principle allowed the taking party to reduce the compensation to property owners by the amount of benefit that the taking conferred on the owners’ remaining property. For discussion, see FISCHER, *supra* note 1, at 80-84; Harry N. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 *PERSP. AM. HIST.* 329 (1971); and *infra* Section IV.C. For cases applying the principle, see, for example, *St. Louis & San Francisco Railway v. Mathews*, 165 U.S. 1 (1897); *McKeen v. City of Minneapolis*, 212 N.W. 202 (Minn. 1927); and *Pierce County v. Thompson*, 144 P. 704 (Wash. 1914).

38. The doctrine of average reciprocity of advantage originated with Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), who noted that some regulations, while diminishing the value of property in one respect, could be said to benefit the property owner in another, such that no additional compensation was required. For example, he explained that a regulation forcing mining companies to leave intact pillars of coal in abandoned mines was excused from the compensation requirement because the regulation benefited the mine owners by protecting the safety of their employees. *Id.* at 415.

It has never been entirely clear how the concept of “advantage” is to be measured in order to determine whether a given regulation produces average reciprocity. If the value of the advantage must be precisely equal to the loss, the question of whether there is average reciprocity of advantage (thereby defeating the need for finding a taking) becomes identical to the question of whether “just compensation” has been paid. On the other hand, if the calculus is looser, as seemed to be the case in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130-35 (1978), some average reciprocity of advantage may be found in any taking of private property. See Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 *AM. U. L. REV.* 297 (1990) (arguing for expanded use of reciprocity of advantage and elimination of compensation whenever the net effect of government action is positive); *infra* Section IV.C.

39. “The floor area ratio measures the amount of floor area relative to total site area, including all floor space in office and other nonresidential multi-story buildings.” Frederick W. Acker, Note, *Performance Zoning*, 67 *NOTRE DAME L. REV.* 363, 373 (1991).

40. See *supra* note 14.

41. *Infra* notes 251-254 and accompanying text.

building limitations in an environmentally sensitive area might have their compensation offset by a charge for the benefit they receive in being adjacent to greenery, while the remainder of the charge would be assessed only upon sale of the property.

We mold these four conceptual clusters—reversibility of the act, identifiability of the recipient, proximity of the act to a taking, and refusability of the benefit—into a basic model of givings law. The model has three stages: identifying givings, assessing the value of the givings, and collecting charges. In the identification stage, the government determines whether a giving has taken place, and whether it is susceptible to charge. If a chargeable giving is identified, the government issues a notice of giving to the beneficiary, triggering the assessment stage. Here, the first two clusters—reversibility of the act and identifiability of the recipient—are particularly important. In the assessment stage, the government or the giving beneficiary assesses the value of the giving for payment of the charge. Actual payment of the charge occurs only in the third stage of the process—the collection stage—which is triggered by a realization event. Sometimes, the realization event occurs at the time of the giving, making payment for the charge due immediately. At other times, the realization occurs much later, deferring the charge. In this stage, the last two clusters—proximity of the act to a taking and refusability of the benefit—play a crucial role.

Our model of givings is intended to provide three important elements to future discussions of givings and takings. First, it identifies key ingredients of the relationship between givings and takings. Second, it proposes a framework for future consideration of the role and nature of givings. Third, it presents one possible view of administering a law of givings. This Article is intended to be a starting point for the discussion of givings. It consciously invites—and acknowledges the need for—future development and refinement.

Structurally, the remainder of this Article consists of five Parts. In Part II, we provide a comprehensive account of the distributional effects of government actions. We show how givings correspond to takings and sketch the connections between the two. In Part III, we demonstrate why theories of takings—whether based on efficiency or fairness—require an understanding of givings. In Part IV, we divide the universe of givings into our four conceptual clusters and develop a set of rules to determine for which givings “fair charge” should be collected. In Part V, we sketch out our basic model for identifying, assessing, and collecting fair charges. Finally, in Part VI, we address potential objections to our analysis.

II. THE LAW OF GIVINGS AND TAKINGS

In this Part, we provide a framework for understanding givings and takings. Following convention, we begin with takings. As we argued elsewhere, takings come in three varieties: physical, regulatory, and derivative.⁴² After expounding each category, we unveil the world of givings. We demonstrate that it, too, may be divided into three categories: physical givings, regulatory givings, and derivative givings. Thus, each type of taking has a giving analogue. Next, we expose the conceptual relationship between takings and givings. We argue that, in practice, every taking is accompanied by a giving. Consequently, every relevant government action involves both takings and givings, and no theory of takings is accurate without a corresponding theory of givings. Finally, we explore some theoretical aspects of givings and illuminate the historical and present importance of givings.

A. *A Taxonomy of Takings (Takings 101)*

1. *Three Types of Takings*

The Takings Clause of the Fifth Amendment—the touchstone of takings jurisprudence—limits the “taking” of property to public use and mandates the payment of just compensation. Despite the seemingly clear language of the Takings Clause, its original meaning remains obscure.⁴³ Modern courts and scholars continue to disagree about the scope of the Clause.⁴⁴ Thus, it is not surprising that takings jurisprudence is considered a

42. Bell & Parchomovsky, *supra* note 8, at 280-81.

43. Treanor, *supra* note 1, at 798-818.

44. *Compare, e.g.,* Miller v. Schoene, 276 U.S. 272 (1928) (finding no taking where a state regulation required owners to cut down red cedar trees infected with a virus that could kill apple trees), with Dep't of Agric. & Consumer Servs. v. Mid-Fla. Growers, Inc., 521 So. 2d 101 (Fla. 1988) (holding that full and just compensation was required when the state, pursuant to its police power, destroyed healthy trees); *compare* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) (finding a taking when a statute totally annulled previously existing mining rights), with Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (holding that no compensation was required when a statute restricting mining activity did not make it impossible for the plaintiff to engage in profitable mining operations). For academic commentary, see BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 3 (1977) (describing takings jurisprudence as a “set of confused judicial responses”); Coletta, *supra* note 38, at 299-300 (describing takings jurisprudence as a “chameleon of ad hoc decisions that has bred considerable confusion”); 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, 308 (1998) (“The incoherence of the U.S. Supreme Court’s output in this field has by now been demonstrated time and again by practitioners and academic commentators *ad nauseam*, and I refuse to add to the ongoing gratuitous slaughter of trees for the paper consumed in this frustrating and increasingly pointless enterprise.”); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1301, 1304 (1989) (“[I]t is difficult to imagine a body of case law in greater doctrinal and

leading candidate for the “doctrine-in-most-desperate-need-of-a-principle prize.”⁴⁵

Despite the disagreement on various aspects of the Takings Clause, it is indisputable that the case law recognizes the existence of two types of takings: physical takings and regulatory takings. Physical takings involve physical seizure of or entry onto property.⁴⁶ Regulatory takings are far more difficult to define. In the watershed case of *Pennsylvania Coal Co. v. Mahon*,⁴⁷ Justice Holmes recognized that some government actions not involving physical occupation of property may nevertheless constitute a taking if they significantly diminish the property’s value. The focus on government action that reduces property value naturally suggests a third type of taking, which we labeled a derivative taking. Derivative takings are a hybrid of their more familiar close cousins. While a regulatory taking involves regulating the use of property in a manner that unduly diminishes its value, a derivative taking occurs whenever a taking—or a giving—diminishes the value of surrounding property.⁴⁸ The essential difference between a regulatory taking and a derivative taking is that in the former case, the government directly imposes a regulatory burden on the affected property, while in the latter case, the affected property is not directly regulated.

The three types of takings may be illustrated with an example. The city of Bepin seeks to build an airport. It seizes twenty lots for building the airport itself. In addition, Bepin limits the height of 100 buildings north of the future airport in order to preserve open air lanes. Finally, as a result of completion of the new airport, the value of 200 lots adjacent to the new airport drops by forty percent.⁴⁹ The owners of the twenty seized lots have suffered a physical taking. The owners of the 100 buildings placed under height limitations have sustained a regulatory taking.⁵⁰ The owners of the 200 lots of diminished value, who have suffered neither physical seizure nor a direct regulatory burden, have incurred a derivative taking.

2. *The Takings Controversy*

The Takings Clause has spawned an enormous literature on the question of when government action enters the crosshairs of the Takings

conceptual disarray.”); and Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

45. Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993).

46. *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

47. 260 U.S. 393 (1922).

48. Bell & Parchomovsky, *supra* note 8, at 279-81.

49. This example is very loosely based upon *United States v. Causby*, 328 U.S. 256 (1946).

50. We assume that the restrictions are substantial enough to support a takings claim under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

Clause, creating a duty of just compensation. For the past quarter-century, the judiciary has struggled, mostly unsuccessfully, to devise a coherent test for determining when compensation is necessary.⁵¹ The result has been three per se rules, two discretionary multifactored tests, and a sea of uncertainty.

First, regarding physical takings, the Court has consistently treated permanent physical invasions, trivial as they may be, as takings. Thus, a law requiring property owners to grant an easement to cable television companies created a taking, even though the total diminution in value amounted to one dollar.⁵²

Second, in the context of regulatory takings, a regulation that effectively wipes out the value of a property, unless ascribable to nuisance prevention, is a taking. Accordingly, a law prohibiting all development of a beachfront property constituted a taking.⁵³

Third, government regulations that prevent the noxious use of property do not work a regulatory taking and thus do not require compensation.⁵⁴ A municipal ordinance preventing the manufacture of bricks in a residential area simply curbed a noxious use of property and, therefore, did not work a taking.⁵⁵

Outside the realm of the per se rules, a regulatory taking may be identified by means of an ad hoc inquiry adopted by the Court in *Penn Central Transportation Co. v. New York City*.⁵⁶ The *Penn Central* test requires that courts examine three factors to determine whether a regulation is a taking: the owner's reasonable investment-backed expectations, the nature of the government action, and the degree of diminution in property value.⁵⁷

To complicate matters further, regulations of property that fail to meet certain rationality and proportionality requirements will be deemed takings. In *Nollan v. California Coastal Commission*,⁵⁸ the Court ruled that a taking occurred when a local government conditioned a land-use permit upon the property owner's granting pedestrians permission to cross through the property. The Court explained that the condition lacked the necessary rational nexus between the governmental goal (preserving access to the beach) and the means chosen to pursue it (attaching conditions to a building permit). Consequently, the Court considered the action a taking rather than

51. See *supra* note 44.

52. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

53. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

54. *Id.* at 1022.

55. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

56. 438 U.S. 104 (1978).

57. *Id.* at 124.

58. 483 U.S. 825 (1987).

a noncompensable regulation. In *Dolan v. City of Tigard*,⁵⁹ the Court added the requirement of a rough proportionality between the government action and its goal.⁶⁰ It is uncertain whether these rationality and proportionality requirements apply to all regulations or simply to exactions—the conditioning of a government benefit on the payment of a property right.⁶¹

In an attempt to clarify this confused picture, scholars have proffered various alternative tests for identifying takings.⁶² The most nuanced position is that of Frank Michelman, who explained that when a utilitarian calculus demonstrates the net positive benefit of the government action, one might appropriately let the losses lie where they fall and refuse to pay compensation.⁶³ However, expressing some skepticism about the utilitarian approach, Michelman added that demoralization may result from the feeling of having been victimized by a government taking and should be accounted for in the utilitarian calculus.⁶⁴

Various other commentators have proposed that takings be defined with reference to other social or legal norms. For instance, William Fischel has suggested that compensable takings should be found where regulations diverge from social norms.⁶⁵ In a similar vein, Saul Levmore has argued that “[r]esponsibilities that private parties can impose on each other through the tort system, and thus without compensation, can similarly be imposed by the government without compensation.”⁶⁶

Representing the extreme property-rights view, Richard Epstein has proposed that practically any government action that reduces property values is a taking for which compensation must be paid.⁶⁷ At the other end, surprisingly echoing the welfare state view, Louis Kaplow has questioned

59. 512 U.S. 374 (1994).

60. *Id.* at 391.

61. *See, e.g.*, John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1046, 1051-52 (2000) (“According to some courts and commentators, the relatively demanding *Nollan/Dolan* analysis should apply not only to land use exactions but also to other kinds of regulations and other government actions that affect private property interests.” (citations omitted)); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 11 (2000) (discussing the various uncertainties concerning the scope of the *Nollan* and *Dolan* holdings). *But see* *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702-03 (1999) (holding *Dolan*’s rough proportionality rule inapplicable to a takings claim based on a denial of a development permit).

62. There have also been attempts to rationalize the doctrine without resort to grand theory. *E.g.*, Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53 (1990).

63. Michelman, *supra* note 1, at 1214-24.

64. Michelman recognized the potential unfairness of refusing compensation on utilitarian grounds, even after taking into account demoralization costs, and he presented a Rawlsian fairness approach as an alternative to his utilitarian approach. However, he viewed a purely fairness-based jurisprudence as practically unworkable. *Id.* at 1245-53.

65. FISCHEL, *supra* note 1, at 351-53.

66. Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1334 (1991).

67. EPSTEIN, *supra* note 1. Epstein also sees torts as giving rise to constitutionally required compensation.

the grounds for distinguishing compensable takings from other government actions affecting property values and has expressed some doubt about the necessity of government compensation altogether.⁶⁸ Like Kaplow,⁶⁹ Lawrence Blume and Daniel Rubinfeld have suggested that privately supplied insurance for government-induced diminution of property values might be preferable to a scheme of government-provided compensation; they concluded, accordingly, that compensation should mimic insurance and be available only where the owners are highly risk-averse and the losses large.⁷⁰

Still other theorists focus on the government's pre-taking motivation or post-taking use of the property. Joseph Sax has proposed requiring compensation whenever the government acts like an enterprise, such as when it uses the property to provide goods or services, but not when it arbitrates private disputes, for instance, by preventing noxious uses.⁷¹ In a variation on Sax, Jed Rubinfeld would require compensation for purported regulatory takings whenever the post-taking property is put to public use.⁷²

As the foregoing demonstrates, the prominence of takings in jurisprudence and scholarly attention has not yielded clear guidelines as to when a government action constitutes a compensable taking. Nevertheless, this inability to delineate the boundaries of takings has not generally been understood to call into question the validity of the very concept of takings. As is the case with many constitutional doctrines, takings jurisprudence consists of a well-defined core—physical takings of fee simples in land—and an increasing degree of vagueness as one moves toward the margins. As we show in Part IV, the same uncertainty that shrouds compensation in the takings context also arises with respect to when givings should be accompanied by a fair charge. As with takings, the uncertainty at the margin of givings must not vitiate the viability of the core doctrine. Similarly, as with takings, a nuanced doctrine of givings can minimize the uncertainty at the margins and provide a workable test for determining when a fair charge should be assessed for a giving.

68. Kaplow, *supra* note 3, at 531, 537, 554. Kaplow writes:

The similarity between the arguments for and against compensation of losses and taxation of gains suggests that advocacy of one result for losses should be accompanied by advocacy of a corresponding result for gains. If the common view in many contexts is that losses should be compensated or otherwise mitigated, while gains can be ignored, the question is which position should be abandoned.

Id. at 555. Kaplow concludes with "a general preference for ignoring both gains and losses." *Id.*

69. *Id.* at 538-41.

70. Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 10 RES. L. & ECON. 53, 67 (1987).

71. Sax, *supra* note 1, at 62-63. Sax later recanted major parts of his theory. Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

72. Rubinfeld, *supra* note 45, at 1078-81.

B. *A Taxonomy of Givings (Givings 101)*

While the Constitution does not specifically refer to givings in the manner of the Fifth Amendment's Takings Clause, the concept of a giving is a necessary concomitant of the concept of a taking. Any government redistribution of private property necessarily involves givings and takings, and any government destruction of property can be matched with a government creation of property.⁷³ Takings and givings are two sides of the same coin. Not surprisingly, therefore, our taxonomy of takings applies with equal validity to givings.

Like takings, givings fall into three categories. In a physical giving, the government bestows a property interest upon a private actor.⁷⁴ A regulatory giving occurs when a government enhancement of property value by means of regulation goes "too far."⁷⁵ A derivative giving transpires when, as a result of a government giving or taking, surrounding property increases in value even though no direct giving has occurred.

Here, too, an example is apt. Wildwestia has decided to offer the first 1000 homesteaders to arrive in Homestead County the right to seize 100 acres of public land.⁷⁶ To promote the absorption of the homesteaders, Wildwestia relaxes zoning regulations in abutting counties, permitting all residential property (amounting to 2000 lots) to double their built-up area. Finally, 4000 lots in surrounding counties, not directly affected by the zoning change, experience a 100% increase in property value as a result of the homesteading. The 1000 homesteaders have received a physical giving. The 2000 abutting owners have enjoyed a regulatory giving. The owners of the 4000 lots of enhanced value have benefited from a derivative giving.

All three types of givings are ubiquitous in reality. Examples of physical givings include the granting of cattle grazing rights, mineral rights, and logging rights on public land to private interests, and the transfer of public land to private entities such as professional sports franchises.⁷⁷ Real world instances of regulatory givings pervade zoning law.⁷⁸ In principle,

73. Cf. Reich, *supra* note 6 (discussing the role of government in creating wealth).

74. There might also be givings to public actors, just as there are takings from public actors. See, e.g., Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829 (1989).

75. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

76. Homesteading acts were a popular form of government giving in the nineteenth and early twentieth centuries. See, e.g., Homestead Act, ch. 75, § 1, 12 Stat. 392 (1862) (repealed 1976); Enlarged Homestead Act, ch. 160, §§ 1-6, 35 Stat. 639 (1909) (repealed 1976); Stock-Raising Homestead Act, ch. 9, § 1, 39 Stat. 862 (1916) (repealed 1976). In citing homesteading acts as examples of givings, we do not argue that they should necessarily be viewed as *chargeable* givings. We discuss the mechanics of distinguishing chargeable from nonchargeable givings in Part IV.

77. See generally RUNGE ET AL., *supra* note 3; Bill Johnson, *Editorial Notebook: How Fair Is It for City To Grab Land for Select Firms?*, DETROIT NEWS, Apr. 11, 1997, at A10.

78. See *supra* note 4 and accompanying text for a definition of upzoning.

any case of upzoning may constitute a giving. The same is true of grants of variances, exceptional uses, and even transferable development rights.⁷⁹ Finally, derivative givings may be found anywhere there are physical and regulatory givings. For example, when the government builds a new park, the value of surrounding residential property increases dramatically, bestowing a derivative giving on the property owners.⁸⁰ Likewise, any zoning change that increases (or decreases) the value of the subject property might also enhance the value of neighboring property not subject to the change.⁸¹

Currently, givings are not a recognized category of law. Givings implicate no fair charge on the recipient. Often, they are not even taxed.⁸² As we argue in Part III, this state of affairs is potentially unfair and inefficient. Overlooking givings may cause a massive misallocation of resources, impose an enormous cost on the public, and create opportunities and incentives for political mischief. Moreover, as we show in the following Section, failing to take account of givings distorts our understanding of takings.

C. *Givings and Takings (Givings 102)*

The various types of givings and takings discussed so far are summarized in the form of a table:

TABLE 1. SIX TYPES OF TAKINGS AND GIVINGS

	Physical	Regulatory	Derivative
Takings	Seizure	Downzoning	New dump nearby
Givings	Grant	Upzoning	New park nearby

Traditionally, takings jurisprudence concerned itself with only two of these six categories: physical takings exemplified by seizures and regulatory takings exemplified by downzoning. Elsewhere, we unveiled a third category—the derivative taking exemplified by the building of a

79. For a description of recent zoning tools such as transferable development rights, see John M. Armentano, *Zoning and Land Use Planning*, 27 REAL EST. L.J. 216 (1998); Julian Conrad Juergensmeyer et al., *Transferable Development Rights and Alternatives After Suitum*, 30 URB. LAW. 441 (1998); and Charles L. Siemon, *Successful Growth Management Techniques: Observations from the Monkey Cage*, 29 URB. LAW. 233 (1997). As is the case with regulatory takings, it is difficult to delineate precisely when the use of zoning bestows a giving. See *infra* Section II.D.

80. See *supra* note 14.

81. Bell & Parchomovsky, *supra* note 8; Parsons, *supra* note 14.

82. For a discussion of current taxes on givings, see *infra* Section VI.A.

nearby garbage dump on condemned land.⁸³ In the preceding discussion, we have brought to light the three categories of givings in the lower half of the table: physical (exemplified by land grants), regulatory (exemplified by upzoning), and derivative (exemplified by the creation of a park on nearby land). We have also shown that the categories in the top half of the table have analogues in the bottom half of the table and that each taking has a potential reciprocal giving, equal and opposite in effect.

In the remainder of this Part, we explore the relationships among the various types of givings and takings. We show that, in principle, a government action may combine different categories. Indeed, the ordinary government action that works a classic taking (physical or regulatory) will be accompanied by another taking (generally, a derivative taking), as well as a giving (generally, a derivative giving). This is due to two basic facts that shape the world of takings. First, the Takings Clause permits takings only for public use.⁸⁴ Thus, any taking must confer some benefit on the public, which will ordinarily come in the form of a derivative giving.⁸⁵ Second, most physical or regulatory takings produce negative as well as positive effects on the values of adjacent properties, creating derivative takings.⁸⁶

We show that any type of giving or taking may be accompanied by any other type (or types) of giving or taking. Moreover, we show that givings and takings are legal Siamese twins and that certain combinations of takings and givings may be anticipated. The presence of those combinations produces important insights into the distributive effects of government actions regarding property. These insights provide the informational basis for crafting the doctrine of givings and takings.

To further the discussion of the analytic relationships among the various categories, we use the following table, representing the central combinations of givings and takings. We have numbered the cells in order to facilitate the discussion. It should be noted that the table is necessarily incomplete, as it does not reflect the possibility of the most common type of government action—one that simultaneously creates more than one type of giving or taking. Nevertheless, it suffices to demonstrate the illuminating power of examining givings and takings together.

83. Bell & Parchomovsky, *supra* note 8, at 280-81.

84. U.S. CONST. amend. V.

85. More broadly, Kaplow has noted the importance of taking account of benefits created by government policy because “policy change is presumably undertaken in order to generate net gains in social welfare.” Kaplow, *supra* note 3, at 552.

86. See RUNGE ET AL., *supra* note 3, at 12-20.

TABLE 2. COMBINED TAKINGS AND GIVINGS

		Taking		
		Physical	Regulatory	Derivative
Giving	Physical	I. <i>Hawaii Housing Authority v. Midkiff</i>	II. <i>St. Louis & San Francisco Railway v. Mathews</i>	III. <i>Poletown Neighborhood Council v. City of Detroit</i>
	Regulatory	IV. <i>Nollan v. California Coastal Commission</i>	V. <i>Penn Central Transportation Co. v. New York City</i>	VI. <i>Boomer v. Atlantic Cement Co.</i>
	Derivative	VII. <i>Miller v. Schoene</i>	VIII. <i>Pennsylvania Coal Co. v. Mahon</i>	IX. <i>United States v. Causby</i>

Currently, takings law tends to treat all cases as if they were outside of this table altogether, ignoring givings in determining compensation. Consider the following example. Gotham City amends its zoning ordinance to impose a height restriction on the neighborhood of Bellevue. As a result of this change, Belinda Belle, a property owner, is deprived of the ability to add another two floors to her ranch-style home. She claims that the change constitutes a regulatory taking, as a result of which she is entitled to compensation in the amount of \$40,000.⁸⁷ Belinda has a neighbor, Clarence Clearlight, who enjoys a view of the sea from his living room that would be blocked by Belinda's proposed second floor. The value of this view to Clarence is \$40,000. Under current law, the case is treated as being outside the table. Belinda will collect a later sum whose present value is \$40,000, and Clarence will pocket the \$40,000 in improved value. In a givings analysis, however, the taking from Belinda, when properly understood, is also a giving to Clarence. This is a Cell VIII case, in which it might be most appropriate for Clarence, rather than the public, to compensate Belinda.⁸⁸

Ironically, takings jurisprudence can be blind to the possibility of givings, even when the recipient of the giving is identical to the person

87. We assume, for purposes of this example, that the height restriction constitutes a compensable regulatory taking. Under *Penn Central's* multifactor test, the precise determination is highly fact-specific. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978); *supra* Subsection II.A.2.

88. We discuss this remedy further *infra* Section IV.C.

suffering the taking. Imagine, in the previous example, that Gotham City's newly imposed height restrictions create an air of exclusivity in Bellevue, eventually raising the value of all homes in Bellevue, including the value of Belinda's home, by a future sum whose present value is \$40,000 (again, making this a Cell VIII case). Thus, Belinda's loss from the foregone opportunity to build a second and third floor is offset by her subsequent gain due to the greater value of the neighborhood as a whole. Under the current legal system, which focuses exclusively on harm at the time of the taking, Belinda could collect \$40,000 in compensation for the lost opportunity to build, and later collect another \$40,000 for the increase in neighborhood property values—an anomalous outcome by all accounts. Takings law avoids this result only if the gain to Belinda is incorporated into the oft-neglected concept of average reciprocity of advantage.⁸⁹ In this case, Belinda would likely receive compensation under existing law, since Belinda's gain is unrecognized, leading the courts wrongly to treat the case as not belonging in the table.

Cell VIII cases are not alone, nor do they exist solely in the realm of hypotheticals. As we show, there is no shortage of cases that can be placed in the several cells of the table. By analyzing these cases with an eye toward givings, we demonstrate the importance of a givings analysis for takings.

1. *Cell I: Physical Takings and Physical Givings*

Physical takings are not infrequently accompanied by physical givings, as illustrated by the case of *Hawaii Housing Authority v. Midkiff*.⁹⁰ In *Midkiff*, the State of Hawaii confiscated property of large landowners to redistribute it to the erstwhile tenants. The Court determined that the giving (the redistribution) constituted a “public use,” and since Hawaii paid compensation for land confiscations, the Court found no constitutional infirmity. Importantly, the Hawaii legislation linked the givings to the takings. Hawaii seized property only when more than half of the tenants of

89. *Penn Central*, 438 U.S. at 134-45. Lynda Oswald observed that the average reciprocity of advantage has undergone a dramatic, and unfortunate, transformation through time:

Simply put, in its original form, the rule stated that a land use regulation that resulted in benefits to *regulated landowners* roughly equal to the burdens imposed on them did not violate the United States Constitution. In its modern, corrupted form, however, the average reciprocity of advantage rule states that if a land use regulation results in benefits to *society as a whole* roughly equal to the burdens imposed upon the regulated landowners, no taking has occurred. As a result of this perversion, the average reciprocity of advantage rule has lost its former potency as a tool for distinguishing valid police power actions from invalid regulatory takings and instead has become a method for simply rubberstamping legislative acts.

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, 1489 (1997).

90. 467 U.S. 229 (1984).

that property expressed an interest in purchasing it. The purchasing tenants would then pay the former landlords directly for the seized property at a negotiated price or at a price set by the condemning court.⁹¹ This system, which did not occupy the attention of the Supreme Court, is an exemplary model of linking takings compensation with givings charges.⁹² Although Hawaii adopted it only for Cell I cases, the same approach to compensation and charge is, in principle, equally applicable to other cells.

A less congenial approach is represented by the case of *Poletown Neighborhood Council v. City of Detroit*,⁹³ to which we return in our discussion of Cell III. For our purposes here, it is sufficient to note that Detroit's scheme of physical takings from landowners and a physical giving to General Motors did not require General Motors to pay just compensation to the harmed owners. Among its many vices, Detroit's approach depleted public funds by more than \$200 million, as the liability for compensating harmed owners greatly exceeded anticipated costs.⁹⁴

2. *Cell II: Regulatory Takings and Physical Givings*

Cell II cases are rarer, but may be found in situations similar to those in *St. Louis & San Francisco Railway v. Mathews*.⁹⁵ A landowner had sued the St. Louis & San Francisco Railway Company for property damages resulting from a fire ignited by sparks thrown off by the company's locomotives. The Supreme Court upheld a Missouri statutory scheme that departed from the common-law negligence rule and imposed strict liability on railroads, while granting railroad companies the power to condemn land for tracks. The pairing of a physical giving (in the form of the land grants to railroads through private takings) and a regulatory taking (in the form of an enhanced liability standard) effectively forced the railroad companies to keep their property, tracks, and locomotives in good repair.⁹⁶ The heightened liability standard also offered neighboring landowners some

91. *Id.* at 233-34.

92. We develop this idea further *infra* Section IV.C.

93. 304 N.W.2d 455 (Mich. 1981).

94. Tina Lam, *De-Stadium*, DETROIT FREE PRESS, May 17, 1999, LEXIS, Nexis Library, Detroit Free Press File; *Protect the Taxpayers*, DETROIT NEWS, Oct. 19, 1999, at A10.

95. 165 U.S. 1 (1897).

96. While we refer to the enhanced liability rule as a "taking," we do not mean thereby to imply that it altered a form of property rule protection, rather than liability rule protection. Nor do we assert that the enhanced liability standards would necessarily be recognized as regulatory takings under any of the legal standards currently used. Rather, we point to the "taking" in its broadest sense—an adverse impact upon the property value as a result of a change in the legislative scheme.

compensation for the involuntary taking of their land, as it increased the value of the adjacent property that was not condemned.⁹⁷

The Supreme Court did not directly discuss Missouri's compensation scheme for landowners whose property was seized. As we explain in Part IV, most nineteenth-century jurisdictions permitted railroads to use the benefit-offset principle in determining the proper level of compensation for the physical taking.⁹⁸ In one sense, the benefit-offset principle was ideal, in that it offset compensation for takings from a landowner by the value of givings to that landowner. Thus, the railroad companies and the state were forced to take into account the true effect on the seized landowner's property. The problem with this scheme lay elsewhere. As William Fischel noted in his summary of the historical evidence, railroads increased the property values of all surrounding farmland. Thus, application of the benefit-offset principle to takings compensation, while ignoring the derivative givings bestowed upon all neighboring owners whose land was not physically affected, created the ironic situation in which the one property owner who paid a charge for a giving was the owner whose land was seized.⁹⁹

3. Cell III: Derivative Takings and Physical Givings

*Poletown Neighborhood Council v. City of Detroit*¹⁰⁰ is, at first blush, a Cell I case, in which land was physically taken from some Detroit landowners in the Poletown neighborhood and physically given to General Motors to allow GM to build a new automobile manufacturing facility. Upon closer examination, however, *Poletown* can also be placed in Cell III. The physical giving to GM resulted in losses in property values not only to the owners whose property was directly seized, but also to neighboring owners whose property values sank due to proximity to the new factory. Prior to the physical giving, Poletown was a thriving, ethnically diverse community. Subsequent to the giving, GM's new plant and parking lot occupied most of the neighborhood.¹⁰¹

97. Some commentators concluded that railroads received excess subsidies and homeowners inadequate compensation. *E.g.*, FISCHEL, *supra* note 1, at 80-81; Scheiber, *supra* note 37, at 362-65.

98. *See infra* Sections IV.C, IV.D.

99. FISCHEL, *supra* note 1, at 83-84. An additional problem was direct subsidy of construction costs. *See infra* notes 138-139 and accompanying text.

100. 304 N.W.2d 455 (Mich. 1981).

101. *See* Peter E. Millspaugh, *Eminent Domain: The Emerging Government/Business Interface*, 59 U. DET. J. URB. L. 167, 167 (1982).

4. *Cell IV: Physical Takings and Regulatory Givings*

Real world examples of physical takings matched with regulatory givings abound, and they can be seen in such phenomena as exactions¹⁰² and incentive zoning.¹⁰³ In *Nollan v. California Coastal Commission*,¹⁰⁴ one of the leading exaction cases, the California Coastal Commission had conditioned the granting of a development permit for the Nollans' beachfront property on the Nollans' yielding an easement to the public over their property. The Court ruled that the state's taking of the easement, even in the form of an exaction, constituted a physical taking.¹⁰⁵ The existence of a regulatory giving in the form of a development permit—placing the case in Cell IV—entered the Court's analysis only as part of the question of whether the state had constitutionally exercised its police powers.¹⁰⁶ Had the Court been more conscious of the presence of a giving, it could have ruled that a taking had indeed occurred, but that the state had adequately compensated the Nollans for the taking by providing the regulatory giving.

Similarly, incentive zoning involves the granting of additional zoning rights (a regulatory giving) in exchange for the dedication of private property to public uses, such as parks and plazas (a physical taking).¹⁰⁷ The additional zoning rights are intended to serve as an "incentive" for the provision of public amenities. As a result, incentive zoning is difficult to distinguish from cases involving exactions, like *Nollan* and *Dolan v. City of Tigard*,¹⁰⁸ and some commentators have concluded that it should be viewed as a physical taking.¹⁰⁹ In principle, we do not oppose this view, but it only captures half of the picture. The additional building rights (or incentive zoning rights) constitute a regulatory giving for which the recipient should be charged.¹¹⁰

102. An exaction is the conditioning of a government benefit on the payment of a property right. *See supra* note 61 and accompanying text. A narrower definition of exaction would presume the wrongfulness of the condition and view the payment as improperly compelled. *See* BLACK'S LAW DICTIONARY 581 (7th ed. 1999).

103. *See* David J. Benson, *Bonus or Incentive Zoning—Legal Implications*, 21 SYRACUSE L. REV. 895 (1970); Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3, 3 (1991) ("Through the land use regulatory technique formally known as 'incentive zoning,' cities grant private real estate developers the legal right to disregard zoning restrictions in return for their voluntary agreement to provide urban design features such as plazas, atriums, and parks, and social facilities and services such as affordable housing, day care centers, and job training.").

104. 483 U.S. 825 (1987).

105. *Id.* at 841-42.

106. *Id.* at 833-37.

107. *See* Kayden, *supra* note 103.

108. 512 U.S. 374 (1994).

109. *See* Peterson, *supra* note 62, at 78-79.

110. The difference between exaction and incentive zoning terminology might be seen as a question of where the baseline building right is seen to lie. If the building rights are viewed in some sense as already inhering in the property, the demanded public amenity should be called an "exaction." However, if the building rights are viewed as a gift by the zoning authority given as a

5. *Cell V: Regulatory Takings and Regulatory Givings*

Examples of regulatory takings matched with regulatory givings are similarly numerous. Interestingly, takings law has sometimes taken account of a regulatory giving to the victim of a regulatory taking, allowing takings law to take account of Cell V of the givings-takings table. Consider, for instance, *Penn Central Transportation Co. v. New York City*.¹¹¹ In analyzing whether a zoning restriction that prevented the plaintiff from building an office tower above Grand Central Station constituted a regulatory taking, the Court took note of the municipal scheme of transferable development rights (TDRs). Using TDRs, Penn Central could transfer some of the “taken” development rights to adjacent properties.¹¹² Translated into the terms of a givings analysis, the Court placed the government action into Cell V, allowing it to take account of the regulatory giving when deciding whether the elimination of development rights over Grand Central Station amounted to a regulatory taking.

Although the Court heeded the fact that Penn Central received TDRs, the Court did not explicitly analyze the grant in terms of givings. Instead, the Court considered the grant of TDRs as a factor affecting the magnitude of the appellant’s loss, as part of the determination as to whether a regulatory taking took place.¹¹³ We argue that a better way to account for the TDRs is to acknowledge the existence of a taking and view the TDRs as a giving distinct from the taking, which may be viewed as separately chargeable, although the charge and compensation may offset one another.

6. *Cell VI: Derivative Takings and Regulatory Givings*

In light of the fact that neither derivative takings nor regulatory givings are part of classic takings vernacular, it is not surprising that little explicit recognition of Cell VI cases may be found in the case reporters. Nevertheless, situations characterized by regulatory givings coupled with derivative takings underlie cases such as *Boomer v. Atlantic Cement Co.*¹¹⁴ In *Boomer*, community property owners brought a nuisance suit against the Atlantic Cement Company for pollution emitted by the defendant’s cement plant. Instead of enjoining the pollution, the New York Court of Appeals

reward to those who provide public amenities, the additional building rights should be referred to as incentive zoning rights. *See also infra* Section VI.A.

111. 438 U.S. 104 (1978).

112. *Id.* at 114.

113. *Id.* at 137.

114. 257 N.E.2d 870 (N.Y. 1970).

permitted the cement plant to continue operating in exchange for a one-time payment of “permanent damages.”¹¹⁵

Although the case involved the tort of nuisance, the decision can be seen, and is indeed perceived by law and economics scholars, as having effectively worked a taking on the homeowners.¹¹⁶ Under our terminology, the taking is a derivative one, deriving from a regulatory giving. Atlantic Cement, on the other hand, benefited from what can be treated as a regulatory giving. The *Boomer* court effectively changed the existing regulatory framework and permitted Atlantic Cement a new profitable use of its property that would have been enjoined under the common-law rules of nuisance.¹¹⁷

7. *Cell VII: Physical Takings and Derivative Givings*

As we noted earlier, the “public use” requirement of the Takings Clause makes derivative givings likely companions of physical takings. *Miller v. Schoene*¹¹⁸ is one of the numerous takings cases properly assigned to Cell VII. In *Miller*, the state ordered the destruction of cedar trees on Miller’s lot in order to prevent the spread of a fungus to nearby apple tree lots. Miller suffered a physical taking—without compensation—while his neighbors received a derivative giving. However, the Court closed its eyes to the givings half of the picture and determined that, as a result of the public benefit, no compensable taking had taken place.¹¹⁹ A better result would have been similar to that of *Boomer*, absent the valuation problems: The apple tree farmers should have been charged for the benefit to their properties, and Miller should have received compensation.

*United States v. Cors*¹²⁰ is an even more interesting Cell VII case. *Cors* involved a Navy decision during World War II to requisition a tugboat and to pay compensation. While both sides acknowledged the existence of a compensable taking, they disputed the magnitude of the award. The Navy claimed that it need not pay for the part of the tugboat’s value attributable

115. More precisely, the court granted the residents a conditional injunction to be vacated upon the payment of permanent damages. *Id.* at 874-75.

116. *E.g.*, Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement To Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1039-40 & n.46 (1995) (using *Boomer* as an example of a private takings case).

117. *See Boomer*, 257 N.E.2d at 875-76 (Jasen, J., dissenting). The *Boomer* decision has proved controversial on many grounds. *See* Daniel A. Farber, *Reassessing Boomer: Justice, Efficiency, and Nuisance Law*, in PROPERTY LAW AND LEGAL EDUCATION 7 (Peter Hay & Michael H. Hoeflich eds., 1988). In retrospect, we can see that the court underestimated the damage to the plaintiffs. *Id.* at 11-12. There is also room to question whether the court, exercising its equitable powers, was the proper institution to effect the giving and takings. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES 14-28 (1994).

118. 276 U.S. 272 (1928).

119. *Id.* at 280.

120. 337 U.S. 325 (1949).

to the general rise in tugboat prices that occurred with the onset of war and the requisitioning of maritime vessels. Accepting this argument, the Court ruled that the tugboat owner was entitled to the market value of the vessel, but not to its additional subjective value to the government. In addition, the Court instructed that market value should not include the holdout component inherent in the market for maritime vessels at the time. Viewed through the prism of givings, the decision is laudable as it takes account of the derivative givings produced by the government's program of physical takings, i.e., its requisitioning of vessels.¹²¹

8. *Cell VIII: Regulatory Takings and Derivative Givings*

Pairings of regulatory takings and derivative givings are similarly numerous. *Pennsylvania Coal Co. v. Mahon*,¹²² arguably the most famous of all regulatory takings cases, belongs in Cell VIII. Pennsylvania Coal, owner of the subsurface property, suffered a regulatory taking, but the surface property owners received derivative givings as a result of the reduction in the likelihood of subsidence. *Lucas v. South Carolina Coastal Council*¹²³ presents a similar combination. Prevented from developing his beachfront property by anti-erosion regulations, Lucas suffered a regulatory taking. But more inland properties that enjoyed access to an open beach enjoyed derivative givings. In each case, a requirement that the benefiting properties pay a charge for the givings would have considerably simplified measurement of the efficiency and equities of the regulation.

9. *Cell IX: Derivative Takings and Derivative Givings*

As we have defined the concepts of derivative givings and derivative takings, it is impossible for the two to be matched in the absence of a predicate physical or regulatory giving or taking.¹²⁴ Nevertheless, there are cases dominated by the pairing of derivative givings and derivative takings. *United States v. Causby*,¹²⁵ in which the Court found that a new airport created physical takings of property directly overflowed by airplanes, could be placed in Cell IX. The overflights in *Causby* harmed the values of many properties abutting the airport not directly overflowed by aircraft using the

121. The case invokes—and resolves admirably—a number of other challenges undergirding the laws of givings and takings. Chief among these challenges are issues of valuation, *see infra* Section V.B, framing of the transaction, *see infra* note 239, and time of measurement, *see infra* Section V.C.

122. 260 U.S. 393 (1922).

123. 505 U.S. 1003 (1992).

124. For a justification of this limit on the definition of derivative takings, see Bell & Parchomovsky, *supra* note 8, at 290-92.

125. 328 U.S. 256 (1946).

airport. Thus, *Causby* involved many more derivative takings than physical takings.¹²⁶ However, the new airport in *Causby* also doubtless created a host of derivative givings for nearby hotel owners and the like. The derivative givings, like the derivative takings, belong in a full accounting of the costs and benefits of the government action.

D. *Take It or Give It: The Importance of Givings*

The enormous body of scholarship on takings,¹²⁷ especially in contrast to the near complete absence of givings scholarship,¹²⁸ would lead one to believe that takings are infinitely more important than givings. In fact, givings play at least as prominent a role in public life as takings and, quite likely, an even greater role.

Government largesse is widespread.¹²⁹ Broadly defined, givings can be found in any government action that bestows a benefit upon someone.¹³⁰ Whereas the power to take is the province of such specialized government powers as eminent domain and taxation, the touchstone of nearly every other power of government is giving. Indeed, even the takings power is required, ultimately, to benefit the public.

One might argue that no restrictions on givings are necessary because the Constitution does not create a power to bestow benefits parallel to the power of eminent domain. However, the argument collapses in light of the fact that nearly every power of the government should ultimately be seen as a power to benefit some or all members of the public.¹³¹ If a limitation on takings is mandated by possible abuses of the power of eminent domain, a givings jurisprudence is necessary to prevent abuses of the other powers of the government. As we will show, the possibility of abuse in the case of givings may be even greater than in the case of takings. This is due to several important differences between givings and takings.

Although takings must always be accompanied by givings due to the “public use” proviso of the Takings Clause of the Fifth Amendment, the opposite does not hold true. A government can bestow certain benefits without creating corresponding harms. For example, the government can upzone a particular neighborhood without creating a matching loss in property values. In this sense, the symmetry between givings and takings is not perfect, and the government can take advantage of this fact. Givings

126. Bell & Parchomovsky, *supra* note 8, at 279-80.

127. *See supra* notes 1, 44.

128. *See supra* note 3.

129. *See RUNGE ET AL.*, *supra* note 3.

130. *See supra* note 2.

131. Indeed, this makes a formal powers analysis an unlikely candidate for framing the law of givings. However, a powers analysis may remain useful in the context of takings. *See infra* Section IV.B.

may produce winners without producing identifiable losers, making givings a very attractive policy tool. Givings that harm no identifiable person may not attract public attention and are unlikely to lead to legal challenges. The dark side, of course, is that the government may abuse its power to reward political supporters.

Armed with this insight, it is easy to see that in certain cases the givings power dominates the power of eminent domain. Assume that in *Poletown*, the city of Detroit had two options to satisfy GM's demand for a bigger plant. The first was to condemn the property of Poletown's residents and to give the land to GM. The second was to grant GM a variance to expand the capacity of one of its existing properties. If the latter option were available in reality, *Poletown* would not be the famous case it is now. Indeed, in ordinary circumstances, Detroit and other municipalities would prefer the second option since regulatory givings do not visibly impoverish the public fisc, and consequently, they give rise to less political criticism.

Furthermore, the government can use its budget in ways that benefit some but not others. For example, a municipality may decide to build a new park in neighborhood *A*, but not in neighborhood *B*. As a result of the new park, real estate prices in neighborhood *A* may increase by fifteen percent, while real estate prices in neighborhood *B* remain the same. Formally, no taking has occurred because the residents of neighborhood *B* are no worse off now than they were before. However, given that municipal budgets are limited—indeed, budgetary decisions are often zero-sum games¹³²—the decision to bestow the benefit upon the residents of neighborhood *A* is a lost opportunity to the residents of neighborhood *B*. Yet, as long as the decision of the municipality is reasonable and nondiscriminatory, it will stand, and no account will be taken of possible allocative injustice.

This observation implies another interesting difference between takings and givings. While takings imposing a considerable loss on an individual or a group are likely to attract attention and generate legal challenges, givings with the opposite effect might not. Victims of takings who suffer a considerable personal loss will find it cost-effective to pursue public and legal action. For givings, however, the costs involved in organizing the nonrecipients may lead to inaction unless the magnitude of the giving is great. The recipient of a considerable benefit will likely be pleased with the giving. The public at large may not be content with the decision, but when the cost of the giving is spread thinly over a large population and imposes an inconsequential cost on each individual member of the public, the cost to each individual of opposing the giving is likely to outweigh the benefit.¹³³

132. Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 503 (1998) (discussing the “zero-sum nature of federal allocative decisions”).

133. We develop this point further *infra* Section III.C.

These characteristics of givings can create opportunities for political abuse that cannot be matched by takings. Imagine that Peter Politician is the corrupt mayor of Sellout City. Peter raises cash for his reelection campaign by granting zoning variances to his corrupt developer friends Barry Bagman and Cody Cashncarry. For each \$1 million in zoning variances, Barry and Cody donate \$1000 to Peter's campaign. Peter also takes revenge on enemies such as the honest developers David Dogood and Edward Eleemosynary by downzoning their property. However, other than the psychic enjoyment of making David and Edward suffer, evil Peter realizes no gains from his takings. While political abuse for the sake of spite via the takings power should not be discounted, there is good reason to suppose that Peter will often find the financial attractions of kickbacks from givings more appealing.¹³⁴

The role of givings in political abuse is hardly restricted to hypothetical situations. The distribution of government benefits has provided the lifeblood of debilitating scandals throughout the history of the United States. The eighteenth-century Yazoo land scandals, for example, resulted from the Georgia legislature's giving of huge land tracts at grossly understated prices to four land companies. Until then, Georgia had distributed land on the "headright" system, which allowed families to claim land for each family member, up to a maximum of 1000 acres.¹³⁵ In the wake of the Revolutionary War, however, Georgia began making large land grants to favored individuals, and in the Yazoo transactions, Georgia sold tens of millions of acres to the four Yazoo companies for a small fraction of their true worth. Motivated by bribes, the Yazoo transactions subsequently brought in numerous innocent third parties that bought land from the land companies. Litigation, rebellion, and even a small war resulted, casting a cloud on national and state politics for several decades.¹³⁶

The nineteenth-century *Crédit Mobilier* scandals emerged from givings associated with the construction of the Union Pacific railroad. The Union Pacific Railroad received givings of land and cash subsidies from the

134. Takings may also present opportunities for financial gain for the corrupt. Barry Bagman may wish to sell his property in Cercla Estates, but he may be unable to find a buyer. In exchange for an appropriate campaign contribution, Peter might arrange for Barry's property to be confiscated by means of eminent domain. Peter might also threaten a taking for inadequate compensation in order to extort contributions. Nevertheless, such a situation differs from the givings example in that it would involve a victim with an incentive to turn to legal authorities.

135. We discuss the differences between grants to singled-out individuals or companies, on the one hand, and grants to the public at large, on the other, *infra* Section IV.B.

136. C. PETER MAGRATH, *YAZOO* (1966). The Yazoo land frauds provided the background for the Supreme Court's landmark decision on the Contracts Clause, *Fletcher v. Peck*, 10 U.S. 87 (1810). See also Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73 (2000) (discussing cases illustrating that takings were "the paradigmatic constitutional taboo" during the nineteenth century).

government in order to build a low-traffic railroad.¹³⁷ While the railroad was unlikely to produce high revenues, the construction—thanks to the subsidies—proved to be quite profitable. Investors created the *Crédit Mobilier* company to perform the construction work and bribed members of Congress with *Crédit Mobilier* shares to continue subsidies. The scandal undermined the presidency of Ulysses S. Grant and later implicated President James A. Garfield and presidential candidate James G. Blaine.¹³⁸

The twentieth-century Teapot Dome scandal, also called the Oil Reserves or the Elk Hills scandal, involved Secretary of the Interior Albert Fall's giving of sweetheart leases over conservation land to several petroleum companies in exchange for cash "gifts" and "loans." The land had been set aside to preserve petroleum reserves for future emergencies, and Fall, who opposed the policy, used the givings to prevent land conservation and enhance his personal wealth. Fall became the first former cabinet officer to be jailed, and a Senate investigation prompted the first-ever appointment of special counsel by the President—the forerunner of the independent counsel.¹³⁹ A North Dakota senator labeled the affair the "slimiest of slimy trails beaten by privilege."¹⁴⁰

Givings retain the power to produce scandal. Insufficient accounting for givings in the form of pork barrel politics has rightly drawn criticism from nearly all quarters.¹⁴¹ In all, there is real reason to suspect that the power to give is a major source of potential corruption and mischief.

III. WHY GIVINGS? EFFICIENCY, FAIRNESS, AND PUBLIC CHOICE

Having demonstrated the prevalence and importance of givings, we next explain why, in principle, a government that compensates for takings should also assess charges for givings. We show that the animating

137. The Pacific Railroad Acts granted 12,800 acres to railroad companies for every mile of track laid, as well as \$48,000 for every mile laid in mountainous terrain. They also subsidized loans. See Act of July 3, 1866, ch. 158, 14 Stat. 79; Act of July 2, 1864, ch. 216, 13 Stat. 356; Act of July 1, 1862, ch. 120, 12 Stat. 489.

138. DAVID HOWARD BAIN, *EMPIRE EXPRESS* (1999).

139. A. Timothy Martin, *The Development of International Bribery Law*, 14 NAT. RESOURCES & ENV'T 95, 97 (1999). For a discussion of these and other prominent cases of corruption, see JOHN T. NOONAN, JR., *BRIBES* (1984).

140. LEASES UPON NAVAL OIL RESERVES AND ACTIVITIES OF THE CONTINENTAL TRADING CO. (LTD.) OF CANADA, SUPPLEMENTAL REPORT, S. REP. NO. 70-1326, pt. 2, at 3 (1928).

141. E.g., Kimberly Kindy & Hanh Kim Quach, *Proposed Budget Most Pork-Laden Yet*, ORANGE COUNTY REG., June 15, 2000, at A1 ("The problem is the entire budget has become a grab bag of pork-barrel projects." (quoting State Senator Tom McClintock)); Larry Sandler, *Antrak Critic Wants Thompson Ousted*, MILWAUKEE J. SENTINEL, July 13, 2000, at 1B ("When you add pork-barrel trains to carry very few people through rural districts represented by powerful congressmen . . . that is the opposite of what is needed."). In one notable, and apparently facetious, exception, a recent essayist proclaimed: "Pork is good. Pork is virtuous. Pork is the American way." Jonathan Cohn, *Roll Out the Barrel: The Case Against the Case Against Pork*, NEW REPUBLIC, Apr. 20, 1998, at 24, 28.

concerns of takings jurisprudence—fairness and efficiency—apply with equal force to givings and demand a givings doctrine. Because givings must be understood in political context, we draw on public choice literature to support our claim that lack of a givings jurisprudence undermines good government.

A. *The Fairness of Givings*

From the vantage point of fairness, the law of takings is concerned with the allocation of burdens; our proposed law of givings focuses on the allocation of benefits. Justice Black famously summarized the fairness concern of the Takings Clause in *Armstrong v. United States*,¹⁴² explaining 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.”¹⁴³ By the same token, fairness concerns should bar the government from allowing some people alone to enjoy benefits that in “in all fairness and justice” should be enjoyed by the public as a whole.

Unaccounted-for givings have the potential to create distributive injustice by allowing a select few to benefit disproportionately from the public’s limited resources. Just as it is inequitable to single out members of society to bear the burden of societal needs, it is inequitable to privilege a few by permitting them to enrich themselves at the expense of the public. Distributive justice demands that the government allocate burdens and benefits in accordance with some principle of equality.¹⁴⁴ To be sure, theorists of different political bents will disagree about the precise meaning of equality in this context, and even as to whether equality is the supreme value.¹⁴⁵ However, all theorists agree that the government must not allocate benefits on the basis of one’s ability to exploit the political system. The government must not discriminate among its subjects based on favoritism borne of improper political influence.¹⁴⁶

Furthermore, in the same way the takings power may be used by those with the greatest political influence to cast burdens on the least well-off,¹⁴⁷ the givings power may be used to the disadvantage of society’s weakest

142. 364 U.S. 40 (1960).

143. *Id.* at 49.

144. John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164, 165 (1958).

145. See WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 50-94 (1990).

146. See Alan E. Brownstein, *Illicit Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1 (1988); Sunstein, *supra* note 23, at 1670.

147. See, e.g., Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 487-88 (1976) (studying exercises of eminent domain in Chicago, and finding that the indigent—i.e., those with lower-value property—were consistently undercompensated relative to affluent property owners).

members. The likely recipients of givings are politically influential individuals or factions.¹⁴⁸ The ability of the politically powerful to extract benefits for themselves invariably comes at the expense of the politically disenfranchised—individuals and groups with insufficient political clout and limited financial resources. This unhappy result stems from two different, yet related, phenomena. First, the same political process that distributes benefits imposes burdens and collects taxes. Thus, when the government collects taxes from both Alice and Beth, and then gives the revenues to Alice, Beth is indirectly paying for Alice's benefit. Second, by making Alice better off relative to Beth, Beth's position in society has been relatively worsened.

Both takings and givings generate demoralization, albeit differently. In his classic treatment of takings, Frank Michelman observed that "a visible risk of majoritarian exploitation" might cause an individual to "be paralyzed by a realization that [she is] at the mercy of majorities."¹⁴⁹ Unlike other misfortunes that might befall one's property to which one can psychologically adjust, a government decision to burden particular individuals thrusts upon them "a perception that the force of a majority is self-determining and purposive, as compared with other loss-producing forces that seem to be randomly generated."¹⁵⁰ Thus, "even though people can adjust satisfactorily to random uncertainty . . . they will remain on edge when contemplating the possibility of strategically determined losses."¹⁵¹ Logically, this demoralization will occur not only after takings, but also after givings. While people can view windfalls that befall another with sanguinity, when the windfall arrives as a result of a strategic and deliberate decision of the government, the reaction may turn to resentment and frustration.

Recall our earlier discussion. Givings and takings are intimately linked. Government largesse is not manna from the heavens. It does not come free of charge, and it does not benefit everyone in the same way. Takings, as we have shown, are generally accompanied by givings.¹⁵² It would be inconsistent to argue that fairness requires compensating takings but permits ignoring givings. Our goal here is not to develop a meta-theory of fairness for determining when the government can take and when the government can give. For our purposes, it is enough to show that fairness, as understood in the context of takings, mandates accounting for givings.¹⁵³

Admittedly, a degree of vagueness inheres in any theory of takings or givings, since there is no scholarly or judicial consensus regarding the

148. See RUNGE ET AL., *supra* note 3.

149. Michelman, *supra* note 1, at 1216-17.

150. *Id.* at 1217.

151. *Id.*

152. *Supra* Section II.C.

153. In this Part, we do not provide criteria for determining when givings call for a charge. We defer that discussion to *infra* Part IV.

definition of property. Here, too, we make no pretense of providing a clear definition that simplifies the complexity of property. We merely point to the fact that notwithstanding divergent understandings of property, uncompensated takings of property are generally understood to violate the demands of fairness.¹⁵⁴ The same is true of givings.

Of course, government services are not a Procrustean bed.¹⁵⁵ One cannot expect at the end of the day to find that all citizens have received identical benefits and have borne identical burdens. However, systemic bias against the least well-off cannot be condoned by any theory of fairness.

B. *The Efficiency of Givings*

1. *Government Efficiency*

Assuming that the government behaves as a rational wealth-maximizing actor—an assumption we revisit and revise in the next Section¹⁵⁶—it will bestow benefits on members of the public only when the overall benefit of the act to the government exceeds its aggregate cost.¹⁵⁷ Given this framework, the goal of takings jurisprudence is to end the fiscal illusion created by the government's ability to impose harms on individuals without paying compensation. Under traditional takings analysis, the just compensation requirement effectively forces the government to internalize the cost of its decisions and impose burdens only when the net gain of so doing exceeds the cost. Fiscal illusion will persist, however, if the government fails to consider givings.¹⁵⁸

Economic efficiency is achieved by taking into account both costs and benefits.¹⁵⁹ Takings jurisprudence ensures an accurate accounting of costs. Givings jurisprudence is necessary to guarantee an accurate accounting of benefits. Consider the following example. Mirage City is considering the

154. See, e.g., Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 764 (1999); Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 998-1002 (1999); Michelman, *supra* note 1, at 1218-24.

155. Procrustes, in Greek mythology, had one bed for all. Those who were too tall for the bed had their legs chopped off, while those who were too short were stretched to fit. EDITH HAMILTON, MYTHOLOGY 210-11 (1942).

156. *Infra* Section III.C.

157. As a normative theory, economic efficiency prescribes that “law should be made to conform as closely as possible to the dictates of wealth maximization.” RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 362 (1990).

158. A government suffering from fiscal illusion labors under the misimpression that the true net value of its action is reflected by the effect on the government's budget. Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 621 (1984).

159. Law and economics literature generally employs a Kaldor-Hicks wealth-maximization criterion for efficiency. See THOMAS J. MICELI, ECONOMICS OF THE LAW 4 (1997). Analyzing takings from the viewpoint of the citizen victim, Kaplow argued that there is no economic justification for failing to treat gains precisely like losses. Kaplow, *supra* note 3, at 553.

construction of a new exit to the interstate highway. The actual cost of building the roadway is \$1 million. In addition, the government will have to pay \$2 million to property owners whose land will be condemned for the project. We assume that no derivative taking occurs in this case, and thus, the total cost of the project is \$3 million. Turning to the benefit side, the government estimates that the new exit will spur economic activity in a ten-block area of Mirage, raising local property values in that area by \$5 million. As a result, Mirage's income from property tax revenue will increase by \$100,000.¹⁶⁰ Under the assumption that Mirage acts like a wealth-maximizing individual, it will reject the project. By Mirage's taxes-and takings-influenced calculation, the project will lead to a net loss of \$2.9 million.¹⁶¹ However, if Mirage took into account both takings and givings, it would see that the project produces a net benefit of \$2 million.¹⁶² Since economic efficiency is concerned with aggregate efficiency, Mirage's decision is clearly welfare diminishing.

Importantly, even if the government is not treated like a rational wealth-maximizing individual, as long as government is subject to fiscal illusion, unaccounted-for givings and takings may distort government incentives.¹⁶³ This is due to the fact that, as long as government action is distorted by the illusion that harms and benefits are costless, government action will be most accurate if government takes into account the full set of costs and benefits occasioned by its behavior. While there is little empirical data to suggest that government acts precisely like a wealth-maximizing individual, there is data showing that government does operate under fiscal illusion.¹⁶⁴

2. *Private Property Owner Efficiency*

Uncompensated takings and unaccounted-for givings may distort allocative efficiency in an additional way. The absence of government compensation or charge may lead individuals to make inefficient investment decisions. It bears emphasis that this matter is a point of

160. This figure represents the present value of the future revenue stream to be created by property taxes.

161. The \$2.9 million loss represents the difference between the \$3 million in costs and the \$100,000 in revenues.

162. The \$2 million gain represents the difference between the \$5 million in societal benefits and the \$3 million in costs.

163. Our fuller treatment of the incentives on government behavior appears in Section II.C. Due to distributional effects among voters, as well as the nonuniformity of nonpecuniary factors, such as ideology, that affect government and the electorate, distorted incentives may persist even in the instance of a mechanism that compensates for fiscal illusion.

164. See studies discussed in FISCHER, *supra* note 1, at 96-97; and Joseph J. Cordes & Burton A. Weisbrod, *Governmental Behavior in Response to Compensation Requirements*, 11 J. PUB. ECON. 47 (1979). See also Bell & Parchomovsky, *supra* note 8, at 291 n.53 (referring to studies).

contention among economists. While certain economists posit that uncompensated takings spur inefficient investment by property owners, others claim it is actually the payment of compensation that distorts individual investment incentives by creating a problem of moral hazard.¹⁶⁵ We do not attempt to resolve this theoretic dispute. We merely aim to show that the same analysis employed to demonstrate the distortionary effect of uncompensated takings can be applied to show the distortionary effect of uncharged-for givings.

Thus, our analysis proceeds on the premise that government intervention is different from other risks facing property owners. This premise is not shared by Kaplow¹⁶⁶ or Blume and Rubinfeld;¹⁶⁷ they argue, rather, that risk of government action is no different than any other business risk, such as natural disaster or marketplace changes. Accordingly, Kaplow and Blume and Rubinfeld have argued that takings compensation creates a moral hazard because it encourages inefficient investment that fails to account for the risk of government taking. Thus, they urge elimination of takings compensation as they would givings charges.¹⁶⁸ Miceli has rejoined by pointing out that the government is, in turn, affected by the acts of market actors.¹⁶⁹ Thus, for example, the government will refrain from taking property from actors who overbuild in reliance upon government compensation for takings, since the government will not want to overpay for its taking by compensating for excessive building.¹⁷⁰ For Miceli, too, there is a necessary symmetry between takings compensation and givings charges: Just as compensation prevents takings from overbuilders, charges prevent givings to underbuilders. This can be seen in the following examples.

Once again we begin with a taking, based on one of Miceli's examples.¹⁷¹ Suppose that Alison Apartment owns a building of two floors worth \$200,000, in which each floor is worth \$100,000. Alison knows that if the second floor were in the hands of the public (for example, if the second floor were removed, allowing the public to enjoy the air and view above the building), the floor would be worth somewhere between \$50,000 and \$150,000, with an equal chance of any value between these two extremes. Alison knows, moreover, that the city will take the second floor through downzoning if the floor's value in public hands exceeds its value in

165. See, e.g., Blume & Rubinfeld, *supra* note 158, at 597-98.

166. Kaplow, *supra* note 3.

167. See Blume & Rubinfeld, *supra* note 158, at 584-89.

168. Kaplow, in particular, notes repeatedly the symmetry between the upside and downside of the risk of government action. Kaplow, *supra* note 3, at 553-55.

169. See MICELI, *supra* note 159.

170. This assumes the ready availability of substitutes for the property that would be taken.

171. Thomas J. Miceli, *Do Governments Provide Efficient Compensation for Takings?*, ILL. REAL EST. LETTER, Winter/Spring 1993, at 8, 9.

Alison's hands. Thus, Alison estimates that the likelihood that the city will seize her second floor is 50%.¹⁷² Finally, we assume that there will be no compensation for taking, as Kaplow and Blume and Rubinfeld suggest.

Alison can enhance the value of her second floor by \$1000 by adding external ornamentation at a cost of \$1001. Ordinarily, she would not undertake the expense of adding the ornamentation, since it would lead to a loss of \$1. However, once Alison takes into account the effect on the taking, she will undertake the expense. The \$1000 change in value of the second floor will raise the value of the second floor in Alison's hands, without changing the value in the public's hands, thereby lowering the likelihood of a downzoning. Specifically, the likelihood of downzoning will be lowered from 50% to 49%.¹⁷³ The 1% reduction in the probability of an uncompensated downzoning is worth \$510 to Alison.¹⁷⁴ Thus, the added ornamentation is worth a net \$509 to Alison (\$1000 in greater value plus \$510 in reduced chance of taking, less a cost of \$1001). Failure to pay compensation for a taking has thus led to inefficient building.

The same distortive effect obtains with regard to failure to charge for givings as well. Suppose that Alison has only a one-story building, worth \$100,000, and she seeks a giving of an upzoning allowing her to add a second floor worth \$100,000. Once again, Alison knows that the value of the space in the hands of the public (as open air) is worth somewhere between \$50,000 and \$150,000, with an equal chance of any value between these two extremes. Alison knows that the city will give her building rights through upzoning if the floor's value in Alison's hands exceeds its value in public hands, and the public will demand no charge for the giving. Alison therefore estimates that the likelihood that the city will give her a second floor is 50%.¹⁷⁵

Alison can now encourage the giving by underbuilding. Suppose that Alison has the option of building an inferior roof over the first floor that would be perfectly suitable as a median roof between the first and second floors, but is inappropriate as a roof for a one-floor building. Suppose that using this inferior roof reduces the value of Alison's first floor by \$1001. Additionally, suppose that due to the presence of a roof better suited to a two-story building, the value of a second floor in Alison's hands is increased by \$1000. Absent the possibility of an uncharged giving, Alison would install a proper roof. The distorting effect of an uncharged giving, however, leads Alison to install the inferior roof. The presence of an inferior roof increases the chance of a giving by 1% to 51%.¹⁷⁶ The 1%

172. Based on the following calculation: $(\$150,000 - \$100,000)/(\$150,000 - \$50,000) = 0.5$.

173. Based on $(\$150,000 - \$101,000)/(\$150,000 - \$50,000) = 0.49$.

174. Based on $(0.5 \times \$100,000) - (0.49 \times \$101,000) = \$510$.

175. Based on $1 - [(\$150,000 - \$100,000)/(\$150,000 - \$50,000)] = 0.5$.

176. Based on $1 - [(\$150,000 - \$101,000)/(\$150,000 - \$50,000)] = 0.51$.

increase in value due to an uncharged upzoning is worth \$1510 to Alison.¹⁷⁷ Thus, the inferior roof is worth a net \$509 to Alison (\$1510 in greater likelihood of giving, less \$1001 in reduced value of the first floor). Failure to assess a charge for a giving has thus led to inefficient building.

While the inefficient building as a result of uncompensated takings may seem more intuitively appealing than inefficient building stemming from uncharged givings, real-world examples of the latter phenomenon abound. The incentive for mismanagement—or inefficient use of resources—caused by givings underlies the renowned phenomenon of children breaking toys in order to receive newer ones. Of course, such strategic behavior is not confined to the family. Several years ago, as part of a lobbying effort to convince New York City to build a new stadium in Manhattan for the New York Yankees, George Steinbrenner played up in public appearances the problems of transportation to Yankee Stadium, focusing on lack of parking and congested roads. In so doing, Steinbrenner reduced the value of his property interest in the Yankees by lowering attendance and goodwill, with the aim of drawing a giving from municipal government. Had he wanted, Steinbrenner could have taken even more drastic steps to lower the value of his property to induce the giving. For example, he could have opened vendor booths in existing parking lots in order to reduce the number of parking spaces. Likewise, he could have changed the layout of the seats in the stadium to decrease the number of skyboxes and luxury seats.¹⁷⁸

In sum, our efficiency analysis shows that uncharged givings lead to two potential distortions. First, from the vantage point of the government, uncharged givings, like uncompensated takings, create fiscal illusion and lead to inefficient policies. Government failure to account for the benefits of givings may lead to failure to undertake economically efficient projects. Second, the possibility of uncharged givings also may distort the investment decisions of individuals, thereby further skewing allocative efficiency.

177. Based on $(0.51 \times \$101,000) - (0.5 \times \$100,000) = \$1510$.

178. See Matthew Purdy, *Yankees Look Away from Bronx*, N.Y. TIMES, Sept. 24, 1995, § 1, at 45 (citing criticism of Steinbrenner for driving down attendance with negative comments about Yankee Stadium and the surrounding neighborhood); Vivian S. Toy, *Streak Alive as Yankees Veto 13th Stadium Plan in a Year*, N.Y. TIMES, Sept. 6, 1995, at B3 (noting Steinbrenner's criticism of traffic and parking problems in arguing for greater municipal assistance). For an interesting discussion of the advantages of reducing the value of one's property in interactions with private actors to diminish the risks of theft or conversion, see Douglas W. Allen, *Creating Wealth by Destroying It: An Extension of Demsetz's Theory of Property Rights* (Mar. 2001) (unpublished manuscript, on file with authors). Naturally, Allen does not discuss givings. Nor does he address the implications of his analysis for takings.

C. *The Politics of Givings*

In the previous Section, we evaluated the effects of fiscal illusion on government incentives and explained why failure to consider givings may distort efficiency. In this Section, we demonstrate that a more complex view of government decisionmaking buttresses the conclusion that failure to account for givings may result in inefficiencies. Using the tools of public choice analysis, we show that decisionmaking about givings is highly susceptible to improper influence and rent-seeking at the public expense.

Public choice theories of government view government decisionmakers as maximizers of their narrow self-interests, primarily maintaining power.¹⁷⁹ On this view, government decisions do not aim to promote some concept of the public good or to maximize social welfare.¹⁸⁰ Nor can government actions be traced to a cost-benefit analysis aimed at maximizing government wealth. Rather, government decisions result from majoritarian or interest-group rent-seeking to which decisionmakers cater in order to maintain power.¹⁸¹ Less cynical scholars suggest that the truth probably lies somewhere in between the pure rent-seeking view of politics and the simplistic view of Pigouvian theorists, in which government serves as the neutral servant of the public good.¹⁸²

Whatever the precise mix of rent-seeking and good government, there can be little doubt that givings are among the chief means of distributing largesse to interested parties¹⁸³ and that failure to account for such givings allows exploitation of the political process.¹⁸⁴ The giving to General Motors described in *Poletown*,¹⁸⁵ for example, has been criticized as a flagrant wealth transfer from ordinary residents of a mixed-ethnic neighborhood to the more politically powerful General Motors.¹⁸⁶ Even more disturbing is the magnetic effect of givings toward corruption. Givings allow the unscrupulous to tap the vast resources accumulated by the government in state coffers. So long as givings do not give rise to a charge, influential individuals may use a small amount of campaign contributions to induce a much larger giving.

In interest-group models of public choice, pioneered by Mancur Olson,¹⁸⁷ well-organized interest groups are able to manipulate the

179. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 22-24 (1991).

180. This view is generally, if not entirely accurately, referred to as Pigouvian. See FISCHER, *supra* note 1, at 203-04.

181. See FARBER & FRICKEY, *supra* note 179.

182. See *id.*

183. For a discussion of the differences between subsidies and givings, see *infra* Section IV.A.

184. See *supra* Section II.D.

185. 304 N.W.2d 455 (Mich. 1981).

186. Millspaugh, *supra* note 101, at 180.

187. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

government and ensure activity that benefits the interest group at the expense of society. Interest-group public choice theory would interpret the *Poletown* episode as the politically influential General Motors extracting rents from the ill-mobilized citizens of Detroit. Ironically, as Daryl Levinson has noted, compensation for takings (absent the assessment of charges for givings) may *increase* the likelihood of interest-group exploitation of the public fisc.¹⁸⁸ Takings compensation spreads the price of interest-group rent-seeking over the entire public, reducing the likelihood that any given interest group will oppose the takings plan. It is only by charging interest groups for givings that the incentive for feeding at the public trough can be defeated.

However, even without positing corruption or self-dealing by the government, public choice theory demonstrates the need for a givings regime. This can be seen by examining Daryl Levinson's recent attempt to craft a majoritarian public choice model of the incentive structure of government decisions on takings. Levinson's model, by demonstrating the possible distortions created by mandatory compensation for takings, inadvertently highlights the need to incorporate charges for givings into a takings regime.¹⁸⁹

In his majoritarian model,¹⁹⁰ Levinson imagines decisionmakers who vote precisely according to the preferences of the majority of citizens, where each citizen's preference corresponds precisely with her pecuniary self-interest.¹⁹¹ In this basic model, certain skewings of the costs and benefits of government action will lead the government to take property inefficiently and pay compensation. Suppose, for example, that the city of Democracy decides to take Citizen 1's \$100,000 property and turn it into a park, resulting in givings worth \$11,000 to each of Citizens 2 to 10.¹⁹² Suppose further that the compensation of \$100,000 to Citizen 1 is paid by a tax levied on all 10 citizens. The net value of the taking and givings to society is a loss of \$1000. The taking and givings are therefore inefficient because the property in Citizen 1's hands is worth \$100,000, while its value as a park in Democracy's hands is only \$99,000. However, since nine

188. Levinson, *supra* note 23, at 376.

189. *Id.* Levinson discusses the difficulties with the takings regime, but does not discuss the possibility of creating a jurisprudence of givings. He does occasionally allude to the possibility of accounting for benefits. *See infra* note 193 and accompanying text.

190. Levinson offers three distinct models of government decisions on takings—one based on majoritarian decisionmaking, one based on interest-group power, and one based on bureaucratic aggrandizement. Levinson, *supra* note 23, at 361-87.

191. *Id.* at 363-64.

192. Our example is a slightly modified version of Levinson's. *See id.* at 364-66. The terminology of givings is ours. Levinson refers to "benefits." Levinson presumes that the person from whom the property is taken can be excluded from the benefits. While this presumption is unlikely in our simplified example, it is quite possible in more complex real world situations.

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citizens benefit and only one loses, the taking and givings will take place. The results are summarized in the following table:

TABLE 3. MAJORITARIAN PUBLIC CHOICE MODEL
WITH TAKING COMPENSATION

Citizen	Taking	Benefit	Tax	Compensation	Net Value	Vote
1	-100,000	0	-10,000	100,000	-10,000	No
2	0	11,000	-10,000	0	1,000	Yes
3	0	11,000	-10,000	0	1,000	Yes
4	0	11,000	-10,000	0	1,000	Yes
5	0	11,000	-10,000	0	1,000	Yes
6	0	11,000	-10,000	0	1,000	Yes
7	0	11,000	-10,000	0	1,000	Yes
8	0	11,000	-10,000	0	1,000	Yes
9	0	11,000	-10,000	0	1,000	Yes
10	0	11,000	-10,000	0	1,000	Yes
Society	-100,000	99,000	-100,000	100,000	-1,000	Yes

Levinson concludes that even a compensation regime for takings will not eliminate inefficient takings and majoritarian distortions. A givings regime, however, could eliminate the distortion.¹⁹³ Suppose that Democracy, in addition to paying compensation for takings, would now assess charges for its givings. Each of the nine recipients of the giving would be assessed a charge equal to the value of the giving received (\$11,000). Each of Citizens 2 to 10 would enjoy a benefit of \$11,000 as a result of the park, as before, but each would also have to pay \$11,000 in givings charges as well as \$100 in taxes (to fund compensation for Citizen

193. While Levinson does not suggest a regime for assessing charges for givings, he does acknowledge that if "compensation were financed from a tax on regulatory windfalls, only efficient regulations would win majority support." *Id.* at 366. In Section VI.A we demonstrate the inadequacy of the alternative of taxing givings.

1 in excess of the givings charges), resulting in a net loss of \$100 to each citizen. Citizen 1 would also suffer a net loss of \$100, since she would lose her land worth \$100,000, receive compensation worth \$100,000, and pay taxes in the amount of \$100. Thus, all ten citizens would vote against the proposal, since each would lose \$100. The introduction of a givings charge results in full internalization of the economic effects of one's vote, spreading the loss across the entire population, and leading the citizens of Democracy to reject the inefficient taking and givings. The results are shown by the following table:

TABLE 4. MAJORITARIAN PUBLIC CHOICE MODEL WITH TAKING
COMPENSATION AND GIVING CHARGE

Citizen	Taking	Benefit	Tax	Compensation	Charge	Net Value	Vote
1	-100,000	0	-100	100,000	0	-100	No
2	0	11,000	-100	0	-11,000	-100	No
3	0	11,000	-100	0	-11,000	-100	No
4	0	11,000	-100	0	-11,000	-100	No
5	0	11,000	-100	0	-11,000	-100	No
6	0	11,000	-100	0	-11,000	-100	No
7	0	11,000	-100	0	-11,000	-100	No
8	0	11,000	-100	0	-11,000	-100	No
9	0	11,000	-100	0	-11,000	-100	No
10	0	11,000	-100	0	-11,000	-100	No
Society	-100,000	99,000	-1,000	100,000	-99,000	-1,000	No

A regime for assessing charges for givings thus eliminates the problem of inefficient takings prompted by self-interested decisionmakers and restores the proper incentives for efficient government decisionmaking.

A third type of public choice analysis emphasizing agency problems in decisionmaking in government democracies would sound a more cautionary

note about extensive accounting for givings.¹⁹⁴ This analysis focuses on government bureaucrats as decisionmakers, positing that they are primarily interested in expanding their own budgets as a way of aggrandizing their power. Levinson argues that such bureaucrats will not be deterred from taking by compensation. On the contrary, Levinson posits, compensation expands government budgets without any corresponding increase in responsibility for the bureaucrat, creating a perverse incentive to take too much property.¹⁹⁵ A similar argument might be made regarding givings. Importantly, however, the establishment of a direct compensation channel between givings beneficiaries and takings victims mitigates the bureaucratic agency problem.¹⁹⁶ Direct transfers of money from benefited property owners to harmed ones will diminish the opportunity for government self-aggrandizement.

Accounting for givings generates another desirable result: better information about the distributional effects of government actions. Currently, it is very difficult to determine which individuals, or groups, benefit from governmental redistributions of wealth, and moreover, whether the effect of government policies with respect to property is progressive or regressive. Givings, especially in kind, often go unnoticed, despite their obvious redistributive effects. This, in turn, makes it impossible for constituents to evaluate government performance in this area. Although much public and scholarly attention has been given to the distributional effects of tax policies, taxation is by no means the only instrument of wealth distribution. In fact, focusing on tax alone will create a skewed view of the real effect of government policies, if other forms of givings are ignored. Accounting for all types of givings, as well as takings, is the only way of attaining an accurate view of the net distributional effect of government policies.

194. See, e.g., *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981) (mentioning “the unspoken premise that government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission”); ANTHONY DOWNS, *INSIDE BUREAUCRACY* (1967); WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 5-12 (1971); AARON WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* (4th ed. 1984); William A. Niskanen, Jr., *Bureaucrats and Politicians*, 18 J.L. & ECON. 617, 618 (1975) (constructing a model of bureaucratic supply on the “assumption that the bureau acts to maximize its budget”). *But see* Ian Ayres & John Braithwaite, *Tripartism: Regulatory Capture and Empowerment*, 16 LAW & SOC. INQUIRY 435, 436 (1991) (reporting that the theory of agency or bureaucratic capture “has not seemed to be theoretically or empirically fertile to many sociologists and political scientists working in the regulation literature”); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 121-22 (2000) (arguing that “agency capture is no longer regarded as a valid descriptive theory of bureaucratic behavior”).

195. Levinson, *supra* note 23, at 380-82.

196. See *infra* Section IV.C.

IV. IDENTIFYING AND CHARGING FOR GIVINGS

In this Part, we turn to the task of crafting a possible model of givings. Having established the importance of accounting for givings, we craft a model for creating a law of givings and for incorporating givings into takings jurisprudence. Our model addresses the three essential elements of the law of givings: identifying a giving, creating a mechanism for assessing charges for the givings, and deciding when and how such charges should be assessed.¹⁹⁷

The central aim of this Part is to establish what a giving is, when the government must assess a charge for a giving, and how that charge must be collected. By a “charge” we mean a payment by the recipient, or beneficiary of a giving,¹⁹⁸ in exchange for the benefit received. The concept of charge is the equivalent of compensation in the context of takings. The magnitude of the charge, like the magnitude of compensation, reflects the value of the transferred property interest,¹⁹⁹ but moves in the opposite direction. That is, in givings, as in takings, one side receives a property interest, and the other side receives a payment, i.e., the charge or the compensation award.

As we discuss, not every conferment of a benefit gives rise to a givings charge, just as not every deprivation of a property right calls for compensation. We call the granting of a benefit a “chargeable giving” when the giving must be accompanied by the assessment of a charge. This parallels the accepted terminology of a “compensable taking.”

Rather than adopt an artificially uniform system for charging all givings, we divide the universe of givings according to four conceptual clusters. Each cluster is organized around a characteristic feature of givings and embodies a rule for treating the giving. Our list of conceptual clusters is not exhaustive, but it highlights some central features of a givings jurisprudence.

Methodologically, we frame our four clusters around their primary characteristics. Our first cluster is organized around the symmetry between givings and takings. The second looks to the number and character of beneficiaries of the giving. The third examines the relationship between the

197. At the outset, we must acknowledge the important groundwork laid by Donald Hagman and Dean Misczynski’s collection *WINDFALLS FOR WIPEOUTS*, *supra* note 3, which explored the possibility of establishing a system of compensation for takings (including regulatory takings) to be funded by revenues raised from taxing or collecting fees from givings recipients. *Windfalls for Wipeouts* notes many historical schemes related to givings charges in the United States and other countries, and we incorporate those insights into our recommendations in this Part, and, later, in our discussion of alternatives to charges for givings in Part V.

198. We use the terms “recipient” and “beneficiary” interchangeably.

199. Valuation of the measure of compensation might be accomplished by a number of different metrics, such as market value or willingness to sell. We discuss valuation questions in Part V. A fuller analysis is beyond the scope of this Article.

givings and attendant takings. Finally, the fourth focuses on the ability of the beneficiary to refuse the giving.

A. *A Giving or a Taking: Reversibility of the Act*

Eliminating all possibility of government distribution of benefits or subsidies would mean a radical change in our conception of the role of the state in creating and distributing wealth. That is not our aim. Therefore, a central goal of a workable givings jurisprudence must be to distinguish between chargeable givings and nonchargeable distribution of benefits—in other words, to distinguish “between intentional redistribution [on the one hand] and the imposition of gains and losses as an incidental, and sometimes unavoidable, side-effect of government action [on the other].”²⁰⁰

We propose that this line dividing chargeable givings from nonchargeable distributions should mirror the line between compensable takings and noncompensable deprivations of property. Unfortunately, the line between compensable takings and noncompensable deprivations of property is notoriously fuzzy,²⁰¹ and the same fuzziness will blur the line between a nonchargeable subsidy and a chargeable giving. Notwithstanding this fuzziness, a formidable body of case law and scholarship has developed around the identification of compensable takings, and this knowledge can be put to use in identifying chargeable givings. The manner of doing so is a straightforward principle: A giving is chargeable if its inverse would constitute a compensable taking.

We develop this principle by examining several possible types of property grants that, when reversed, produce noncompensable deprivations of property. The first of these types is a prize. A prize is properly seen as the reverse of a penalty. It is the award of a government benefit in response to socially beneficial activity.²⁰² Instances of government prizes include grants for the study of disease or merit scholarships for university study. Government versions of such private sector prizes as Nobel Prizes and Pulitzer Prizes would similarly fall in this category. A prize’s inverse analogue is the penalty, imposed upon socially harmful activity.²⁰³ Just as

200. Kaplow, *supra* note 3, at 519.

201. *See supra* Subsection II.A.2.

202. *See* Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 62 (1992) (suggesting that prizes are cultural means of solving public-good market failures).

203. *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 73-84 (1983); POSNER, *supra* note 27, at 220-22; Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170-80 (1968); Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1466-68 (1979); William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 655 (1983); A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880, 880 (1979); George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970).

the penalty is not considered a compensable taking,²⁰⁴ the prize should not be seen as a chargeable giving. When the government rewards socially beneficial activity, no charge should be assessed. The reason for this treatment is two-fold. First, to require the payment of a charge for a prize would defeat the purpose of the government action. The prize is granted in order to lead actors to internalize positive externalities caused by their actions. Payment of a charge would eliminate the incentive and social benefit produced by the prize. Second, the granting of a prize to produce widespread social benefits transforms the nature of the government benefit from a giving to an individual to a benefit to society at large. As we discuss in the next Section, benefits to the wider public generally should not be considered chargeable givings.²⁰⁵ Both of these rationales assume that the prize is proportionate to the social benefit. Where prizes are grossly excessive, the excessive portion should be treated as a chargeable giving, just as grossly excessive penalties are not validly treated as penalties.²⁰⁶

The prize exception is intended to be a narrow one. One possible way to safeguard against wrapping givings in the clothing of prizes is to examine whether the criteria for granting the prize were established *ex ante* or *ex post*. Another is to check whether the criteria for awarding the prize are of general applicability or, rather, whether they are specifically tailored to suit a particular beneficiary. Finally, the magnitude of the prize may be examined in relation to the purported social benefit it is intended to reward.

Another type of nonchargeable giving can be derived by analogy to taxes. Just as some direct seizures can be seen as taxes rather than compensable takings, some direct grants should be seen as nonchargeable. Consistent with the power of the government to tax for purposes of redistribution, we do not look askance at large scale and nontargeted conferment of benefits for redistribution. Specifically, we do not believe that the goal of takings and givings law is to eliminate welfare programs and similar government redistributions of wealth.²⁰⁷

204. The distinction between a taking and a penalty has been recognized since the days of Grotius. HUGO GROTIUS, *THE LAW OF WAR AND PEACE* bk. II, ch. XIV, § VII, at 385 (Francis W. Kelsey trans., Oxford Univ. Press 1925) (1625).

205. *See infra* Section IV.B.

206. *See, e.g.*, *United States v. Bajakajian*, 524 U.S. 321 (1998) (holding that a large civil forfeiture may constitute an excessive fine); *Austin v. United States*, 509 U.S. 602 (1993) (same). In our system the treatment of penalties and prizes is not entirely symmetrical, in that excessive prizes are not completely barred, but are charged in the amount of the excess. We discuss later the reason for assessing charges, rather than outlawing excessive givings. *See infra* Section VI.D.

207. *Cf. EPSTEIN, supra* note 3.

B. *One or Many: Identifiability of the Recipient*

The distinction between taxes and takings provides guidance for another givings principle. Saul Levmore has noted that a useful way to determine when takings require compensation is to examine the number of people affected by the government action. On Levmore's view, when the government singles out condemnees, compensation is presumptively required. However, a broad taking from the public at large should not require compensation.²⁰⁸ By the same token, we posit that a giving to a single beneficiary should presumptively give rise to a charge. When, by contrast, the government action affects the broader public, there is more reason to view it as a tax or a noncompensable regulation.²⁰⁹ Likewise, when the government action benefits the public at large, the need for assessing a charge is presumptively weaker.²¹⁰

An important caveat is in order here, however. One must bear in mind that tax burdens may not be distributed uniformly over the relevant group members; some members may be disproportionately burdened relative to others.²¹¹ The same may be true of givings. Even when a giving benefits the broad public, the benefit to some members may far exceed the benefit to others.²¹² Public choice theory suggests that those standing to benefit disproportionately from the giving have a strong motivation to engage in political rent-seeking in order to ensure that the giving is effected.²¹³ Thus, in addition to examining whether a giving affects one or many, it is also necessary to examine how the benefits of a giving are distributed over the group of beneficiaries. If the distribution is uniform, no charge should be assessed. As the distribution becomes increasingly skewed, however, there is greater reason to view the giving as singling out particular beneficiaries, and consequently, the *prima facie* case for assessing a charge becomes stronger. Finally, it is also important to consider the randomness of the

208. Levmore, *supra* note 66, at 1348 (“Compensation for a governmental intervention will be required when a politically unprotected loser is singled out and when there is a close substitute in the form of a private purchase.”); *see also* Bell & Parchomovsky, *supra* note 8, at 315 (noting that “few have systematically explored the idea that when the burden of a government action falls on a sufficiently broad public in roughly equal proportions, the action is better characterized as a tax than as a taking”).

209. *See* Levmore, *supra* note 66, at 1348.

210. Obviously, many actions lie on the continuum between the paradigmatic giving to a single individual and a giving to the public at large. We discuss these cases after examining the two extreme scenarios of singling out and benefiting the public at large.

211. Sometimes, the relative equality will have to be equal treatment with regard to economic circumstances rather than equal per capita treatment. An example of such treatment is provided by the progressive income tax. The givings analogue is welfare payments to the indigent.

212. The Yazoo land frauds provide an apt example of this. *See supra* notes 135-136 and accompanying text.

213. *Cf.* Donald J. Kochan, “Public Use” and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49 (1998) (calling for a reinterpretation of the Takings Clause to reduce private rent-seeking).

distribution of benefits. As the benefits are more randomly distributed, the likelihood of improper interest-group capture is correspondingly less.

The singling-out principle is the core of Levmore's distinction between the compensable and the noncompensable. Levmore's primary justification for the singling-out principle lies in the realm of public choice theory. The principle, however, can be justified as well on grounds of fairness. We begin with fairness before proceeding to Levmore's justification.

As the famous formulation in *Armstrong v. United States* put it, the essential fairness principle embodied in the Takings Clause is that one person should not be forced "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."²¹⁴ It is evident, therefore, that when the burden is borne by the public as a whole, this fairness criterion has not been violated. While the *Armstrong* rule tells us neither when the public as a whole ought to bear the burden nor when the burden has fallen on the public as a whole, *Armstrong's* fairness criterion clearly militates against singling people out. As we explained earlier,²¹⁵ the *Armstrong* fairness principle applies with equal force to givings. It would be unfair for an individual to enjoy a benefit at society's expense, when the benefit should, in all fairness and justice, be enjoyed by society as a whole. It is only when the state bestows an identical benefit on every member of the public, and when we assume that the state is a proxy of the entire public, that we can characterize the giving as nothing more than a transfer from the public to itself. It would be wasteful under such circumstances for the public to charge itself for the giving.

This result is underscored by a public choice analysis. From a public choice perspective, politics is driven by rent-seeking.²¹⁶ When the public as a whole is the beneficiary of a giving in equal parts, it is insensible to speak of rent-seeking. However, absent such parity in the distribution of benefits, political decisions may be attributed to factional rent-seeking.

Minoritarian interest-group rent-seeking is well-documented. *Poletown*, as we have shown, is best understood as a giving to General Motors at the expense of the public. Givings to private sports franchises, politically connected real estate developers, and gambling interests²¹⁷ provide other commonplace examples of givings prompted by minoritarian rent-seeking. These groups share an organizational and financial ability to influence the political process to their benefit. Acting as self-interested utility maximizers, such groups are able to outmaneuver diffuse political

214. 364 U.S. 40, 49 (1960); *supra* Section III.A.

215. *Supra* Section III.A.

216. To provide a complete picture, there is also a third possibility of rent-seeking: rent-seeking by bureaucrats. We seek to curb this type of rent-seeking by matching givings with takings. *See infra* Section IV.C.

217. *See* Kochan, *supra* note 213, at 76-78.

opponents whose ability to take advantage of their larger numbers is hampered by high coordination costs. Naturally, minoritarian rent-seeking leads to the enrichment of the better organized groups at the expense of the larger public. Forcing interest groups to pay a fair charge for the benefits they receive is an effective way to curb minoritarian rent-seeking. Doing so will not only benefit the public financially, but will also improve the political decisionmaking process in the long run. Moreover, forcing interest groups to pay will diminish their incentive to influence political processes, which will reduce in turn the deadweight loss stemming from political lobbying and counter-lobbying.²¹⁸

Obviously, factional rent-seeking may be majoritarian as well. Less glamorous land-use decisions, such as ordinary suburban zoning, are less likely to fall prey to minoritarian rent-seeking, but are far more likely to attract majoritarian rent-seeking.²¹⁹ Although in such cases singling out of givings beneficiaries is rare, the giving is likely to be accompanied by the singling out of the victims of takings. Consider, for example, *Kinzli v. City of Santa Cruz*.²²⁰ Kinzli owned an undeveloped tract of land in a rapidly developing suburb. After neighboring landowners profited from the development, they adopted a “greenbelt” plan, barring further development and preventing Kinzli from developing his land. The result can be characterized as the singling out of Kinzli for a regulatory taking in order to grant derivative givings to a majority faction of landowners who had already profited from previous development. The ability of suburban majorities to abuse the zoning process to extract rents for majority factions has been widely noted, especially in the context of exclusionary zoning.²²¹ In these cases, as we note later, the best remedy is to be found in takings compensation, rather than givings charges.²²² For example, in *Kinzli*, assuming that the environmental plan conferred roughly equal benefits to all homeowners, there would be no need to assess charges against all givings recipients since the larger public benefited from the derivative givings in the form of the “greenbelt.” However, as the taking did not fall on the larger public, payment of compensation would be warranted under the singling-out principle. Since takings compensation comes out of the public fisc, the

218. See, e.g., Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 295-96 (1974) (analyzing the efficiency effects of political lobbying); Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 809 (1975) (same).

219. See FISCHER, *supra* note 4, at 233.

220. 620 F. Supp. 609 (N.D. Cal. 1985), *rev'd on other grounds*, 818 F.2d 1449 (9th Cir.), *amended*, 830 F.2d 968 (9th Cir. 1987).

221. E.g., FISCHER, *supra* note 4, at 233; CHARLES M. HAAR, *SUBURBS UNDER SIEGE* (1996); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 695 (1973).

222. See *infra* Section IV.C.

recipients of the benefit indirectly sponsor the compensation to the singled-out property owner.

An important caveat should be inserted at this point. If the majoritarian rents are of such a nature that the majority may exclude the minority from participation in the benefits of givings, the givings should no longer be immune from charge. For example, if *Kinzli* involved a mechanism for excluding Kinzli himself from enjoyment of the greenbelt, charges for the givings would be necessary alongside compensation for the taking.²²³ Such cases are rare, but certainly within the realm of possibility. For example, a majority may allow itself expansive building rights, while denying similar rights to a minority of homeowners in order to preserve scenic views or other benefits that would accrue only to the majority.

Our analysis implies the following general principle. Considerations of fairness and minoritarian rent-seeking mandate assessment of charges for givings to individuals or to discrete interest groups. We emphasize that we exclude from this general principle givings to discrete minority groups that purport to compensate such groups for past wrongs. In such cases, the giving should properly be viewed as compensation for past takings or deprivations and should not be classified as a benefit.

C. *Give and Take: Proximity of the Act to a Taking*

In this Section, we turn to the relationship between givings and takings for further guidance in determining whether and how to assess charges for givings. Both of our previously enunciated principles—givings that cannot be characterized as inverse takings should not give rise to charges, nor should widely and equally distributed givings—involve questions of takings as well as of givings. This is hardly surprising in light of the intimate connection between givings and takings. As we have shown, the connection between takings and givings extends beyond theory; takings cases almost invariably involve givings as well. We now show that the relationship between givings and takings can be specifically adapted to the question of when and how to assess charges for givings. We note that this relationship also played a key role in Hagman and Misczynski's "windfalls for wipeouts" proposals.²²⁴

Indeed, even though current takings jurisprudence does not explicitly recognize the concept of givings, it looks to the relationship between givings and takings for an important guideline in determining eligibility for

223. See *supra* Section III.C.

224. Donald G. Hagman & Dean J. Misczynski, *Recommendations, in WINDFALLS FOR WIPEOUTS*, *supra* note 3, at 26, 31.

compensation.²²⁵ For instance, the average reciprocity of advantage doctrine, enunciated by Justice Holmes in *Jackman v. Rosenbaum Co.*²²⁶ and *Mahon*,²²⁷ establishes that no takings compensation is warranted where the government action works an average reciprocity of advantage, i.e., it creates diffuse public benefits to all, including the owner whose property is taken.²²⁸ The underlying logic is that both the wealth-enhancing (giving) and wealth-diminishing (taking) elements of government action must be taken into account in determining compensation. Following the same logic, we argue that in determining the amount of compensation to be paid or charge to be assessed, the total value of givings and takings must be taken into account. Takings compensation must be reduced by the value of attendant givings received by an owner, and givings charges must be reduced by the value of attendant takings. Moreover, in some cases, when givings can be specifically tied to takings, it may be appropriate to channel both into a scheme of private takings, such as the one described in *Hawaii Housing Authority v. Midkiff*.²²⁹

The relationship between takings and givings suggests two principles for determining charges. First, it implies consideration of the overall effect of government actions, i.e., both harms and benefits. Second, it implies that when compensable takings are associated with chargeable givings, the recipients of the giving should compensate the victims of the taking.

A natural starting point for our discussion is the benefit-offset principle of the nineteenth century. Under this principle, the government (or private agents empowered to take by eminent domain) would reduce compensation paid for takings by the value of the benefits that accrued to the aggrieved homeowner as a consequence of the government action.²³⁰ For example, when a railroad laid track through farmland, the value of all surrounding farmland would rise. Using delegated powers to take through eminent domain and applying the benefit-offset principle, railroads would take farmland in order to lay track and then reduce the amount of compensation by the value of the benefit to the owner's remaining farmland.²³¹

The benefit-offset principle was a more sophisticated version of today's average reciprocity of advantage doctrine, incorporating several elements

225. See generally *supra* Section II.C (documenting the relationship between givings and takings).

226. 260 U.S. 22, 30 (1922).

227. 260 U.S. 393, 415 (1922). For a historical review of the concept, see Oswald, *supra* note 89, at 1490-510.

228. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

229. 467 U.S. 229 (1984).

230. The benefit-offset principle allowed the government to reduce the compensation to property owners claiming a taking by the amount of the benefit that the taking conferred on the owners' remaining property. *Supra* note 37. For a discussion of the benefit-offset principle, see FISCHER, *supra* note 1, at 80-84.

231. *Id.* at 80-89.

lost in the later doctrine. First, while not using the term givings, the benefit-offset principle aggregated the total value of the derivative giving and physical taking in order to determine the amount of compensation. By contrast, the average reciprocity of advantage doctrine is binary. It determines either that there is a rough reciprocity, negating the finding of a regulatory taking and eliminating the need for compensation, or that there is no such reciprocity, whereupon compensation will be based solely on the value of the taking, while the giving is ignored.²³² Second, the average reciprocity of advantage doctrine is only understood to apply to regulatory takings and not to physical takings (or derivative takings).²³³ The benefit-offset principle, on the other hand, was applied specifically to physical takings.²³⁴

Despite its relative advantages, the benefit-offset principle remained clumsy and inadequate. First, the principle served only to reduce compensation for takings. Thus, property owners who received givings in excess of the value of the taking, or from whom no property was taken at all, paid no charge.²³⁵ Second, the principle left open the possibility of other unaccounted-for givings and takings effects, such as the adverse effects of derivative takings.²³⁶ In the particular setting in which the benefit-offset principle was applied, unaccounted-for givings posed the more daunting problem. The railroads, for whose benefit the property was taken, increased the property values of all surrounding farmland. Applying the benefit-offset principle to takings compensation, while ignoring the derivative givings bestowed upon all neighboring owners whose land was not physically affected, led to an odd outcome. A charge was assessed only on property owners who suffered the brunt of the government actions: those whose land was actually seized. All others received the giving free of charge.²³⁷

232. See Coletta, *supra* note 38, at 321.

233. *Id.* at 356.

234. As *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), had not yet recognized regulatory takings, it is not surprising that the benefit-offset principle was not applied in that context.

235. See FISCHER, *supra* note 1, at 85-89.

236. Cf. Bell & Parchomovsky, *supra* note 8, at 290 n.52 (discussing the distortion arising from failure to take into account full costs and benefits).

237. FISCHER, *supra* note 1, at 82-83; *supra* Subsection II.C.2. Other commentators criticized the benefit-offset principle on the ground that it unfairly subsidized railroads. See, e.g., Scheiber, *supra* note 37, at 364-68. This would have been true only if there were other uncompensated takings that outweighed the uncharged givings, or if the actual values of the givings and takings were measured inaccurately. Although the former explanation is belied by the historical evidence, the latter is a real possibility. The accurate measurement of values enhanced or diminished by givings or takings is of obvious importance for the proper functioning of the law. See FISCHER, *supra* note 1, at 80-89. Issues of the adequacy of the yardsticks for measuring takings (and, by implication, givings) are beyond the scope of this Article. See *infra* Section V.B.

The benefit-offset principle's shortcomings ultimately doomed it, despite its periodic resurfacing.²³⁸ Nevertheless, an updated benefit-offset principle is an important asset of any proper application of a law of givings. The intuition underlying the benefit-offset principle is correct: Any payment in compensation for a taking must be reduced by the value of the giving to the property owner.²³⁹

A complementary detriment-offset principle must be used in the law of givings. Any charge for a giving must be reduced by the absolute value of the taking to the property owner. Nevertheless, care must be taken to avoid the one-dimensionality that undid the benefit-offset principle. Assessing charges for all givings to all property owners would undo the core unfairness of the nineteenth-century version of the benefit-offset principle. Additionally, the updated principle must take into account all three types of givings and all three types of takings in order to lead to just and efficient results.

Unified treatment of givings and takings need not be restricted to cases where the giving beneficiary and taking victim are the same person. Sometimes the takings and givings are intimately linked, and the givings recipients sufficiently well-identified and discrete, such that takings compensation and givings charges can best be taken care of by having beneficiaries make payment directly to victims. *Poletown*²⁴⁰ provides a particularly salient example. The obvious beneficiary of the physical giving was General Motors; the victims of the physical takings were numerous homeowners in Poletown. Direct compensation from General Motors to the homeowners would have eliminated an unnecessary public subsidy to the auto company and might have led General Motors to reevaluate whether the Poletown facility was cost-effective.

Indeed, the proper course in cases such as *Poletown* is to aggregate the givings and takings and reinterpret the total government action as a government-mediated private taking. In a private taking, the government empowers a private individual or organization, such as a utility company, to take property by using the government's power of eminent domain, while

238. *E.g.*, *Bookman v. N.Y. Elevated R.R.*, 41 N.E. 705 (N.Y. 1895); *Bohm v. Metro. Elevated Ry.*, 29 N.E. 802 (N.Y. 1892); *Newman v. Metro. Elevated Ry.*, 23 N.E. 901 (N.Y. 1890); *see also* Charles M. Haar & Barbara Hering, *The Determination of Benefits in Land Acquisition*, 51 CAL. L. REV. 833 (1963) (discussing the use of benefit-offset to finance highway construction).

239. We assume here that the taking and giving are properly aggregated into a single transaction. Daryl Levinson argues that the boundaries of "transactions" are difficult to identify and that a course of interactions between individuals and the government that takes place over an extended period of time ought nevertheless to be viewed as a single transaction in many contexts. Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. (forthcoming 2002).

240. 304 N.W.2d 455 (Mich. 1981).

remaining subject to the requirement of just compensation.²⁴¹ While the notion of private takings may sound exotic or corporatist, the technique is widespread, and past examples of private takings fall on various points along the political spectrum. For example, *Hawaii Housing Authority v. Midkiff*²⁴² involved a Hawaii statute that achieved land reform by allowing tenant farmers privately to take land from large landowners. Private takings by railroads were commonly permitted in the nineteenth century.²⁴³ As long as all the relevant givings and takings are accounted for, the private taking should create significant savings in transaction costs by substantially reducing the largely unnecessary intermediary role of the government.

The rendering of compensation by givings recipients to takings victims in cases of government-mediated private takings is mandated not only by efficiency principles but also by the demands of corrective justice.²⁴⁴ Corrective justice requires that individuals who wrong others compensate the victims for their losses.²⁴⁵ Wrongs consist of actions that harm or invade individual rights or the legitimate interests of others.²⁴⁶ When individuals or corporations enlist government power to transfer property from other owners to themselves, they should be held responsible for the losses they inflict. The involvement of the government should not blind one to the underlying quasi-tortious situation—the taking of one’s private property by another. The private taking power should not be granted lightly. This power has its drawbacks. A private taking power is a potent tool that transforms property-rule protection into liability-rule protection.²⁴⁷ It should only be

241. A private taking, also known as a private condemnation, is “the taking of private property by a private individual for a public use.” Kent M. Brown, Casenote, *Cohen v. Larson: The Idaho Constitution and the Right of Eminent Domain*, 31 IDAHO L. REV. 623, 624 (1995); *supra* note 36 and accompanying text.

242. 467 U.S. 229 (1984).

243. FISCHER, *supra* note 1, at 80-89.

244. While there is no single universally accepted definition of corrective justice, in a recent article, Gregory Keating characterized it as follows: “First, it applies to human agency, not, say, to natural misfortunes. Second, it is concerned with repair or rectification. Third, it is concerned with rectifying some kind of wrongdoing—with ‘wrongful losses’ in Coleman’s case. Fourth, it involves correlativity.” Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 197 (2000) (citing Jules L. Coleman, *The Practice of Corrective Justice*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 53, 66-67 (David G. Owen ed., 1995)). Given this list, it is not surprising that tort law has captured the attention of corrective justice theorists. Notable accounts grounding tort law in principles of corrective justice include JULES L. COLEMAN, *RISKS AND WRONGS* 303-28 (1992); ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 24 (1999); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 56-83 (1995); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); and George P. Fletcher, *Fairness and Utility in Torts Theory*, 85 HARV. L. REV. 537 (1972). For a critical review of the attempts to base tort law on corrective justice, see Benjamin Zipursky, *Civil Recourse, Not Corrective Justice* (2000) (unpublished manuscript, on file with authors).

245. COLEMAN, *supra* note 244, at 332 (“Corrective justice imposes the duty to repair wrongful losses.”).

246. *Id.* (“Wrongs are actions contrary to rights.”).

247. Property-rule protection confers upon the entitlement-holder the exclusive power to determine the price nonholders would have to pay for using the protected asset or right. Thus, all

used to promote important societal goals, and not to redistribute wealth from one individual to another.

The relationship between givings and takings thus produces two distinct principles of importance for an understanding of givings. First, payment of compensation for a taking, or assessment of a charge for a giving, should reflect the net effect of all givings and takings befalling the property owner. Compensation, if any, should reflect the net property loss occasioned by the aggregated takings offset by the aggregated givings. Charges, by the same token, must incorporate the net value of the benefit to the property, after the aggregated givings are offset by the aggregated takings. Second, where linkage between the giving and taking is sufficiently clear, the number of givings beneficiaries and takings victims is sufficiently small, and the givings and takings sufficiently measurable, compensation and charge should be made directly between the parties to the extent feasible. In some cases, this may take the form of direct authorization of a private taking.

D. *Take It or Leave It: Refusability of the Benefit*

Our fourth, and final, conceptual cluster is organized around a principle we extract from the law of gifts and unjust enrichment. Both bodies of law require voluntary acceptance by the recipient of the benefit.²⁴⁸ The rationale for this requirement is straightforward. The law does not force people to accept benefits against their will. The underlying goal of the voluntary acceptance requirement is to prevent forced transactions in which professed “benefactors” involuntarily impose “benefits” on others and later demand the recipients pay. Forcible extraction of a payment in exchange for an involuntary “gift” may carry the odor of extortion.²⁴⁹

transfers of entitlements protected by a property rule must be consensual; all attempts to transfer the entitlement nonconsensually would be met with an injunction. Liability rule protection, by contrast, gives the nonholder the power to take the entitlement without the consent of the entitlement-holder and pay a price to be determined by a third party, typically a court or the legislature. The entitlement-holder would not be able to enjoin third parties from taking her entitlement; instead, she would have to settle for damages. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

248. Paul Wangerin argues:

Defendants who are the recipients of gifts, for example, clearly are enriched. However, that enrichment is clearly not unjust. . . . The same thing is true regarding “volunteers.”

If a person voluntarily provides something to another, the other may well be enriched.

But, because of the voluntariness, the enrichment is not unjust.

Paul T. Wangerin, *The Strategic Value of Restitutionary Remedies*, 75 NEB. L. REV. 255, 272 (1996).

249. Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 202 (1992) (“Because restitution defendants are usually passive rather than active recipients of others’ actions, courts are reluctant to impose liability upon them. . . . [T]he very paradigm of corrective justice is best described as a relationship between ‘doer’ and ‘sufferer.’ Imposing liability on a non-doer requires special justification.”).

Suspicion about the propriety of forced transfers is grounded in foundational assumptions about morality and efficiency. Primary among these is the belief in the moral autonomy of individuals, and confidence in their right and ability to make decisions that promote their own interests.²⁵⁰ When a would-be beneficiary refuses to accept a transaction that the “benefactor” deems to be in the beneficiary’s best interests, respect for the beneficiary’s autonomy and decisionmaking capacity dictates deference to her decision.

The framework of put and call options provides a useful lens through which to see the relationship between givings and takings and the importance of voluntary acceptance.²⁵¹ A call option creates the power to purchase an asset from a specific seller at a later time; a put option is an option to force a sale in the future. The call or put eliminates the need for future acceptance by the call seller or the put buyer. Instead, the call seller or put buyer grants her acceptance upon creation of the option, allowing the “caller” (the call buyer) or the “putter” (the put seller) to make a future offer with acceptance assured. The call or put option generally specifies an “exercise price,” i.e., the price at which the option-holder can buy or sell the underlying asset.²⁵²

Seen in this light, the power of eminent domain is a call option in the hands of the government. All property is subject to the government power to “call,” i.e., the power to force a sale to the government. The exercise price to be paid by the government is “just compensation” (under current doctrine, the objective market price of the property).²⁵³ The giving power, in this framework, is equivalent to a put option. Remarkably, under current law, which does not fully recognize the concept of givings, the exercise price of the government’s put option is zero. That is, the government can bestow valuable benefits, but the recipients are not required to pay for them.

Because the creation of government call and put options is by operation of law, such options lack the consensual basis of commercial options. Individual property owners have granted the government neither the power to take, nor the power to give.²⁵⁴ The government must therefore exercise these options with great caution. The reason to be even more cautious about givings than about takings is grounded in notions of autonomy. In the context of takings, the government may prefer its judgment to that of the

250. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 62-66, 93-95 (H.J. Paton trans., Harper Torchbooks 1948) (1785).

251. We are indebted to Ian Ayres for this insight.

252. See Ian Ayres, *Protecting Property with Puts*, 32 VAL. U. L. REV. 793 (1998) (discussing and evaluating protection of property rights with put and call options).

253. *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (Posner, J.).

254. Presumably, it is the polity of which the owners are a part that has empowered the government to give and take.

individual property owner since the government, subject to the discipline of the Takings Clause, represents the interest of the public, whereas the harmed property owner only considers her own interest.²⁵⁵ In the context of givings, on the other hand, the intended beneficiary is the property owner who receives the giving. The receiving property owner is thus the best judge of whether the giving actually constitutes a benefit, and her right to make her own decisions about her own welfare should be respected.

Implementing an acceptance requirement in the law of givings leads us to the following rule: If a giving is refusable and the beneficiary accepts it, she should pay the charge upon receipt. If, on the other hand, the giving is not refusable, payment of the charge should be deferred until a future realization event transpires.²⁵⁶ If the benefit is permanently refused and realization never occurs, no charge should be assessed.

Consider the following example. The City of Gro decides to upzone one of its neighborhoods by granting all the residents the possibility of adding two extra floors to their houses. Harriet Height, who has been waiting for years for the possibility of adding an upper floor to her low-slung, ranch-style home, decides to avail herself of the giving immediately. Her more cautious neighbor Lea Low has no need of the extra space and has no desire to alter her dwelling. Under our proposed rule, Harriet will be assessed a charge for the giving immediately, while Lea will not be assessed any charge at present. However, should Lea or her successors in interest decide to build in the future, they will have to pay a charge at that time.

Sometimes, realization will be more difficult to determine. Imagine that Gro now decides to convert a large landholding into a nature preserve, raising the value of all neighboring property owners. Denise Dale, Elise Evergreen, and Francine Forest are ecstatic about the new preserve, but Geraldine Grouch dislikes the new greenery. In this case, the benefit is not refusable. There is no way to grant the benefit to Dale, Elise, and Francine, while preserving for Geraldine an option to refuse. The moment the benefit is created, all affected neighbors receive a financial benefit; the benefit in this case is nonexcludable. Once she is outvoted by the other residents, Geraldine will have no power to reject the financial benefit created by the new preserve. Our rule dictates that the charge for this nonrefusable benefit be deferred until its value is actually realized—for example, by sale of the property. Geraldine will enjoy the same financial benefits upon sale of the property as her neighbors, and at that time, she should pay the same charge.

255. As we noted earlier, public choice theory disputes the Pigouvian view of government and requires the discipline of the Takings Clause to prevent excess use of the power of eminent domain. *Supra* Section III.C.

256. Realization is the conversion of property into money. BLACK'S LAW DICTIONARY, *supra* note 102, at 1271.

By the same token, since the giving is nonrefusable, Denise, Elise, and Francine should not be punished for their external manifestation of support for the nature preserve, and they too should be asked to pay only when they realize the gain.²⁵⁷

This last example highlights a common aspect of takings and givings. In both cases, an element of coercion is necessary to overcome potential holdout problems.²⁵⁸ In the context of takings, property owners might hold out in order to extract greater payment from the government. In the context of givings, property owners might hold out to extract higher payments from their neighbors. In our example, if Geraldine could refuse the giving, she could abuse her refusal power to force her neighbors to pay for the benefit she receives. It is to alleviate the risk of such strategic behavior that the government is granted the extraordinary power to take and the power to give.²⁵⁹

Our discussion may be summarized as follows. In principle, recipients of givings should not be forced to pay a charge if they elect to refuse the giving. If the giving is nonrefusable, all beneficiaries should be permitted to defer payment of the charge until a later realization event, typically a sale of the property.

V. PAYING FOR GIVINGS

In this Part, we translate the conceptual clusters of givings into a basic working model for identifying, assessing, and collecting charges for givings. Our central purpose here is illustrative. That is, we propose this model in order to demonstrate how a law of givings can be formulated and implemented. We do not foreclose the possibility of other models of administering the law of givings.

Our model uses our conceptual clusters to craft the three central pillars of the law of givings: identification, assessment, and collection. At the identification stage, the government recognizes that a chargeable giving has taken place, and it issues a notice of giving to the beneficiary. In the assessment stage, the beneficiary assesses the value of the giving for the purpose of paying the charge. In our model, assessment can take place immediately upon receipt of the notice of giving, or at some later time when the charge is collected. In the third and last stage, collection, the government collects the charge for the giving in accordance with the

257. Our rule would function in a manner not dissimilar to realization rules for taxes of capital gains. *See* *Comm'r v. Gillette Motor Transp., Inc.*, 364 U.S. 130 (1960).

258. For a discussion of the holdout problem in the context of takings, see Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 749-61 (1986).

259. EPSTEIN, *supra* note 1, at 164-66.

giving's assessed value. Depending on the character of the giving, collection is either made upon receipt of the benefit or triggered by a realization event, such as sale of the benefited property.

A. *Identifying Chargeable Givings*

The first stage in the givings process, after a government decision to confer a benefit, is the determination of whether a chargeable giving has occurred. Answering this question requires using the first two of the four conceptual clusters presented in the previous Part. For a giving to be chargeable, the character of the government act—its singling out of beneficiaries²⁶⁰ or, more generally, its character as an inverse taking²⁶¹—must properly be seen as a chargeable giving. Unfortunately, the determination relies upon judgments of degree, like decisions about whether deprivations of property constitute compensable takings.

Once the government determines that the conferment of a benefit is a chargeable giving, it should give notice to all beneficiaries that they have received a giving and that it is chargeable. In the notice of giving, the government should also state whether the charge for the giving is immediately payable or is deferred until a later realization. Obviously, the timing of the assessment affects the magnitude of the charge. An upzoning, on its own, does not entitle property owners to start building. There are numerous other obstacles property owners must clear before they receive a building permit. Thus, an assessment that follows immediately after a zoning change will invariably be lower than one submitted following realization, reflecting discounting due to uncertainty. The decision whether to charge immediately or defer charge until realization must be made in accordance with the process we describe in our discussion of the collection stage.²⁶²

B. *Assessing Givings*

There are two possible models of assessing givings. The first, and perhaps more conventional one, places the burden of assessing givings on the government. The second, utilizing various methods of self-assessment, places the burden on givings recipients.

The key to the assessment process is to determine the market value of the benefit bestowed. For example, in the case of a physical giving, the charge should be the sale price of the property given or similar property.

260. See *supra* Section IV.B.

261. See *supra* Section IV.A.

262. See *infra* Section V.C.

With respect to regulatory or derivative givings, standard methods of property appraisal should be employed to determine the amount due.

Complications set in where there is a significant divergence between the market value and one or both of the subjective government or beneficiary values. In such cases, the general rule should be that the person choosing to carry out the transaction should pay the full subjective value of the property in the hands of the nonchooser. Thus, for a taking or a giving, the general rule would prescribe government compensation or charge of the full subjective value of the property in the hands of the citizen losing or receiving the property. The rationale is that since the nonchooser has no choice in the matter, the chooser should have to internalize the full value to the nonchooser in order to ensure that the transaction is worthwhile. In a recent article, however, Ian Ayres and Paul Goldbart argued that where the recipient has an option to refuse the benefit the general rule should no longer apply. This is due to the fact that setting the charge at the full subjective value of the nonchooser would eliminate the incentive of the nonchooser to accept the taking or giving. Rather, the optimal exercise price is obtained at a price somewhere between the value to the chooser and the value to the nonchooser.²⁶³ According to Ayres and Goldbart's analysis, then, the charge assessed for a giving should be the average of its value to the government and to the recipient, unless the giving is nonrefusable. For nonrefusable givings, Ayres and Goldbart would assess a charge of the full value to the recipient.

Under the model of government assessment, the government would inform givings recipients that a giving has occurred by sending them a notice of giving. The notice would also specify the amount due from each recipient. The government can assess the charge at one of two times—either within a reasonable period of time after sending a notice (for example, until the next income tax filing deadline) or, if realization of the giving is deferred to a later date, at that time. The advantage of imposing assessment responsibility on the government is that in many cases government assessment will reduce the administrative cost of charging for givings because the same assessment applies to multiple recipients. Rather than forcing 100 recipients of an upzoning to obtain their own appraisal of the market value of the benefit received, the government can appraise the benefit and inform all recipients of the amount due.²⁶⁴ Moreover, because the government employs appraisers for tax and other purposes, it may be able to obtain appraisal at a lower cost. The assessment of local government

263. Ian Ayres & Paul M. Goldbart, *Optimal Delegation and Decoupling in the Design of Liability Rules*, 100 MICH. L. REV. (forthcoming 2001) (discussing the possibility of “dual chooser rules,” which allow either party to a transaction to veto the transfer of an entitlement).

264. Of course, the government can spread the cost of obtaining the appraisal over the group of beneficiaries.

assessors may serve as the benchmark for charges. Admittedly, these assessments are not fully accurate.²⁶⁵ Yet, they already form the basis for tax liability. Furthermore, assuming that the ratio of underassessments to overassessments is roughly equal—and we have no reason to assume otherwise—on average, the two effects will cancel out, and the government will collect the amount due.

Government assessment is not the only possibility. The market value of the giving need not necessarily be determined by the government; it may also be determined by the recipient of the giving through self-assessment. Under the model of recipient assessment, the notice of giving will only announce that a giving has occurred, whereupon the duty to assess the magnitude of the giving passes to the giving beneficiary. As was the case with government assessment, giving beneficiaries will have the option of making the assessment within a reasonable time from the receipt of the notice of giving, or making it at the time of realization of the giving when realization of the giving is deferred.

Of course, self-assessment may give rise to a problem of underreporting. Left to their own devices, property owners may understate the benefits they receive from state action. To counter the proclivity of the assessors to exaggerate in their own favor by understating the magnitude of their benefits, the state must employ a mechanism of random audits and penalties of sufficient magnitude to deter false reporting. We propose a self-assessment mechanism similar to that which we described in our proposal for valuing derivative takings,²⁶⁶ modeled in part on the income tax enforcement apparatus,²⁶⁷ meeting the need for low cost and accuracy.

Another option is the self-assessment model proposed by Saul Levmore.²⁶⁸ Levmore pointed out that the incentive of property owners to underreport may be countered by making the assessed value serve not only as the basis for property tax liability but also as a call price. In Levmore's system, third parties could periodically "call" the property, forcing a sale at the self-assessed price. Under this system of forced sales, an underreporting property owner exposes herself to the risk of her property being purchased at a lower-than-market price. Thus, underreporting is a self-defeating strategy.

265. For a discussion of the assessment system and its drawbacks, see Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771, 771-75 (1982).

266. See Bell & Parchomovsky, *supra* note 8, at 300-04.

267. See generally JAMES J. FREEDLAND ET AL., FUNDAMENTALS OF FEDERAL INCOME TAXATION 962-85 (11th ed. 2000) (surveying the self-assessment, auditing, and penalty procedures in the federal income tax apparatus); James Andreoni et al., *Tax Compliance*, 36 J. ECON. LITERATURE 818 (1998) (citing various studies relevant to the income tax enforcement apparatus).

268. Levmore, *supra* note 265, at 779.

Finally, Hagman and Misczynski have put forward the interesting proposal of allowing owners to propose in advance a single number for property value that would serve as the basis for calculations of both givings and takings. This approach has the advantage of deterring over- or understating property value, since the figure could serve as the basis of either compensation or charge. However, in order for such deterrence to be effective, the probable effects of over- and under-reporting (taking into account the likelihood of givings and takings and the value of each) would have to be roughly equivalent.²⁶⁹

C. *Collecting Charges for Givings*

The last stage of the givings process is the collection stage, in which givings beneficiaries pay the giving charge. If the giving is refusible, the charge should be paid within a reasonable time (perhaps a year) of receipt of the benefit. Otherwise, payment of the charge should be deferred until a realization event. Whether payment of the charge is immediate or deferred, givings should be treated together with other associated givings and takings, and the relevant charges and compensations should be offset. An individual who suffers a taking together with a giving should receive, or pay, in accordance with the aggregate value of the government action. If the number of givings beneficiaries is sufficiently small, the givings beneficiaries should make payment directly to takings victims, or the government action should be turned into a private taking.

The collection stage may thus be summarized by the following table:

TABLE 5. COLLECTION STAGE OF A GIVING CHARGE

	Linked to Taking	Unlinked to Taking
Refusable	Offset taking and pay remainder of charge, if any	Pay charge
Nonrefusable	Offset taking and defer remainder of charge, if any	Defer charge

Where charges are deferred, payment should be made only when the giving benefit is realized. The realization event may be the sale of the affected property or any other event deemed appropriate.

269. Hagman & Misczynski, *supra* note 224, at 31, 52.

VI. DEALING WITH MISGIVINGS

So far, we have demonstrated the need for a law of givings and sketched out its necessary components. We proposed a foundation for a givings jurisprudence, and we have offered a possible model for identifying chargeable givings and assessing and collecting charges. In this Part, we consider potential objections to our framework. Most importantly, we discuss programs—such as exactions, special assessments, and impact fees—that are associated with the core concerns of the law of givings. We also address a host of other objections having to do with the practicality of a law of givings and defining its outer boundaries.

A. *Exactions, Special Assessments, Fees, and Taxes*

The first objection that we address is the argument that specialized development fees such as exactions and special assessments adequately address the challenge of givings.²⁷⁰ An exaction is a required concession imposed upon developers who are granted zoning benefits.²⁷¹ Municipalities often impose exactions on developers.²⁷² Exactions can take various forms, including in-kind dedications for infrastructure, such as roads, parks, and schools,²⁷³ and “in lieu” fees for the same purpose. Exactions also include impact fees, or special assessments, to cover the cost of development.²⁷⁴ The main goal of the imposition of exactions is “to shift to the developer the costs of the public infrastructure that the development requires.”²⁷⁵ Essentially, exactions force developers to internalize the “external cost” they impose on the surrounding community.

One might argue that since developers already pay for the cost they impose on the surrounding community, there is no need to charge them for the giving they receive. This argument, however, does not obviate the need

270. In *Windfalls for Wipeouts*, Frederik Jacobsen and Craig McHenry identify exactions as a possible source of “windfall recapture,” but ultimately reject exactions as an inappropriate device for that purpose. Frederik Jacobsen & Craig McHenry, *Exactions on Development Permission*, in *WINDFALLS FOR WIPEOUTS*, *supra* note 3, at 342, 342-43, 364-66.

271. See *supra* notes 102, 110.

272. In a 1991 article, Vicki Been reported that eighty-nine percent of all communities require dedications and that fifty-eight percent demand some sort of fees. Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 *COLUM. L. REV.* 473, 481 n.42 (1991).

273. Reclamation law recapture is an analogous technique in which lands are seized based on excess value created by reclamation projects. See Paul Lowenberg, *Betterment Recapture Under Reclamation Law*, in *WINDFALLS FOR WIPEOUTS*, *supra* note 3, at 336, 336.

274. See JOHN P. DWYER & PETER S. MENELL, *PROPERTY LAW AND POLICY* 1032 (1998). State courts characteristically uphold impact fees if there is adequate proportionality between the fee and the additional burden imposed on the community as a result of the development. *Id.* at 1035.

275. Been, *supra* note 272, at 482. Been points out that shifting the cost to the developer is desirable for several reasons.

for a law of givings for two main reasons.²⁷⁶ First, exactions are required only for a small segment of the spectrum of givings. Exactions are assessed only when the municipality is required to make an additional investment in infrastructure.²⁷⁷ In other cases, exactions are not imposed. Thus, if the giving does not impose any direct cost on the municipality, no exaction will be imposed, and the giving will manage to escape charge.

Second, and more importantly, exactions are not actually aimed at the same problem as givings jurisprudence. Exactions only address out-of-pocket costs incurred by the municipality as a result of givings.²⁷⁸ They do not at all address the benefit that constitutes the giving. Put differently, exactions only cover the expenses the surrounding community might incur following certain givings, but not the opportunity cost to the community as a result of bestowing the benefit. The remaining benefit to the recipient remains unaccounted for, even if the benefit far outweighs the cost of development. This leads to odd outcomes. Assume that the city of Bigburgh decides to upzone Chris Constructor's property, thereby bestowing upon him \$50 million in added value. Assume that Constructor's construction of the new Constructor Tower will result in greater need for municipal services such as transportation and sanitation, requiring the municipality to invest \$2 million in infrastructure upgrades. By imposing an exaction on Constructor, the municipality prevents Constructor from transferring a \$2 million cost onto the municipality. The \$50 million in zoning benefits remains untouched.²⁷⁹

Our point is not to criticize the imposition of exactions. As should be clear by now, our goal is to achieve full accounting for both the costs and benefits of government action. Exactions are a step in the right direction. However, as the above example illustrates, they fall short of satisfying the need for a givings law.

In fact, the law of givings would prove useful in resolving some of the difficulties currently plaguing the field of exactions. In the aftermath of *Nollan v. California Coastal Commission*²⁸⁰ and *Dolan v. City of Tigard*,²⁸¹

276. Jacobsen and McHenry present a different set of objections to the use of exactions for charging givings: The existing body of exactions law would make courts resistant to changing it to conform to the needs of charging for givings; municipalities generally prefer to levy fees; and the timing of exactions is too early in the municipal approval process. Jacobsen & McHenry, *supra* note 270, at 365.

277. Julian C. Juergensmeyer & Robert M. Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 415, 417 (1981); James C. Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, 50 LAW & CONTEMP. PROBS. 85, 88 (1987).

278. Juergensmeyer & Blake, *supra* note 277.

279. We assume here that the value of the zoning benefits in the hands of the municipality is \$50 million. We make no assumption concerning the value of the benefits in the hands of the recipient.

280. 483 U.S. 825 (1987).

281. 512 U.S. 374 (1994).

exactions have been subject to special rationality and proportionality requirements. Exactions that fail to meet the requirements are viewed as regulatory takings, for which compensation must be paid.²⁸² The scope of *Nollan's* and *Dolan's* requirements have proven difficult to define, in light of the fact that givings are so often paired with takings that there are an enormous number of government actions that can be creatively described as exactions.²⁸³ The necessity of drafting special requirements for exactions would be eliminated if all givings and takings were properly accounted for.

In short, exactions are hardly an adequate replacement for a law of givings. Indeed, the law of givings is, in some respects, a superior way of examining exactions.

Similar observations may be made about increased property tax payments that might result from givings. The \$50 million increase in the value of Constructor's property will produce increased property tax revenues for Bigburgh. However, unless the property tax rate is sufficiently high that the present value of all property taxes is equal to the value of the property itself (a highly unlikely occurrence), Constructor will be able to pocket the difference between the tax payment and the actual increase in property value resulting from the giving. If the annual property tax rate is two percent of assessed value, for example, the present value of the increased property tax payments will be only \$12.5 million (assuming a discount rate of eight percent). This contrasts with a charge of \$50 million if Constructor actually had to pay for the giving.

Special windfall taxes, if targeted specifically to the property owner's gain resulting from the giving, could resolve this difficulty; however, depending on their magnitude and incidence, such windfall taxes would either be inadequate, excessive, or indistinguishable from givings charges. To see this, consider the following three cases.

First, windfall taxes could be assessed on all increases in property value. This proposal stood at the center of the Uthwatt Report, produced in England in 1942 and ultimately rejected.²⁸⁴ The Uthwatt Proposal sought to incorporate the lessons of the English Town Planning Act of 1909, which had sought to assess charges for regulatory and derivative givings in the amount of fifty percent of the value of the giving (raised to seventy-five percent in 1932). The Uthwatt Committee, concluding that the earlier Act had been too difficult to administer, proposed levying a seventy five percent windfall tax on all increases in urban property value not directly attributable

282. See *supra* notes 58-61 and accompanying text.

283. See EPSTEIN, *supra* note 3, at 11; Fennell, *supra* note 61, at 9-11; cf. City of Monterey v. Del Monte Dunes, 526 U.S. 687, 702-03 (1999) (holding that *Dolan's* rough proportionality rule is inapplicable to a takings claim based on denial of a development permit).

284. David Replegle, *The Uthwatt Proposal*, in WINDFALLS FOR WIPEOUTS, *supra* note 3, at 422 (discussing the *Final Report of the Expert Committee on Compensation and Betterment*, otherwise known as the Uthwatt Proposal).

to owner improvements. While the Uthwatt Proposal was never adopted in England, a number of jurisdictions have adopted special capital and real estate windfall taxes based upon similar ideas.²⁸⁵ It is evident that the Uthwatt Proposal and its ilk are not a pure givings scheme in that they ignore some kinds of givings (nonurban givings, for example, in the case of Uthwatt), while taxing other gains in property value that are not givings. As such they fall prey to the critique of property taxes stated above.

A second option for windfall taxes would be to assess windfall taxes in the full amount of all givings, in response to all givings. Such a scheme has never been adopted, and—presuming that the givings taxed would be those givings that are properly taxable, in accord with the analysis we outline—the result would be indistinguishable from our proposed law of givings, other than terminologically.

Third, and finally, windfall taxes might be assessed on all properly charged givings, but only upon a certain percentage of the value of the givings, as in the Town Planning Act of 1909. Such taxes would be indistinguishable from givings charges, reduced by a given percentage. Certainly such taxes would represent an improvement, so long as they were properly applied only to chargeable givings and, particularly, if the proportion of the giving charged were symmetric to the proportion of takings compensated. Nonetheless, depending on how such costs and revenues are actually incorporated into citizens' welfare functions and government calculations, incomplete givings charges could fail to produce optimal givings incentives because they would effect less-than-complete internalization. The better alternative, then, is an explicit law of givings with charges properly calibrated to creating an optimal amount of givings by encouraging full accounting for their economic effects.

B. *Baselines for Givings and Takings*

The preceding discussion raises a more general question. Why should givings beneficiaries be asked to pay for anything more than the costs they impose on society? Why should the magnitude of the giving be measured from the baseline of the immediately prior property and land-use scheme?

This objection might be a variant of a broader property-rights critique of land-use law aimed at expanding takings compensation. The expansive property-rights critique views property rights as absolute, subject only to the traditional limitation of *sic utero tuo ut alienum non laedas* (one should

285. Madelyn Glickfeld & Donald G. Hagman, *Special Capital and Real Estate Windfalls Taxes* (SCREWTS), in WINDFALLS FOR WIPEOUTS, *supra* note 3, at 437.

use one's property in such a manner as not to injure others' interests).²⁸⁶ On this view, the baseline from which givings and takings should be measured is one in which property owners are subject to few limitations, and many government actions that raise property values should be seen as removals of wrongly uncompensated takings, rather than givings. In our example, the advocate of this critique would argue that the \$50 million addition to Constructor Tower rightly belongs to Constructor, and that he should not be asked to pay for anything other than the actual cost Constructor imposes on society by way of required infrastructure improvements.

Another version of the objection might take precisely the opposite view, positing that property rights are purely a creature of government largesse and arguing that the baseline from which givings and takings should be measured is a point of zero property rights.²⁸⁷ On this view, Constructor should be charged for the full \$50 million in value of the benefit, but would not be entitled to compensation for downzoning.

In both versions of the objection, using the legal status quo ante as the baseline for measuring givings and takings would be attacked as arbitrary and unjust. We elected to use the status quo ante as the relevant benchmark, nevertheless, because this is the baseline generally employed by the courts in takings cases.²⁸⁸ As we have shown throughout this Article, takings and givings are inextricably related. Therefore, it would be inconsistent to use one baseline for takings compensation and another for givings charges. Doing so would unnecessarily inject additional confusion and incoherence into an already complex body of law. However, we do not argue that this is the only baseline from which takings and givings should be measured. Indeed, several programs for injecting market forces into zoning utilize other baselines. For instance, zoning by eminent domain—which pays compensation to homeowners subject to zoning for the economic impact of the regulation without regard to whether the zoning would be considered a regulatory taking—seems linked, at least conceptually, to a baseline of property as essentially unlimited.²⁸⁹ Zoning by auction—which requires homeowners to purchase in an auction all regulatory rights—meshes well

286. EPSTEIN, *supra* note 1, at 3-31; Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1147 & n.310 (1996).

287. Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 392-93 (1995); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

288. As Andrea Petersen has noted, the baseline understanding of property has also been the source of some confusion in takings jurisprudence. Peterson, *supra* note 62, at 57.

289. A closely related technique is zoning by special assessment financed eminent domain, which finances the compensation paid for zoning regulations by levying special assessments on owners benefiting from the derivative givings created by the regulatory takings. Donald G. Hagman, *Zoning by Special Assessment Financed Eminent Domain (ZSAFED)*, in WINDFALLS FOR WIPEOUTS, *supra* note 3, at 517, 517-18.

with a baseline of property as limited only to those rights created by the states.²⁹⁰ Either baseline would suit the law of givings, so long as it applied to both givings and takings. However, transitioning to the new baseline would involve substantial administrative costs and might upset prior expectations.²⁹¹

A related objection concerns the other end of the measuring stick for givings and takings. The extent of the giving or taking has been measured with reference to willingness to pay market value. This measure does not include subjective and idiosyncratic value and may therefore lead to insufficient charge or compensation.²⁹²

We do not deny the validity of this concern. The general critiques of imprecise measurements in the law of takings naturally apply to the law of givings as well, and we do not purport to resolve this puzzle. We simply note the link between givings and takings measurements and follow accepted takings measurements in the law of givings. Again, consistency demands that the same method of calculating compensation or benefits be employed for takings and givings. In addition, the conventional objection that subjective value is unverifiable by third parties makes it extremely unlikely that policymakers will ever choose to account for subjective harms or benefits resulting from takings and givings. Just as imprecision in the law of takings does not obviate the need for a takings jurisprudence, parallel imprecision regarding givings does not avert the need for a givings jurisprudence.

C. *Administering Givings and Takings*

Next, we address the concern that creating and administering a law of givings is impractical and overly costly. In this Article, we have sketched out the elements of a givings jurisprudence in order to show that it can be

290. See Madelyn Glickfeld, *Sale of Development Permission: Zoning on the Auction Block*, in *WINDFALLS FOR WIPEOUTS*, *supra* note 3, at 376; see also David E. Ervin & James B. Fitch, *Evaluating Alternative Compensation and Recapture Techniques for Expanded Public Control of Land Use*, 19 NAT. RESOURCES J. 21, 29-33 (1979) (discussing both zoning by auction and zoning by eminent domain and their possible connection to a scheme of “windfalls for wipeouts”).

291. See Glickfeld, *supra* note 290, at 385.

292. One court has explained:

Compensation [for takings] 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 “inframarginal,” 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”).

Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988); see also JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 1121-23 (4th ed. 1998); MICELI, *supra* note 159, at 138.

implemented. The self-assessment system, in particular, is designed to reduce administrative costs and to promote implementation. We make no claims regarding the proper institution to implement the law of givings, although we note that Hagman and Misczynski's "windfalls for wipeouts" proposal appeared to assume a legislative source of legitimacy.²⁹³ Nor do we seek to rewrite the scope of government in redistribution; rather, we aim merely to make symmetrical limitations on the taking and giving powers of the state.

Nevertheless, one important difference between givings and takings must be acknowledged. Self-assessment for takings compensation should have the side effect of eliminating *de minimis* claims for compensation because property owners will not prepare self-assessment takings reports if the cost of reporting and obtaining compensation exceeds the actual compensation reward. No such incentive is present regarding self-assessment for givings charges. This problem might be rectified by adding a *de minimis* exception to the givings assessment requirement.²⁹⁴ The government, for example, could exempt givings from charge if they were lower than a given value.²⁹⁵ This exemption could serve a function similar to minimum income requirements for income tax reporting in reducing transaction costs and eliminating overly small claims. The exemption could also be cast as a standard deduction, allowing even those who are required to file self-assessments to deduct a certain amount from the charge in order to cover administrative costs.²⁹⁶

D. *Charges and Alternative Remedies*

Another potential objection focuses on our choice of remedy. We propose a fair charge as the correct remedial measure for objectionable givings. One could argue, however, that injunctions, not charges, are the adequate remedy for givings. This objection draws on cases, such as *Mahon*, in which the Supreme Court struck down a regulation that unduly diminished property values.²⁹⁷ Reasoning by analogy, one could propose that whenever the state engages in a "chargeable giving" the government act should be invalidated.

293. Hagman & Misczynski, *supra* note 224, at 31.

294. Cf. Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 1008-09 (1999) (calling for the introduction of a "de minimis" exception into takings doctrine, and explaining why such an exception is desirable).

295. Hagman and Misczynski suggest an exemption for givings or takings of less than ten percent of the value of the property prior to the government action, although it is not clear how their rule would work when the giving consists of entirely new property. Hagman & Misczynski, *supra* note 224, at 60.

296. Cf. I.R.C. § 63(c) (2000) (establishing a standard deduction for the income tax).

297. 260 U.S. 393 (1922) (voiding the Kohler Act).

Indeed, some states already bar public gifts, i.e., gifts by the government to private entities.²⁹⁸ The constitution of the State of Washington, for example, provides that “[n]o county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm.”²⁹⁹ Although such state restrictions generally remain unenforced, they have occasionally been utilized by courts to bar givings. For example, in 1966, the Florida Supreme Court invalidated a municipal bond issue on the ground that the funds could not constitutionally be dedicated to building a spring training baseball facility for the Pittsburgh Pirates.³⁰⁰

Nevertheless, we submit that for both doctrinal and policy reasons, charges are the preferable method of treating givings. To be sure, we do not argue that givings should never be enjoined. Clearly, not all givings are permissible. For example, givings that violate the Establishment, Due Process, or Equal Protection Clauses by favoring a certain group based on religion, race, or gender should certainly be invalidated.³⁰¹ Yet, for the reasons that follow, enjoining the government should be the exception rather than the rule. First, the injunction of regulation that goes beyond the legitimate limits of the police power has been criticized as wrong and baseless. Several commentators have noted that regulation that goes “too far” is simply a compensable taking under the Fifth Amendment.³⁰² Indeed, in recent cases, such as *San Diego Gas & Electric Co. v. City of San Diego*³⁰³ and *First English Evangelical Lutheran Church v. County of Los Angeles*,³⁰⁴ the Supreme Court seems to have adopted the view of the

298. See Michael J. Cremonese, Comment, *Building New Stadiums with Your Money Whether You Like It or Not: The Pennsylvania Constitution Does Not Prohibit the Use of Public Funds To Construct New Stadiums*, 37 DUQ. L. REV. 423, 434 n.118, 436 n.140 (1999).

299. WASH. CONST. art. VIII, § 7.

300. *Brandes v. City of Deerfield Beach*, 186 So. 2d 6, 12 (Fla. 1966) (concluding that building a sports stadium for leasing to a private sports club is not a “municipal purpose”).

301. See, e.g., *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (striking down a law drawn for the benefit of a religious sect).

302. See Robert I. McMurry, Comment, *Just Compensation or Just Invalidity: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. REV. 711 (1982); E.F. Roberts, *Mining with Mr. Justice Holmes*, 39 VAND. L. REV. 287, 292 (1986). But see Richard F. Babcock et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193, 211-12 (1984) (arguing that overzealous regulations are invalid rather than compensable); cf. Thomas E. Schnur, Note, *Compensation and Valuation for Regulatory Takings*, 35 DEPAUL L. REV. 931 (1986) (describing the controversy as a debate over whether takings are struck down as exceeding the police power, or for failure to pay compensation for the exercise of eminent domain).

303. 450 U.S. 621, 636 (1981) (Brennan, J., dissenting). In this case involving open-space zoning, a five-Justice majority decided to dismiss the appeal on the ground that it was premature. In an important dissent, Justice Brennan, joined by three Justices, opined that the case was not premature, and that if the challenged zoning regulation worked a taking, compensation was the right remedy.

304. 482 U.S. 304 (1987) (holding that compensation is the remedy mandated by the Constitution when a land use regulation works a taking).

critics, stating that compensation, rather than injunctive relief, is the correct remedy of aggrieved property owners. This new judicial trend is consistent with both the language and goals of the Takings Clause.

In addition, there are weighty prudential reasons to adopt charges as the appropriate remedies for givings. As we explained, bestowing benefits is an integral part of government's job.³⁰⁵ Barring the government from engaging in givings would strip it of one of its most fundamental powers. It would also deprive the public of the only effective means to overcome certain collective-action and holdout problems. In a world replete with transaction costs, the coercive power of the government is often the only viable way of improving allocative efficiency,³⁰⁶ and, as we have shown, the government must have both the power to take and the power to give in order to perform its role successfully. Granted, it is important, for all the reasons we stated, to impose a check on the power of the government to give. However, injunctions are an unnecessarily harsh means of achieving this purpose. Assessed adequately, charges provide an effective mechanism for forcing government to internalize harms and benefits without unduly impairing its ability to function. By requiring payments for benefits, charges force beneficiaries to consider the cost they impose on the general public and accept only givings that effect a net gain. The use of charges also guarantees that when a giving is efficient, the public at large receives adequate consideration in exchange for the giving. Moreover, charges confer the decisionmaking power on the best decisionmaker: the individual property owner. Under our scheme, recipients can reject refusible givings. The ability to refuse the giving, and thus to avoid the charge, provides property owners with sufficient protection against governmental abuse of power. There is no reason, therefore, paternalistic or otherwise, to enjoin the government from giving.

Indeed, the experience of state courts with constitutional restrictions on public gifts suggests that a bar on givings is too blunt a tool. Courts faced with public gifts questions must either find a sufficient public purpose and allow the giving, despite its potential inefficiency, or find a private purpose and bar the giving, despite its potential utility.³⁰⁷

305. See *supra* Section IV.A.

306. Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1217 (1991); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

307. For discussion of courts' construction of state constitutions' public gifts provisions, see Cremonese, *supra* note 298; and David D. Martin, Comment, *Washington State Constitutional Limitations on Gifting of Funds to Private Enterprise: A Need for Reform*, 20 SEATTLE U. L. REV. 199 (1996). Cf. Dale F. Rubin, *The Public Pays, The Corporation Profits: The Emasculation of the Public Purpose Doctrine and a Not-for-Profit Solution*, 28 U. RICH. L. REV. 1311 (1994) (arguing for invalidating many givings on the ground of the lack of a "public purpose").

VII. CONCLUSION

In this Article, we laid a foundation for a law of givings. Givings are ubiquitous in practice and a theoretical inevitability. Yet, they have received scant scholarly attention and no consistent doctrinal or theoretical treatment. The Takings Clause of the Fifth Amendment has allowed takings to hog the scholarly limelight, relegating givings to a dark corner of the stage. There, givings have been patiently waiting to be discovered. In this Article, we took a first step on the way to rectifying this disparate treatment. Givings are a formative force in the world of property. Indeed, as we showed, it is impossible to devise a comprehensive takings jurisprudence without an understanding of the phenomenon of givings and the relationship between givings and takings.

Givings and takings are mirror images of one another. The same policy rationales that call for a takings law—namely, fairness, efficiency, and public choice theory—also mandate a law of givings. The only major difference is that while in the context of takings these underlying policy rationales prescribe compensation, in the case of givings, they call for a charge. By exploring takings law, identifying its essential doctrinal and policy features, and adapting them as necessary, we developed some legal tools to determine when a giving occurs and when a fair charge must be assessed. Furthermore, we designed a three-step model of identifying, assessing, and charging for givings, demonstrating the practical administrability of a law of givings. A successful law of givings would eliminate the lopsidedness of the property governance system where the general public, via the government, bears the costs it imposes on individuals, but does not share in the benefits it bestows. Charging for givings would reduce interest-group politics, enhance the efficiency of government decisions, and improve the fairness of our property system.