APPRAISING 9/11: ‘SACRED’ VALUE AND HERITAGE IN NEOLIBERAL TIMES

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ABSTRACT

It is a common refrain that value is increasingly assessed in monetary terms. Public services are privatized. We live in a ‘neoliberal’ era, one in which market understandings of value seem to be the only understanding of value. What, then, are we to make of actions and policies that seem to go in the opposite direction, which decommodify and nationalize, which transfer persons and objects from the private to the public domain? Are they just strange outliers? Do they paradoxically support a neoliberal conception of value by providing an affirming counterpoint? And just how are such transformations effected as a matter of law? This Article documents one such case—the taking by eminent domain for use as a national memorial the private property in rural Pennsylvania where one of the planes hijacked on September 11, 2001 crashed. What had been private property was revealed to be national territory. While the site’s transformation to ‘sacred ground’ was seemingly uncontested as a matter of national politics, as a matter of law it was not so simple. I trace in detail how different constituencies—family members of those killed, the landowner’s ‘stigma’ appraiser, the memorial designers and architects, lawyers, the court—struggled over whether the landowner should be compensated for the enhancement in value due to the plane crash, since the site was now a tourist destination. In the recently concluded court case, the landowner was indeed paid for the land’s enhanced ‘sacred’ and heritage value. We see, as it were, the birth pangs of decommodification in a neoliberal order: the simultaneous recognition of the public’s interest and the assessment of that interest in terms of monetary value and the payment of that value to the owner.

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INTRODUCTION

In his deposition, Randall Bell, a real estate appraiser with an expertise in stigmatized property, explained that the land where United Airlines Flight 93 crashed during the attacks of September 11, 2001 had increased in value because of the attacks:

[T]here's an intangible asset attached to this property in perpetuity that's going to generate income, so it's unlike another business such as a McDonald's where you can take those intangibles and move them to another building across town. You can't do that here.'

Bell, also known as the "Master of Disaster," is usually concerned with the kind of stigma that diminishes value, as with a violent death or a haunted house. He has appraised properties such as the man-

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sion where Heaven's Gate members committed suicide and the house where JonBenet Ramsey was strangled.  

But the stigma at issue in the 9/11 crash did not diminish the site's value—quite the contrary, according to Bell. What Bell described as a "permanently attached intangible" asset increased that site's monetary value by almost forty times, from about $600,000 to over $23 million. In the context of an eminent domain proceeding to determine what would constitute just compensation under the Fifth Amendment, Bell urged that this higher amount should be paid to his business partner who owned the crash site.

This Article tells the story of the former strip mine where Flight 93 crashed, its transformation into what many people called "sacred ground," and the recently concluded court proceeding, United States of America v. 275.81 Acres of Land, More or Less, which determined that the landowner would indeed be compensated for the enhancement in value occasioned by the 9/11 attacks. Although there is an enormous literature on 9/11 and the memorialization of the attacks, this is the first piece of legal scholarship on the Flight 93 proceeding.

Rather than a routine takings proceeding, this case speaks to timely issues of how collisions between market and non-market ideas of value are managed by our legal system. In an era where value seems to be increasingly assessed in monetary terms, what many deem a "neoliberal" era, how did this supposed sacred value intersect with

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3 Russell Hollingsworth & David E. Wright, Conversations on Success, 183.
4 Bell Deposition, supra note 1, at 78:1.
5 Id. The value of the land simply as "open space," that is, its value absent any enhancement from the 9/11 attacks, was about $610,000. Report of the Commission at 46, Dec. 9, 2013 United States of America v. 275.81 Acres of Land, at *5, 2014 WL 1248205 (W.D. Pa., 2014) [hereinafter "December 2013 Commission Report"].
6 The Takings Clause of the U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.
7 See infra Parts I.B and I.C, and accompanying text (defining and elaborating on the concept of "sacred ground[s]").
9 See infra Part III.A (discussing just compensation as equity).
11 Wendy Brown, Undoing the Demos: Neoliberalism's Stealth Revolution 10 (2015); David Singh Grewal and Jedediah Purdy, Introduction: Law and Neoliberalism, 77 J.L. & Contemp. Probs. 4 (2014). The term "neoliberal" has been used in a variety of senses but often refers to a way of imagining social order and proper public policy as grounded in market conceptions of value. It is generally associated with the "free market" policies of President Ronald Reagan and British Prime Minister Margaret Thatcher, but has been used to capture a broader array of phenomena than just those policies. It is distinct to classical liberalism, some such as Brown contend, in that it is a form of imagination which actually overcomes the state/market divide and the public/private divide,
monetary value? By public demand and Congressional action, the land was decommodified, that is, it was taken out of its everyday status as private property and exchangeable resource, and designated a place of national mourning. But the transformation was not simple, and this Article traces in detail how different constituencies—family members of those killed, real estate appraisers, lawyers, the court—understood and struggled over the change. It documents, as it were, the birth pangs of decommodification. Focusing on the tension between market value, heritage, and the sacred, it asks in what ways, and through what frameworks and categories, this transformation has been understood and contested.

The Article fills a gap in the existing legal scholarship by addressing whether just compensation includes the enhancement in value due to a national tragedy, a context where it may seem inequitable to financially profit from the deaths of fellow citizens. While legal scholars have spent a good deal of energy, post-*Kelo v. City of New London*, discussing what counts as a public use under the Fifth Amendment, much less attention has been paid to what constitutes which remained central to classical liberalism. Rather, for neoliberalism, the state becomes an instrument of the market, which in turn is seen as the creation of the state’s complicated regulatory apparatus. Thus, neoliberalism overcomes the naïve conception of markets inherent in laissez-faire market liberalism. The problem with, or question for, this form of imagination, when put into lived practice, is that this conception of everything as marketized undermines basic conditions of sociability and mutual aid. This essay explores two central categories of sociability and mutual aid: the notions of sacrifice and the sacred; and notions of value that are seen to transcend or ground market value. Through this exploration, the implicit claim put forth is that our social order cannot be seen as truly “neoliberal,” as non-monetary conceptions of value are still patently quite important. But this case-study is a bit more nuanced, since it is an examination of just how—through law, doctrine and practice—we move between the sacred and monetary conceptions of value.

12 See *infra* Part I.A (elaborating on the discussion of moving “from the sacred to heritage”).

just compensation. The dominant market value understanding of just compensation should be seen as derivative, this Article argues, of the goal of providing just—that is, equitable—compensation. Indeed, the Supreme Court has repeatedly stated that just compensation is grounded in equity. In the context of the Flight 93 case, equity does not, it is urged, require that the landowner be compensated for the market enhancement attributable to the attacks. In World War II, the Court excluded the enhanced value due to total war from its definition of just compensation, describing the rise in wartime prices as a consequence of the government project of war-making; and equity did not require the government to pay for the increase it had itself created. The Flight 93 case presents the updated scenario for the war on terror, a conflict in which sporadic attacks punctured everyday life and created sites of mourning, and which, incidentally, changed the economic value of some of those attacked sites. In its simplest form, the claim is that the enhancement in value was intrinsically public, and thus not the property of the owner. Just compensation seeks to make the condemnee whole, to return to them what is taken from them, and the owner, it is argued, did not own Bell’s intangible

See infra Part II; Kelo v. City of New London, 545 U.S. 469, 472 (2005). To the extent that market value has been interrogated, it is for undercompensating the landowner (by not including compensatory damages, relocation costs, and the subjective value of the property, leading some to advocate above-market compensation). See James W. Ely, Jr., The Historical Context of Just Compensation, 30:3 PRACTICAL REAL ESTATE LAWYER 9 (2014) (summarizing complaints regarding market value measure of value). Such discussions have not engaged the question of how to determine just compensation where there is an enhancement of value due to an act of violence against the nation where market value may be too high. More broadly, however, my argument regarding just compensation as equity dovetails with these efforts to displace market value as the only way to understand just compensation. See Nicole Stelle Garnett, The Neglected Political Economy of Eminent Domain, 105 MICH. L. REV. 101, 111 (2006) (noting that takings “literature concentrates on discerning when a taking has occurred, rather than how much is owed once it has” and arguing that perception that landowners are undercompensated is not accurate because government has political incentives to avoid property with a high subjective value); see also Christopher Serkin, The Meaning of Value: Assessing Just Compensation for Regulatory Takings, 99 NW. U. L. REV. 677, 682 (2005) (“Surprisingly, this familiar disagreement ignores what should be a central issue in takings analysis: when compensation is due, how much should the government have to pay?”). Serkin describes the flexibility that in practice underlies the apparently monolithic measure of market value. Id.; See also Katrina Miriam Wyman, The Measure of Just Compensation, 41 U.C. DAVIS L. REV. 239, 241 (2007) (noting renewed interest in alternatives to market value after Kelo).

See infra Part II.A.

See infra notes 177-80 and accompanying text.

United States ex rel. Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 281 (1943) (“It is a well settled rule that while it is the owner’s loss, not the taker’s gain, which is the measure of compensation for the property taken, not all losses suffered by the owner are compensable under the Fifth Amendment.”).
value. Thus, the recent award, which included the value of the land as a private 9/11 memorial, and simply used market value as its measure of just compensation, was mistaken.\footnote{18}

Part I describes the change from unremarkable land to a place of national prominence as hundreds of thousands of people visited the site and created an impromptu memorial.\footnote{19} The category of heritage provided the legal and policy structure through which the transformation was given recognition and institutional form—the land was declared a national historic site and a national park to be managed by the National Park Service. A key element of this transformation was to be the national memorial; controversies over the design of this memorial provide insight into how the transformation was envisioned. The winning entry in the design competition for the memorial was centered around the “sacred ground” of the crash site. But this design encountered strident opposition: it was accused of including sacred Islamic symbolism because it included two semi-circles, which the designer had slated to be planted with trees with red leaves—that is, two “red crescents.”\footnote{20} In this controversy, we see the deployment of two notions of the “sacred”—one supposedly unifying, nonsectarian or even post-religious, and evoking national tragedy, the other a controversial and, in the eyes of protestors, insulting intrusion of an alien religion.

Part II turns to the Article’s central concern: the taking of the crash site through eminent domain and the recently concluded effort in United States v. 275.81 Acres of Land to determine the amount of compensation due the owner, Svonavec, Inc. (“Svonavec”), a family-owned quarry company.\footnote{21} Even though the crash site was destined to be a national memorial, this side of the process—the land acquisition—ran into trouble. The owner wished to receive the increase in value to the land due to the crash, while the government was unwilling to pay that surplus. Lurking underneath the inability to come to terms were questions as to whether the value of a place of national meaning can be assessed in money, and whether the landowner should own or receive the enhancement in value occasioned by the 9/11 attacks. This Part begins by describing the legal framework of takings law and determines, at least at first glance, that the landowner was due any increase in value to the land due to the attacks since the

\footnote{18}{See infra notes 174-206 and accompanying text.}
\footnote{19}{See infra notes 29-79 and accompanying text.}
\footnote{20}{See infra notes 69-79 and accompanying text.}
typical formula looks to market value at the time of taking. Then, through an analysis of the competing real estate appraisals submitted in the condemnation proceeding in the federal court, it describes the dual transformation of the land into a form of value beyond the market and, simultaneously, its apparent increase in market value. The government disputed whether such an increase existed at all on what it called “vacant” land. And yet, because it adhered to the usual formulation of just compensation as market value at the time of taking, the government did not contest that an increase, if it could be demonstrated, should accrue to the landowner. Finally, this Part describes the outcome of the condemnation proceeding. A court-appointed Commission of local real estate experts compensated the owner for the 9/11 related enhancement in value, but found that it was not as valuable as the owner and the stigma appraiser had suggested. The Commission awarded $1.5 million on the basis of the market value of a private memorial at the time of taking, more than double its non-9/11 value, but far less than the $23 million Bell had urged.

Part III revisits the legal doctrine of just compensation to argue that despite first appearances, the landowner should not have received any increase in the land’s value due to the attacks. As the Supreme Court has stated many times, it is just compensation that must be provided, and courts may consider the equitable factors at issue. Unlike other windfalls where we assume the landowner would retain the benefit, this windfall derived from illegal conduct and an act of war; thus there are equitable reasons why the owner should not receive compensation for the sacred value.

Part IV attempts to understand what many of the participants in this story are talking about when they call the site “sacred,” and, more ambitiously, asks whether the term is of any legal utility in understanding the dispute over value. One archaic sense of the sacred is that it is the property of the gods. While we cannot, of course, apply that notion directly to the controversy here, it suggests a way of un-

22 See infra notes 87-96 and accompanying text.
23 See infra notes 142-57 and accompanying text.
25 See infra notes 176-84 and accompanying text.
26 See infra notes 185-203 and accompanying text.
27 TALAI, ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 30 (2003) (citing W.W. Fowler, The Original Meaning of the Word Sacer, in ROMAN ESSAYS AND INTERPRETATIONS 15 (1920)). Asad writes of the sacer in the Roman Republic as "anything that was owned by a deity, having been taken out of the region of the profanum by the action of the State, and passed on into that of the sacrum."
understanding what people are talking about when they talk about the sacred: the added value is bound up in real property, but it does not belong to any private party as property itself. Bell is correct to see an intangible asset—but wrong to think the landowner should be paid for it. Patrick White, a real estate lawyer and a member of the group representing the family members of those who died on Flight 93, put it this way:

Everybody’s private property has a value. I understand that . . . . I represent clients in that fashion, but that property to me is priceless to [sic] the reason that it has blood, bones and the souls [sic] of my cousin . . . and that of 39 other people, and in a sense a tremendous price has been already paid for that land.\[^{28}\]

I. PRIVATE PROPERTY TO NATIONAL MEMORIAL

On September 11, 2001, the forty passengers and crew on board United Airlines Flight 93, having learned of the attacks on the World Trade Center and the Pentagon, collectively decided to regain control of the plane.\[^{29}\] They are credited with preventing the hijackers from reaching their target in Washington, DC. The plane crashed at about 500 miles per hour, leaving a deep gash in the ground. As one witness said, it seemed as though the land had “swallowed” up the plane and passengers.\[^{30}\] The victims had become embedded in soil and debris and were, except for tiny fragments, unrecoverable.\[^{31}\] The land itself became a site of potent meaning for family members, who felt a connection to it.\[^{32}\] One FBI employee recounted in a memoir seeing angels guarding the site.\[^{33}\] Many of the family members, law

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\[^{31}\] See, Katherine Q. Seelye, At a 9/11 Site, a ‘Last Funeral, N.Y. TIMES, Sept. 9, 2011, http://www.nytimes.com/2011/09/10/us/10shanksville.html (quoting Somerset County coroner, Wallace Miller, as stating that only 8 percent of human remains were recoverable and that “[e]verything vaporized on impact”); Dave Barry, On Hallowed Ground, MIAMI HERALD, Sept. 7, 2002, http://www.miamiherald.com/living/liv-columns-blogs/dave-barry/article1938637.html (“No bodies were recovered here, at least not as we normally think of bodies. In the cataclysmic violence of the crash, the people on Flight 93 literally disintegrated. Searchers found fragments of bones, small pieces of flesh, a hand. But no bodies.”).

\[^{32}\] See, e.g., Reeger, supra note 28 (“[B]ut that property to me is priceless to [sic] the reason that it has blood, bones and the souls of my cousin . . . .”).

\[^{33}\] LEONARDI, supra note 50, at 37; see also Joe Mandak, Lillie Leonardi, Ex-FBI, Claims She Saw Angels Guarding Flight 93 Site, ASSOCIATED PRESS, July 3, 2012,
enforcement officers, and politicians, described the land as “sacred.” What did they mean, and were there any legal consequences to this assertion?

Along with the other 9/11 sites, the field became an improvised shrine. Tens of thousands of objects were left by visitors: flags, key chains, crucifixes, flowers, photographs, teddy bears, and baseball caps. Within months, the crater was filled and the area planted with grass. Within a year, plans for a more permanent memorial were underway. There were about 150,000 visitors per year in the decade following the attacks, a number that was expected to double in 2012. Pamela Tokar-Ickes, a local official, described to Congress the sense that this “history belongs to all of us” and that “Our Buckstown” had become an important place. “Whether by fate or destiny,” she testified, “Somerset County, Pennsylvania holds a unique place in American history. . . .” Not only had an out-of-the-way part of Pennsylvania become important nationally, the local people had “become the caretakers” of this new resource.

A. From The Sacred To Heritage

Even though many people described the land as “sacred,” there was anxiety about what this entailed and whether the local “caretakers” were able to preserve the site. This special place, family members and others contended, needed federal protection, support, and legal recognition. One year after 9/11, Congress passed The Flight 93 National Memorial Act, authorizing the creation of a memorial as

34 See infra notes 28, 30-32 and accompanying text.
38 Id. at 34.
39 Id. at 33.
40 See infra notes 42-49 and accompanying text.
a "unit" of the National Park Service, a part of the Department of the Interior.\textsuperscript{41} As the law noted, "Many are profoundly concerned about the future disposition of the crash site . . . ."\textsuperscript{42} The concerns about the future of the site were described in the Congressional hearings. Elizabeth Kemmerer, a family member of one of the passengers, told the House Subcommittee on National Parks that the "site, without proper care . . . and maintenance, has the potential of becoming a circus atmosphere where trinkets and trash will be sold."\textsuperscript{43} A National Park Service representative, P. Daniel Smith, explained that the local governments were unable to "protect the site from inappropriate relic seekers."\textsuperscript{44} And "[e]stablishing a permanent memorial would . . . provide an appropriately respectful setting for family members and other visitors."\textsuperscript{45}

Kemmerer brought along to the hearings photographs of the temporary memorial that visitors had created—an eclectic combination of flags, mementos, and photos.\textsuperscript{46} Such popular, unregulated activity was unpredictable, and institutional and governmental support was needed, Kemmerer noted, but the local governments were not up to the task.\textsuperscript{47} They were "not equipped to take on the burden, both financial and logistical, of maintaining a site where Americans can go to remember the heroics of [the] 40 passengers and crew. The crash site should be a place to say a prayer, meditate or reflect on just what happened. . . ."\textsuperscript{48} Smith, of the Park Service, noted that, in addition, there is a crucial need for National Park Service technical assistance to be available to consult on the immediate needs of collections, storage, oral history, and archives. We learned from our role at the Vietnam Veterans Memorial there is a great need to permit the public to place mementos and express feelings.\textsuperscript{49}

\textsuperscript{42} Id. at § 2(a)(3).
\textsuperscript{44} Id. at 11 (statement of P. Daniel Smith, Special Assistant to the Director, National Park Service, U.S. Department of the Interior).
\textsuperscript{45} Id. at 15.
\textsuperscript{46} Kemmerer, supra note 43, at 39. See generally, Snodgrass, supra note 35 (presenting a collection of photos of mementos from the site).
\textsuperscript{47} Id. at 38-39.
\textsuperscript{48} Id. at 38.
In sum, a fear of unregulated commercialism and the circus, along with a need to curate and document the popular memorials, required federal involvement.

Congress did not have an established category of “sacred” ground within which to locate the parcel. The term only appears in the Flight 93 case as a legal category in relation to whether there were Indian sacred sites on the land, a matter which the Environmental Impact Statement disposed of handily: “Sacred sites (as defined in [Executive Order] 13007)[.] No; none exist.” Instead, Congress turned to the National Park Service, and the vocabulary of memorials, nature, parks, and heritage. As Peter Byrne has described, the Park Service had moved into historic preservation in the 1920s, and it had taken responsibility for other sites of national mourning, such as Gettysburg Battlefield and Arlington National Cemetery. Within this structure, the decision to see Flight 93 through the lens of parks and heritage is understandable. And yet the absence of an explicitly nationalistic or religious framework is noteworthy and led to some points of tension with family members. In response to a complaint that a “park” sounded like a place for picnic, not a place to mourn, an apologetic Park official explained:

It's really hard for us sometimes to not say 'the park' because of our NPS habits and culture. We really do know it's a national memorial. What we try to do is say 'the unit of the National Park Service.' Does that make sense and is that more palatable?

The designation of the site as a unit of the Park Service was procedurally unusual, bypassing the normal bureaucratic processes of extensive study into whether a site would be an appropriate park and whether it was of genuine historic significance. Both of these crite-

50 National Park Service, FLIGHT 93 NATIONAL MEMORIAL FINAL GENERAL MANAGEMENT PLAN/ENVIRONMENTAL IMPACT STATEMENT, Ch. IV, Table IV-1 (2006) [hereinafter FLIGHT 93 ENVIRONMENTAL IMPACT STATEMENT].
51 J. Peter Byrne, Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law, 22 TUL. ENVTL. L.J. 203, 213 (2009) (explaining that battlefield parks were transferred from the War Department to the National Park Service in 1933 and that “[t]he NPS, founded in 1916, had become heavily involved with historic preservation during the 1920s... the NPS institutionalized historic preservation expertise within the federal government. In 1935, Congress entrusted the NPS with important duties under the Historic Sites Act, which enhanced professional standards for the appraisal of proposed historic landmarks and tools for preservation. The landmark 1966 National Historic Preservation Act (NHPA) confirmed the role of the NPS in establishing the criteria and administrative processes for the National Register of Historic Places...” (internal citations omitted)).
53 The process for such a designation is governed by the National Parks Omnibus Management Act of 1998 (P.L. 105-391) which requires an in-depth study of any proposed additions.
ria were self-evidently satisfied. Smith, of the Park Service, commented that the usual process is to wait a “sufficient interval of time to allow for historical judgment. Yet, the events of September 11th are so clearly important to contemporary America that some kind of national recognition is appropriate now.”

Congress’s designation of the site as a national memorial and a unit of the National Park Service also meant that it was “automatically listed” in the National Register of Historic Places. While the normal practice was to wait fifty years for a historic designation, the Park Service later wrote that the “Flight 93 National Memorial is a historic site that is commemorative in nature. National memorials frequently consist wholly or partly of agency created resources that are historic because they are commemorative.” In other words, the Park Service was able to accommodate this unusual “instant” heritage.

The Flight 93 law created a process to develop plans for an appropriate memorial, and it created an organization, the Flight 93 Advisory Commission, composed of relevant governmental and interested parties, to aid in that undertaking. It permitted purchase of land for the memorial (the law initially did not appropriate any funds for the project, which over time would expand to more than 2,000 acres and cost about $70 million), from “willing sellers.” But the framework of commemoration, heritage and parks was not able to contain the process that followed without challenge. In particular, notions of the sacred and the import of Bell’s “intangible” value were still to be negotiated and litigated.

B. Memorial Design: Sacred Ground And Wounded Nature

In 2004, the Park Service’s announcement of its international design competition for a national memorial explained that the “crash site, now considered sacred ground, will become a... national memorial.” The winning bid, selected out of over one thousand en-

55 FLIGHT 93 ENVIRONMENTAL IMPACT STATEMENT, supra note 50, at 16.
56 Id.
tries, was by architect Paul Murdoch. Murdoch centered his design around the crash site, which he also called the “Sacred Ground.” Visitors would enter from the north, following the plane’s route and walk through a tall structure, which Murdoch called the “Tower of Voices.” The tower “houses 40 wind chimes that present through sound a living memory of the passengers and crewmembers. The last memory of many was through their voices on calls from Flight 93, and of the rushing wind.”

The site then opened onto a large bowl-shaped field, which Murdoch called the “Field of Honor.” In his design, the perimeter of the bowl is planted with two semi-circles of trees, a “national gesture of embrace that orients visitors toward the Sacred Ground.” Visitors can approach the sacred space, “but not enter.” On the other hand, family members may do so. Murdoch envisioned a design that would be “open to interpretation”:

Most importantly, the design is an open circle: Open to seasonal change, maturity over time and open to personal interpretation through multiple memorial and landscape experiences. It is not just a closed, singular form. The memorial walls near the entrance open to the western landscape. Those walls frame the open sky above the flight path. The memorial groves open the circle along lines that radiate out from its center. Rebuilt wetlands span the bowl edge, opening natural habitat between the memorial and landscape beyond. Different vantage points around the bowl offer vistas of the countryside beyond the park.

The theme of healing the land became increasingly prominent in explaining the design—healing it not only from the crash, but also from strip mining. By healing the former mining site, visitors would be healed too. One can detect an alternative to the “sacred” status of the crash site in the restorative powers of nature. A Park Service video explains:

The vistas still hint at its mining history. But, today, the life of this land is being restored. It is now healing. And, in return, nourishing our souls

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62 Id.
64 Paul Murdoch, Flight 93 National Memorial Design Presentation, supra note 60.
65 See Murdoch Answers Questions About Flight 93 Memorial Design, supra note 62.
66 For a conception of nature as occupying the place of the sacred in contemporary jurisprudence, see Carol M. Rose, Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age, 66 J.L. & CONTEMP. PROBS. 89, 109 (2003).
[at this point in the video there are images of ducks beside a pond]. The fields, wooded groves, and rolling hills that bore witness to incredible violence are now a final resting place and lasting testament to forty extraordinary people aboard Flight 93.67

Unlike the spontaneous, messy, popular memorial that members of the public created (which included crucifixes and an endless assortment of odds and ends), Murdoch's "sacred" did not have an explicitly religious or nationalistic dimension. It is a supposedly post- or non-religious vaguely spiritual sacred site tied to nature,68 while also austere, controlled, and non-commercial. His sacred derives its sentimentiality not from the political domain or kitsch commercialism, but rather from nature. The overlaying of the sacred by nature is expressed in particularly literal form by the 2011 installation of a 17-ton "native sandstone boulder" on top of the crash site "mark[ing]" where the "journey of flight 93 ended so violently."69 It is as though the sacred ground of Murdoch's original design was too vacant. Nature, in the form of a "native" boulder, rendered the sacred tangible.

C. From Sacred To Sacrilege

In emphasizing what he saw as interpretive openness, however, Murdoch left his design open to misinterpretation. The turn to nature took place amidst attacks against the design for its perceived Islamic symbolism. It was a sacred design, but in the wrong sense, according to these critics. Among them, Alec Rawls was perhaps the most energetic: "If you let Murdoch plant the world's largest mosque on the sacred ground where America's heroes died fighting, your lives will be destroyed."70 He posted online his book-length monograph analyzing the design, Crescent of Betrayal.71 At a 2008 Flight 93 Commission meeting, an attendee claiming to represent thousands of people, Harry Beam, complained about the "Islamic symbolism" of

69 National Park Service, Fight 93 National Memorial Preview Summer 2011 [video].
the design. The row of trees around the Field of Heroes was a Muslim crescent, he thought, and the design pointed towards Mecca. The minutes of the same Commission meeting record that a family member defended the design:

'Wow, such hate, I am totally blown away by this.' She goes on to say that this is the site where their loved ones remain, and that when the opponents of the design insult the place and inflame the events, they are hurting them. . . . She has been involved in the process since day one, and that she would never support any design that would support Muslims. . . . She advised there is nothing anyone can do with the shape of the land. It is a bowl, an embrace saying welcome home. Her husband would have loved the place. There is an existing landscape to work with, and they cannot change the place, nor alter it, because their loved one's remains are there. She further states that the circle of trees around the bowl is broken, because the land is broken and has been man-handled before; now it is time to heal. A decision was made not to hurt the land anymore.

The accusations of a hidden Islamic message were reported in the national press and trumpeted by national politicians. The Commission took the explosive charges seriously: "Over the past few years, we have reached out to experts in the areas of religious iconography, Islamic Law/theology and memorial design." The Commission prepared a "Chart of Facts" responding to questions such as: "Is the memorial sited so that it faces Mecca?" The answer, the chart helpfully responds, is that the memorial "is oriented toward the sacred ground, the final resting place of the 40 heroes of Flight 93."

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73 Id. at 16.
74 Included among these national politicians is U.S. Rep. Tom Tancredo (R-Colo). See Vicki Rock, Congressman No Longer Critical of Flight 93 Design, DAILY AMERICAN, JULY 25, 2008 ("Two years ago, the congressman asked the National Park Service to revamp the memorial. Last November, he asked the agency to direct the Flight 93 Federal Advisory Commission to scrap the plan and start over. At that time, he said the original design, first called the Crescent of Embrace, was questionable because of the crescent's prominent use as a symbol in Islam and the fact that the hijackers were radical Islamists.").
75 Statement of Gordon Felt, President, Families of Flight 93 (May 2, 2008); see also Summary from R. Kevin Jacques, Assistant Professor, Department of Religious Studies, Indiana University (Feb. 27, 2007) ("Rawls has a fundamental flaw in his reasoning, namely: just because something is 'similar to' something else, does not make it the 'same.' I doubt that anything I, or any except in Islamic architecture or mosque design, could say would satisfy him. A typical example of this is on page 40 where he gives the shapes of two maple trees and says that because the shape is vaguely similar to the space created by an arch, they are the same thing. He then shows a single evergreen and says that because the shape is similar to a pointed arch, it is the same thing.").
76 National Park Service, Chart of Facts about the Memorial Design (n.d.).
Perhaps in response to the controversy, the National Park Service dropped its use of the term "sacred ground" in its description of the memorial plan. The area that on Murdoch's map (still on the NPS website) was labeled "Sacred Ground" is now not labeled at all.\footnote{National Park Service, \textit{Flight 93 Site Plan}.} Instead, the adjacent sliver of land is called "Memorial Plaza and Arrival Court."\footnote{Id.} In contrast to Murdoch's interpretative "openness," the design description now available on the Park Service website is highly prescriptive, telling the visitor what each feature "symbolizes."\footnote{National Park Service, \textit{Visiting Flight 93} (Feb. 5, 2016), http://www.nps.gov/flni/learn/photosmultimedia/virtualtour.htm [video] ("Concrete walls are textured to evoke the region's barns . . . . The shiny chips in a wall "remind us of the coal mined from this land . . . Benches are tapered reminiscent of plane wings.").} A "rugged gate," for instance, reminds us—we are told—of the "strength and resolve" of passengers and crew.\footnote{Id.}

In sum, Congress classified the site as a memorial and as heritage and located it within the Park System. But the site exceeded that legal and policy structure for many people. Calling it sacred clearly meant a variety of things—but not all could be included in the Park Service's plans. Murdoch invoked a notion of sacred that was calm and reflective, and intersected with nature and seasonal change. In response, he was accused of bringing forward a different kind of sacred. Subsequently, this interpretative openness was supplemented by explicit guidance explaining the design's details, and by a sustained emphasis on the theme of nature. In what follows, I turn to the question of what these varying conceptions of the sacred suggest in terms of how the land's value was understood and calculated.

\section*{II EMINENT DOMAIN AND JUST COMPENSATION FOR SACRED LAND}

While the Park Service and the Flight 93 Commission fought back accusations that their chosen design contained Islamic iconography through 2008, another problem was coming into focus. They still did not own the essential parcel—the crash site, the sacred ground. It was empowered under the 2002 law only to acquire land from "willing sellers."\footnote{Flight 93 National Memorial Act, Pub. L. No. 107-226 § 5(8), 116 Stat. 1345, 1347 (2002).} As time wore on, it became increasingly apparent that there was a problem in settling on a price with the landowner. Apparently attuned to the possible positive effects of owning sacred property, the landowner was reported to want a substantial premi-
Frustration mounted as it appeared that memorial construction might not be underway by the tenth anniversary of the attacks. In late 2007, Congress empowered the Department of the Interior (containing the Park Service) to invoke eminent domain. The decision to use that power caused a minor outcry for violating private property rights and caused two of the Commission’s members to resign in protest. In 2009, the government took the land through a condemnation proceeding filed in federal court and then began to litigate the amount of compensation owed.

This Part focuses on the efforts to determine the monetary value of the property where the sacred ground is located—a 275-acre parcel belonging to a family-owned quarry company, Svonavec, Inc.

The questions focused on are how and whether the land’s sacred status impacts its monetary value, and whether the landowner should be awarded whatever enhancement in value is attributed to the attacks. First, this Part briefly lays out the legal context of takings jurisprudence and suggests that, at first glance, the landowner is to receive any enhancement in market value due to the attacks because compensation is usually determined by the market value at time of taking. Second, this Part examines the ways in which the government, the landowner, the district court and its appointed Commission of local real estate experts, approached the question of value—with a particular focus on the dueling expert appraisals. As I describe in that Part, all of these parties simply accepted without argument that if the 9/11

83 See Sean D. Hamill, Flight 93 Families Reach Out to Bush, N.Y. TIMES, Jan. 10, 2009, at A11 (reporting on demands made by families of the victims due to the slow process of getting the land for the memorial site).
84 Consolidated Appropriations Act, § 128, 121 Stat. 1844, 2122 (2007) (amending Public Law 107-226 (Flight 93 National Memorial Act) to: (1) remove the requirement that the land or interests in land for the memorial site be acquired from willing sellers; and (2) authorize the acquisition of the land or interests by condemnation with donated or appropriated funds).
87 Sean D. Hamill, Flight 93 Families Reach Out to Bush, NEW YORK TIMES, Jan. 10, 2009, at A11 (describing Svonavec Inc. as “family-owned quarry company”).
attacks had increased the market value of the land, that this enhancement should accrue to the owner. I take issue with that assumption in Part III.

A. Just Compensation

The Takings Clause of the U.S. Constitution provides that “private property [shall not] be taken for public use, without just compensation.” Much current discussion focuses on when a taking has occurred, and, especially after the Supreme Court’s decision in *Kelo*, on the question of what is “public use.” Our focus, however, is on what constitutes “just compensation”; and there is very little guidance to be found on the question of the fairness, equity, or justice of a private landowner’s benefitting from the value of their property as a site of national tragedy.

“Just compensation” is usually described as “the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken . . . what a willing buyer would pay in cash to a willing seller.” But just compensation may depart from market value to the extent that the government’s own project has impacted market value. Under the “scope of the project” rule, changes in market value due to the government’s own actions should be excluded from the compensation analysis: “Neither the Government nor the condemnee may take advantage of ‘an alteration in market value attributable to the project itself.’”

Applied to the Flight 93 site, it seems that the enhancement of value due to the attack and the crash should be included in the amount due as just compensation. The attack was not a government project to create sacred ground on Svonavec’s land. Indeed, it was a government failure to prevent the attack that is a condition of the value. It seems that it was the passengers, the hijackers, the United Airlines plane, combined with a broad public interest in the site, that created the enhancement. On the other hand, under the scope of

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88 U.S. CONST. amend. V.
89 *Kelo v. City of New London*, 545 U.S. 469, 479-80 (2005) (rejecting a requirement that the land be used by the general public and instead applying a “public purpose” test).
91 *Id.* at 480 (Powell, J., concurring) (citing United States v. Reynolds, 397 U.S. 14, 16 (1970)). For the scope of the project rule, see Uniform Appraisal Standards for Federal Land Acquisitions 46 [hereinafter “Uniform Appraisal Standards”] (defining the scope of the project rule).
the project rule, the portion of the increased value that can be attributed to the government’s decision to create a public memorial itself would not go to Svonavec.

It may be, however, that the market value that includes the “sacred” value is not quite the $23 million windfall that Svonavec and the “stigma” appraiser Bell envisage. The Department of Justice guidelines for takings, the “Yellow Book,” or the Uniform Appraisal Standards for Federal Land Acquisitions, provides that the preferred method of valuation is looking to comparable sales,92 which are difficult to establish in this case. Another form of valuation is “highest and best use” which the appraiser may consider “if the property is clearly adaptable to a [more profitable] use other than the existing use . . . .”93 Perhaps at the sacred ground site, highest and best use would be a for-profit memorial or a theme park related to the crash. The Yellow Book provides that a “proposed highest and best use cannot be the use for which the government is acquiring the property (e.g., missile test range, habitat conservation, airfield, park), unless there is a prospect and competitive demand for that use by others than the government.”94 If Svonavec could show that there is such market demand, then it could avoid this problem of asserting the same use as the government. Highest and best use must also be a legal use and the appraiser can take into account zoning.95 If Svonavec’s plan were to create a for-profit memorial or theme park, it might be a genuine problem for the appraiser to determine whether such a use would be permitted. Indeed, Congress’s designation of the land as a national heritage site (not in itself a taking)96 and a park within the Park Service may entail some impediment to pursuing profit above all else. But Svonavec cannot attempt to avoid the legal use problem by saying that it intends a not-for-profit memorial. If it

92 Uniform Appraisal Standards, supra note 90, at 37 (noting comparable sales are the “best evidence of market value”).
93 Id. at 34; see also id. at 36 (explaining that “highest and best use is a most important consideration in estimating market value”).
94 Id. at 35.
95 Id. at 36 (noting the Yellow Book advises that the appraiser is to consider “physical possibility, legal permissibility, financial feasibility, and its degree of profitability. That use which meets the first three tests and is the most profitable use (i.e., results in the highest value) is the property’s highest and best use”).
wants to use the highest and best use methodology, it should have shown an “economic” use. A tentative summary of the appraisal issues, then, suggested that Svonavec’s award would include any enhanced “sacred” value; however, comparable sales valuation would be inconclusive, and highest and best use as a for-profit memorial or theme park would be discounted due to uncertainty around whether it could truly operate a profit-making memorial.

B. Dueling Appraisals

This Part describes some of the steps leading up to the condemnation proceeding, and then turns to the competing appraisals that the government and the landowner submitted in court. Before the taking, Svonavec blamed the government for the delay because it had refused to release its appraisals. Indeed, various parts of the government (the Appraisal Services Directorate within the Department of the Interior, the Park Service, the Department of Justice) do seem to have struggled with how to appraise the land, and how to include or exclude its historic and “sacred” dimension. In one appraisal the profit-making potential of the site due to its special status was included. But the government refused to accept the appraisal, and commissioned an evaluation of the appraisal. In another appraisal, commissioned after the taking, the site’s special status was excluded. The government, I suggest, was properly seeking to exclude the sacred value from the appraisal, but it lacks an explanation as to why this is appropriate.

1. The Government’s Appraisals: Including Or Setting Aside The Effects Of 9/11

Before exercising its power of eminent domain, in 2008 the government received an appraisal from Utah-based LECG Corporation ("LECG"). The plane crash, the appraisal found, had tripled the value of the land, and it was now worth $1,530,000. Observing that

97 See Uniform Appraisal Standards, supra note 92, at 36 (stating the Department of Justice’s “view is that an appraisal premised on a highest and best use of ‘preservation,’ ‘conservation,’ ‘natural lands’ and the like is not an appraisal of ‘fair market value’ and is unacceptable for both direct purchase and eminent domain acquisitions . . . . Nor will it approve any appraisal report that incorporates a definition of highest and best use that includes the concept of non-economic uses”).

"[m]arket comparables suggest that there is significant interest by paying customers in facilities that memorialize national or international tragedies," LECG found that use of the property as a private memorial was likely the highest and best use.\footnote{That is, "the value of the Subject land for use in conjunction with a privately owned and operated memorial far exceeds the agricultural and mining value."}{99} Drawing on eleven case studies of memorial museums throughout the U.S.,\footnote{LECG determined that entrance fees could be charged to enter a museum and that revenues could be generated from a gift shop and restaurant sales. In turn, a landowner could collect rent from the museum operator.}{100} LECG found that use of the property as a private memorial was likely the highest and best use.\footnote{DRAWING on eleven case studies of memorial museums throughout the U.S.,\textsuperscript{101} LECG determined that entrance fees could be charged to enter a museum and that revenues could be generated from a gift shop and restaurant sales. In turn, a landowner could collect rent from the museum operator.}{102} LECG acknowledged that the market for a memorial is "shallow," meaning that there were not many buyers for this sort of property and that it "is therefore necessary to identify the market."\footnote{LECG acknowledged that the market for a memorial is "shallow," meaning that there were not many buyers for this sort of property and that it "is therefore necessary to identify the market."}{103} It envisioned a private memorial operating alongside "a non-profit entity. Such an entity would have to be viewed as legitimate by stakeholders in the Flight 93 event, which narrows but does not eliminate the prospective market."\footnote{LECG acknowledged that the market for a memorial is "shallow," meaning that there were not many buyers for this sort of property and that it "is therefore necessary to identify the market."}{104} Significantly, LECG’s analysis was rejected by the Appraisal Services Directorate of the Department of the Interior, which noted that "[b]ecause of this appraisal’s attempt to justify a private memorial value and being unable to do so, the report is deemed unacceptable for use."\footnote{Significantly, LECG’s analysis was rejected by the Appraisal Services Directorate of the Department of the Interior, which noted that "[b]ecause of this appraisal’s attempt to justify a private memorial value and being unable to do so, the report is deemed unacceptable for use."}{105} Svonavec expressed its "shock" that the government would "hide" the appraisal.\footnote{Id.}{106}
Subsequently, but still before the taking, the Park Service hired an appraiser to review the LECG appraisal. Colliers Pinkard, in its report of November 2008, recommended rejecting the LECG analysis:

To suggest a narrow and unique use for the property as the basis for valuation is contrary to the definition of market value. Setting aside for a moment the property’s unique historic significance, this property is typical of dozens of rural sales in Somerset County that can provide an indication of typical uses of similar rural land sold in the market area. These include cropland, pasture, timber, recreation and farmette home sites. While LECG had placed the “unique historic significance” of the site at the heart of its analysis of value, Colliers Pinkard saw this as an error. Market value, it contended, was to be determined where buyer and seller are “typically motivated,” where price was not affected by the “undue stimulus” of the unique event. Rather than being misled by an eccentric, overly stimulated market value, Colliers Pinkard saw value as that which is determined in a “broader marketplace,” as seen in comparable sales. Market value entailed “setting aside for a moment the property’s unique historic significance” to determine what were the typical uses of land in the area and how they are valued.

In an important part of its report, Colliers Pinkard wrote that LECG’s “highest and best use conclusion differs little from a public interest use for which a narrowly defined buyer market will pay a price premium, leading to a result in the LECG appraisal that borders on public interest value.” That is, the market that LECG identified was composed of private individuals who were publicly motivated (including groups such as Families of Flight 93)—parties wishing to preserve, as LECG put it, “this piece of history for the edification of present and future generations.” This description is important in that the idea of market value in this context is understood in terms of a “private” market, one motivated by profit (recall the earlier discussion of appraisal basics where the highest and best use must be “economic”).

107 Colliers Pinkard Review of LECG Appraisal, supra note 101, at 8. The review of LECG’s appraisal was conducted by Terry Dunkin and Gregory Jones of Colliers Pinkard for Pam McLay, Chief of Business Services for the National Park Service’s Northeast Region. Id. at 4.

108 Id. at 11 (emphasis added).

109 Id.

110 Id. at 14 (emphasis added).


112 See supra notes 92-96 and accompanying text.
Rather than develop its insight, Colliers Pinkard cordoned off the significance of that special market demand and appraised the land as though Flight 93 had not crashed there: “Presumption of such a narrow special-purpose use disregards the property’s value in the eyes of the broader marketplace. In rural Somerset County, large land parcels are mostly used for agriculture, . . . homesites[,] [etc.].” Colliers Pinkard also argued that even if valued as a memorial, LECG had underestimated the financial risk. The land residual technique LECG used—which calculated the profits from entrance fees to set a value for the land—was highly likely to be thrown off by minor changes in inputs. While LECG had treated the land as the same investment grade as a shopping center, Colliers Pinkard objected that:

In our view it is improbable that a prudent investor would pay a substantial price premium for rural land on the premise that a proposed museum operator would pay well above market rent to locate a facility there, notwithstanding the historic significance of that specific site. The immediate area of the Flight 93 crash itself will always remain hallowed ground, but a museum and memorial could be built offsite. . . . Competition from adjoining parcels vying for the museum would tend to moderate the rent or land price to a rate commensurate with the intrinsic value of land in the surrounding area.

Thus, Colliers Pinkard rejected LECG’s analysis that had included the value of the site as a profit-generating memorial. It did not deny that there was something special about the land (“it will always remain hallowed ground”), but contended that this was not necessarily of any economic importance. Colliers Pinkard (and the government, as we will see) ended up in the odd position of appraising the land as if it were empty farmland. If it seemed surprising for the stigma specialist, Bell, to include the effects of the attacks as an amount owed the owner, it is perhaps more surprising to find that after the attack the highest and best use included farming, grazing, and home sites.

Subsequently, in September 2009, the government took the property through a declaration of taking and, in November 2010, the Department of Justice obtained another appraisal to use in the condemnation proceeding. In the appraisal by Cassidy Turley, the ex-

113 Colliers Pinkard Review of LECG Appraisal, supra note 100, at 14.
114 Id.
115 Id. (emphasis added).
116 Id. at 16.
117 Id. at 11, 14.
118 See Declaration of Taking, supra note 85.
119 United States’ Response in Opposition to Defendant’s Motion to Exclude the Expert Testimony of Gregory Jones, Exhibit 2, Cassidy Turley Appraisal of Svonavec, Inc. Property,
clusion of the land’s historical or sacred significance was better developed than in the Colliers Pinkard Report. “Sacred” seemed to mean set apart and excluded from the valuation analysis: “An estimated 6 acres around the crash site would be reserved as sacred ground, left undisturbed in perpetuity. That leaves about 265 acres for development.”[^120] The appraisal then asked about the highest and best use of that remainder and, again, found that the land had a variety of uses, including cropland, hunting, grazing, and farmettes.[^121]

The Cassidy Turley appraisal expanded upon the analysis of the Colliers Pinkard report and, in fact, shared an author, Gregory Jones[^122] (Jones was one of the government’s experts at trial, and I will refer to the Turley report as Jones’s).[^125] Finding that the land was worth about the same as its pre-9/11 value, Jones’s valuation was $600,000.[^124] Jones seemed to exclude the sacred ground from his analysis of the site’s dollar value:

> Notwithstanding the prospective uses of the surrounding acreage, the vicinity of the impact site would in any event be preserved as an undisturbed sacred ground forever, as would a cemetery. Suffice it to say, any buyer of the property would likely be expected to keep a respectable distance between the impact site and any incompatible use.”[^125]

In this appeal to propriety, to a “respectable distance,” Jones excludes the crash site from his evaluation. He does not explain how this appeal to propriety conforms with the appraisal guidelines and the clear demand that only “economic” considerations be included.[^126] For Jones, the sacred value is visible only in the way it might affect the surrounding acres—if, for instance, they could be profitably used for a visitor’s center. He considered whether a portion of the property

[^120]: United States v. 275.81 Acres of Land, No. 3:09-cv-00233, 2014 BL 387242 (W.D. Pa. June 10, 2014), Doc. 110-2 [hereinafter Cassidy Turley Appraisal Part I]. This appraisal was prepared by Gregory Jones of Cassidy Turley, a commercial real estate services firm located in Baltimore, for Kristen Muenzen of the U.S. Department of Justice’s Environmental and Natural Resources Division.


[^122]: Id. at 5.

[^123]: See, e.g., Svonavec Inc.’s Motion to Exclude the Expert Testimony of Gregory Jones, United States v. 275.81 Acres of Land, No. 3:09-cv-00233, 2014 BL 387242 (W.D. Pa. June 10, 2014), Doc. 104 (attempting to exclude Gregory Jones’s testimony as an expert witness because his methods were flawed and unreliable).

[^124]: Cassidy Turley Appraisal Part I, supra note 119, at 3.

[^125]: Id. at 20 (emphasis added).

[^126]: See supra notes 92-96 and accompanying text.
could be developed as a private memorial, but found “inadequate support to determine that use to be financially feasible.”

In sum, the government obtained appraisals which both included and excluded the “sacred” value from its analysis of market value. Considered together, they each laid out different approaches: the historic or sacred value exists, and it has a market effect that can be included in the appraisal (LECG); the land is sacred, which may have market effect, but the market effect is really a public interest use (and thus to be excluded) (Colliers Pinkard); the land is sacred and set aside by the dictates of propriety, and has no market effect (Jones). In other words, the first simply asks about the market value of the crash. The latter two raise more complicated issues by asking about the public nature of the use and raising a moral language of propriety. But they do so inadequately because—as real estate appraisers—they apparently cannot put aside the formula of market value as the measure of just compensation. That would be a task for the lawyers—one, we will see, they too declined.

2. Randall Bell And The ‘Permanently Attached Intangible’ Asset

The government wished to take the property because it was an exceptional site, but in the appraisal context and in its pleadings seemed to treat the land as though it were any other land in rural Pennsylvania. By contrast, for the landowner, the unique nature of the land is central to its monetary value, not peripheral. The landowner had explained the inability to come to an agreement with the government as due to the fact that the government had not released its appraisals, including the LECG appraisal, which contemplated the profitable use of the site as a memorial. But Svonavec did not publicly make such assertions, and in one document seemingly agreed to donate the sacred ground for free (one document signed by Svonavec referenced the “intention of the Seller to donate to the United States a certain, approximately six-acre sub-parcel at the crash site . . .”).

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127 Cassidy Turley Appraisal Part II, supra note 121, at 4.
128 Swauger, supra note 105 ("We’re shocked that they would reject this [LECG] appraisal,’ said Mike Svonavec, secretary-treasurer for Svonavec Inc. ‘After everything they’ve gone through, we just can’t believe they’d hide it. Put it out there, and we can get this done.").
Randall Bell, the “Master of Disaster” encountered earlier, conducted an appraisal for Svonavec in December 2011 and valued the land at $23 million.\textsuperscript{130} Where the government’s appraiser Jones (author of the Colliers Pinkard and Cassidy Turley reports) saw the property as normal land, with the admitted exception of the “sacred ground,” Bell’s analysis is premised on the unique nature of the land. Unlike Jones, however, Bell does not call the land “sacred”—perhaps this would interfere with his interest in asserting the easy conversion of the land’s special quality into money. As we saw, in his deposition Bell expressed his view about the unique nature of the site containing a “permanently attached intangible” form of value: The intangible value is attached to that property permanently, and so it’s appropriate to look at the income that’s going to be generated as a consequence of that permanently attached intangible and estimate the revenues from it.\textsuperscript{134}

In his appraisal, Bell sought to determine the land’s value as a memorial and visitor center. He collected comparable data from the seventeen sites of “national and international interest,” including the Murrah Federal Building, the Alamo, Graceland, the Hiroshima Peace Memorial, the Empire State Building, the Statue of Liberty, and Gettysburg, among others. He attempted to determine the “net concession income” per attendee and the amount that a bookstore and restaurant might generate. Further, the “projected net operating income [would be] capitalized to yield a value that [was] indicative of the price an investor or developer may pay for the subject property,”\textsuperscript{132} and he arrived at a value of $23 million or $1.94 per square foot.\textsuperscript{133} (This figure, as the U.S. pointed out, is a generous $84,500 per acre,\textsuperscript{134} rather more than the $1,500-2,500 typical of the area\textsuperscript{135}).


\textsuperscript{131} Bell Deposition, supra note 1, 77:22-78:2.

\textsuperscript{132} Expert Report of Randall Bell, supra note 130, at 7.

\textsuperscript{133} Id. at 18 (referencing a table summarizing land residual calculation).

\textsuperscript{134} United States’ Rule 71.1(h) Motion and Memorandum to Exclude Defendant’s Highest and Best Use of the Subject Property as a Memorial and Related Visitor Center at 16, Flight 93 National Memorial and the Flight 93 Museum, United States v. 275.81 Acres of Land, No. 3:09-cv-00233, 2014 BL 387242 (W.D. Pa. June 10, 2014) [hereinafter “United States’ Rule 71.1(h) Motion”].

Bell also expressed his confidence in the staying power of the special value: "The subject site is of considerable national significance, which sets it apart from vacant land with no commercially viable use. The subject property is considered secure from an investment standpoint."137

But Bell does not only apply a market logic. He too acknowledges moral and non-market considerations and did not envision a purely for-profit memorial. From the portions of his appraisal currently available, it is not clear how he envisions the free and paid parts of the memorial intersecting. One example of Bell’s thinking on this matter is a business proposal he sent to Svonavec in 2003. (Bell, in addition to serving as Svonavec’s appraiser in 2011, had been in contact with Svonavec shortly after the 9/11 attacks. Early on, Bell obtained the internet domain names to Flight 93 websites, and in 2007 Bell entered into a joint venture with Svonavec to assist in selling the crash site in exchange for 10% of the sale.)138 In the business proposal, Bell suggested a “Flight 93 National Memorial” that would be a not-for-profit, open to all for free, which would “honor those heroes that died there that day.”139 For an “in depth look,” visitors would pay to enter the Flight 93 Museum.140 This Museum would provide a view of the “Circle of Heroes” encircling the crash site and feature “displays, a theater featuring a proprietary documentary, and a bookstore.”141 While it would be possible to charge money to walk on the Circle of Heroes, Bell’s proposal expresses a concern as to whether that money could go to a for-profit entity. The proposal provides

136 Bell claimed that one could charge $9 per person to enter a paying component of the Flight 93 site. Moreover, bookstore and concession net income would be $4 per person. Expert Report of Randall Bell, supra note 130, at 16 (citing market data projected net income). Bell estimated that 250,000 persons would visit per year, and that 184,000 of those would pay for entrance to the visitor’s center. Id. Bell anticipated $1.6 million in admissions; with a net income of $1.1 million income; adding in bookstore and concessions brought income up to $1.8 million; at a 7% capitalization rate less construction costs he came up with his final figure. Id.

137 Id. at 17.

138 United States’ Rule 71.1(h) Motion, supra note 134. The agreement describes a joint venture between Bell, as holder of “intellectual property,” i.e., the domain names including Flight93NationalMemorial.org, and Svonavec, as owner of the crash site. Id. at 2. It anticipates a sale to a third party and acknowledges that the site, because of a “high level of national and international interest...has the potential for the generation of considerable revenues.” Id. They agree to sell their properties together as a “combined package,” and agree that Bell will prepare a prospectus, identify and contact prospective purchasers, and is to receive 10% share of the sale or lease. Id. at 2-5.

139 United States’ Rule 71.1(h) Motion, supra note 134, at Exhibit 12 at 4.

140 Id.

141 Id.
that "100% of all such proceeds will go to ______." That is, the
draft left blank who should benefit. We might construe this won-
derful empty line as the typographic expression of the confronta-
tion with "sacred" value—it cannot be touched. This money is marked
and set aside in some special way. The blank line suggests a concern
that one cannot take those funds for the profit-making museum. On-
ly later in the document is the matter resolved: this special money
will go to the victims’ families. The clarity emerged in the section on
investment “risks” which, Bell noted, “include political pressures from
surrounding residents, survivors[] [groups] and September 11th ac-
tivist groups.”143
Bell’s proposal mediates the special nature of the land and finan-
cial return by creating a three part structure—free, paid, and dona-
tion—and determining that it would only be acceptable to turn a
profit from the intermediate space. That is, the space between the
public and the sacred is the market. This spatial segregation of the
sacred is mirrored in the legal structure Bell envisaged. In a 2003
email he suggested that there be two entities, a “trust or corporation
that can disperse earnings [and] . . . a non-profit corporation that
can accept donations . . . for the National Memorial and families.”144
Despite their differences, Bell and Jones agree on many points.
Both share the idea that the sacred or intangible cannot be valued as
such, only as expressed in some other form, such as entrance fees.
They agree that there must be some free access to the public, and we
might interpret this to mean that the sacred cannot be fully “owned”
by any party. (I return to this point in Part III where I compare the
enhanced value in this case to a windfall.) Finally, it is agreed that at
least the sacred ground, the crash site, will be a memorial, not some-
thing else entirely. Where they differ is how this special or set-aside
land interacts with the broader context. Jones, the government ap-
praiser, seems to acknowledge it but then treats the land as fungible
and akin to other land in the area. Bell, by contrast, seems to dwell
on the sacred value, even while he declines to follow everyone else
and use that term. Of these two, Bell’s analysis seems to capture an
important truth, that 9/11 probably has had a positive market impact
(although his instincts may have led him astray when he mused

142 Id.
143 Id. at 5. Finally, and after estimating in his proposal annual net profit of $500,000 to 2.5
million, Bell came to the question of “exit strategies” and how to cash out: "Preferred divi-
dends of ___% will be paid to the preferred shareholders, and any dividends will then be
paid to common stock holders." Id.
144 United States’ Rule 71.1(h) Motion, supra note 134, at Exhibit 11 at 2.
whether United Airlines might be a corporate sponsor). As argued below, however, whether that enhanced value exists should be seen as a separate question from whether it is to be included in determining what constitutes just compensation.

C. Sacred To ‘Vacant’ Land

Following the exchange of the appraisers’ expert reports in 2012, the government and Svonavec filed a flurry of motions attacking one another’s appraisals. The word “sacred” drops out of the debate—unlike Murdoch, Jones and the Park Service, the Department of Justice lawyers and Svonavec’s counsel do not use the term. As the valuation dispute moved towards a trial, the government focused on contesting the notion that there was any 9/11-related enhancement in value. In counterpoise to Bell’s “intangible” value, the government described the land as “vacant.” It contended, in contrast to the notion that the land was sacred or had some intangible value, that the site is “raw land.” In response to Bell’s contention that the land has been a private memorial since 9/11, the government’s rejoinder is that “[t]here was no ‘something’ on the subject property . . . that represented a memorial . . .” This characterization bolsters the government’s argument that Bell’s financial projections are speculative:

Most significantly, there was no operating memorial on the subject property on the date of taking. Defendant appears to put forth the notion that a “memorial” is the property itself, and that because Flight 93 crashed on the subject property, the entire property is, in and of itself, a memorial. According to the Merriam Webster Dictionary, a memorial is “[s] ommething, as a monument or a holiday, designed or established to preserve the memory of a person or event.” The land was a “vacant strip mine,” not a memorial. In the government’s narration, a memorial must be built, planned, and constructed—for instance, “rather than simply maintaining vacant land

145 Id.
147 United States’ Rule 71.1(h) Motion to Exclude the Valuation Testimony of Defendant’s Appraiser Randall Bell at 23, United States v. 275.81 Acres of Land, No. 3:09-cv-00233, 2014 BL 387242 (W.D. Pa. June 10, 2014), Doc. 106 [hereinafter Rule 71.1(h) Motion to Exclude Randall Bell Testimony].
149 Id. at 14 (emphasis in original) (internal citations omitted).
150 Id. at 15.
to commemorate the loss and heroic actions of the Flight 93 passengers, the National Park Service plans to develop a ‘permanent memorial’ on the property.\textsuperscript{151}

The issue of whether there was a memorial on the site was also relevant to Bell’s use of an income capitalization approach (first estimating profits, then amortizing these to arrive at a present day dollar amount). If there was nothing there, the use of this approach seems especially speculative, and Svonavec had “failed to explain why an income approach is a proper valuation method to value vacant land.”\textsuperscript{152} This gets to a central issue—that the land is the source of value, it is the “business.”\textsuperscript{153} It was in response to this formulation that Bell’s conceptualization—the “intangible asset attached to this property in perpetuity that’s going to generate income”—became pertinent since it attempted to capture the nature of the value that had been created as “something” and yet also nothing; as a memorial, and yet also an absence.

Confronted with such existential real estate niceties, we can have sympathy for the government. And the government is right in a literal sense: it is an empty field. Nonetheless, it does seem as though the government was not confronting precisely what is interesting about the case—for lack of a better word, that they are taking “sacred” land. Over 100,000 people per year had visited the site,\textsuperscript{154} leaving tens of thousands of objects and memorabilia.\textsuperscript{155} As Svonavec puts it: “Yet the Government and Jones would lead us to believe that these people were simply showing up to see ‘open space used for cropland, grazing, hunting and recreation, farmettes and large-tract home sites.’”\textsuperscript{156} This duality of something and nothing is precisely the point at which the sacred, and Bell’s intangible value, enters the policy and market reality of the situation. And if it is simply vacant land, why

\textsuperscript{151} Id. at 14.
\textsuperscript{152} United States’ Reply in Support of its Motion to Exclude the Valuation Testimony of Defendant’s Appraiser Randall Bell at 1, United States v. 275.81 Acres of Land, No. 3:09-cv-00233, 2014 BL 387242 (W.D. Pa. June 10, 2014), Doc. 119.
\textsuperscript{153} Rule 71.1(h) Motion to Exclude Randall Bell Testimony, supra note 147, at 2 (“Most egregiously, Mr. Bell used an income approach to determine the market value of vacant land . . . . The rest of Mr. Bell’s errors flow from this decision . . . . Finally, Mr. Bell did not even correctly apply the version of the income approach – the land residual technique – he chose to use; this resulted in him valuing a business, as opposed to the land the United States actually acquired.”).
\textsuperscript{154} Peirce, Flight 93 Memorial, supra note 36.
\textsuperscript{155} Rock, supra note 35.
does the government wish to take it? Of course the answer is that the government understands that there is something additional, whether we call it heritage, sacred, or intangible value, but because it either thinks that the additional feature has no market value or doesn’t want to pay for that something extra, it avoids naming it. In sum, the government continued down the road its appraiser started out on—displacing the effects of 9/11.

The government made a number of attacks against the landowner’s position, and they were partially successful. Bell’s numbers, after all, did seem optimistic. The government points out that Bell should not assume that the change in value is positive:

[S]imply because an event happens on a property does not mean that the property is ‘more valuable’ than it was before the event. Ostensibly this type of argument could go the other way, as well, where the creation of a hallowed resting place for the victims of Flight 93 may reduce the available uses of the property and create a burden in the eyes of the prospective buyer.

And yet for the all the government’s efforts, it did not explain how the court should proceed if it determined that the crash did increase the market value of the land. The unstated implication is that such an enhancement is to go to Svonavec.

Svonavec artfully exploited the government’s and Jones’s desire to leave 9/11 to the side and treat the land as though it were any other land in rural Pennsylvania. Jones saw the highest and best use as open space—and in his deposition again stated that “[b]ut for the crash site, [the land] is very similar to many, many properties that have been sold throughout the county.” To this the lawyer responded: “But for the crash site?” And then followed up with another question: “But for the Battle of Gettysburg, a field is there just like any other field in central Pennsylvania; isn’t that true?” Jones responded that he didn’t want to “comment on Gettysburg.” The government correctly defended Jones by pointing out that he had considered a private memorial financially infeasible and too specula-

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157 See Rule 71.1(h) Motion to Exclude Randall Bell Testimony, supra note 144, at 2.
158 United States’ Rule 71.1(h) Motion, supra note 154.
160 Id.
tive, and yet it still stated that Jones ultimately “determined that the highest and best use . . . was crops, grazing, hunting[,] etc.”

The government seemed to lose sight of the fact that there is a “sacred” or “intangible” value that very likely will draw visitors and hence revenue. What the government lacks is a conceptualization of just compensation by which it can admit the reality of the situation and still not pay the 9/11-related enhancement—which is what is offered in the next Part.

D. The Trial And The Decision On Value

In October 2013, the parties convened for a five-day trial before Judge Donetta W. Ambrose at the federal courthouse in Pittsburgh, PA. The courthouse was mostly empty because of the shutdown of the federal government in the wake of stalled budget negotiations in Washington, DC (the Flight 93 Memorial was closed, causing complaints about government interference in access to the site), but the cast of personalities—Mr. Svonavec, Bell, Jones, the government attorneys—were assembled. Before a Commission appointed by the Court, consisting of two local real estate appraisers and one real estate attorney, the parties presented their arguments. The Commission issued a 72-page report in December 2013, and determined that just compensation for the land was $1,535,000. In March 2014, Judge Ambrose adopted the report in its entirety, presumably concluding the litigation.

How did the Commission arrive at this figure, more than double the value of the land absent the 9/11-related enhancement, but far less than the almost forty-fold increase argued for by the landowner? The Commission adopted neither of the approaches urged upon it—although it did not question the notion that just compensation was to

162 Id. at 19.
be understood as market value at the time of taking.\textsuperscript{168} The highest and best use of the property was neither crops, pasture, etc. (as the government contended) nor a museum and visitor center (as the landowner contended). Rather, the Commission struck out on its own, and found that a reasonable buyer would have purchased the property for use as a "private memorial,"\textsuperscript{169} by which it meant a publicly-accessible, privately-run, minimally-developed venue, which would "have an optimum vantage of the crash site and provide an organized venue for observation, reflection and placement of mementos. The real estate improvements would include a viewing area, off-road parking, lighting and restroom facilities."\textsuperscript{170} The Commission disagreed with Bell that the highest and best use was a more elaborate museum. Bell’s financial figures were too speculative, the Commission found, he lacked a marketability study,\textsuperscript{171} and he conflated the value of the land and the value of businesses which could be built upon it, according to the Commission.\textsuperscript{172} Taking the attendance figures from previous years, and assuming that visitors would pay a fee to enter (three dollars), the Commission concluded that after expenses the memorial would turn an annual profit of a little over $200,000, or be worth just over $1.5 million.\textsuperscript{173} In sum, the Commission took a middle path between the government and its denial that a memorial was the land’s highest and best use, and Bell who envisaged substantial infrastructure and great profits.

How did the Commission conceptualize the transformation of the land into a memorial? It did not call the land sacred, but rather the new status of the land is simply an "inescapable" and even obvious fact:

\begin{quote}
[G]iven the heroic and historically significant events that led to it, once the crash of Flight 93 occurred on the subject property, it was inescapable that the property would be permanently preserved both as a place of honor and as a burial ground.\textsuperscript{174}
\end{quote}

In other words, it was a given that the attacks had transformed the land into a memorial site. The land was not “vacant” as the government had contended. A memorial need not be a physical structure, as the government urged, but rather according to the Commission,

\textsuperscript{168} December 2013 Commission Report, supra note 5, at 24.
\textsuperscript{169} Id. at 32.
\textsuperscript{170} Id. at 56.
\textsuperscript{171} Id. at 49-50.
\textsuperscript{172} Id. at 51-52.
\textsuperscript{173} December 2013 Commission Report, supra note 5, at 71.
\textsuperscript{174} Id. at 41.
“the preservation of a place in perpetuity in honor of an event or persons is what defines a memorial.”  

And, the Commission noted, Jones had assumed that the crash site itself would remain untouched (as we saw earlier, he states that it would be “left undisturbed . . . as sacred ground”).  

And yet even if the Commission is correct that the site is a memorial, this fact is simply the point of departure from which the Commission then enquires into the highest and best use.  

Thus, for instance, strip mining the land for coal is not considered as “such activity would not be consistent with the highest and best use of the property as a private memorial.”  

A memorial serves as the premise and benchmark from which to assess other uses as “appropriate” and fitting and “consistent” with that use. This premise is correct, it seems to me, but it is not an economic premise and seems to fly in the face of the injunction that appraisals only consider economic uses.  

It is more a political and social assertion, that the attacks “inescapably” led to the land being a memorial. Whether this is the highest and best economic use does not necessarily follow. There is a prior, informal “taking” or transformation occasioned by the attacks and by the public response. In fact, the Commission does offer one description of how the transformation in the land occurred, stating that through the attacks the land had been “committed” to being a memorial:  

In our view, as of the date of the taking, the subject property was a memorial, committed by the events that lead to the crash of Flight 93 on September 11, 2001 to being preserved in perpetuity as a memorial to events of that day and the heroes of Flight 93.  

The sentence sums up the situation well—and committing seems vague in just the right way. Committed by who? Not the government, for the Commission made clear that this transformation was independent of any act on the part of the government, including Congress’s declaration that the site was to be a memorial in 2002.  

Rather, the committing was to be found, according to the Commission,
in the events of 9/11 and the public response.\(^{181}\) This was the informal, prior “taking,” a committing as in a handing over, a pledging, which is simply being formalized through the court process. In this way, the court proceeding is less a taking than a recovery or securing of something already given to—and taken by—the public. The committing is the political and social act that grounds the Commission’s supposedly dry economic appraisal. It plays the role of the sacred in the Commission’s text, the vague and yet central term that accounts for the setting aside of an item from its everyday usage for some special purpose. But the Commission did not question that even though the land had been committed to serve as a memorial that the landowner owned that increased value, and thus needed to be compensated for it.

### III. JUST COMPENSATION REVISITED

As noted, missing from the court proceedings is an examination of the assumption that just compensation requires compensating the owner for the enhanced post-9/11 value of the land. A mechanical application of takings doctrine does lead to that outcome.\(^{182}\) But examined more closely, there may be ways to argue against such a result. The textual command is to offer *just* compensation—that is, the constitutional requirement concerns doing what is fair and equitable.\(^{183}\)

This Part begins by describing the authority supporting the claim that just compensation concerns equity, and then discusses and distinguishes two precedents: the increase in value of the personal effects of Lee Harvey Oswald after he assassinated President John F. Kennedy; and windfalls, which typically do accrue to the landowner in the takings context. A final Part asks whether there is any doctrinal significance in the usage of the term “sacred” by some of the participants, and argues that it draws attention to a legally relevant claim: that the landowner never “owned” the enhanced value, and thus need not be compensated for it.

#### A. Just Compensation As Equity

Supreme Court precedent clearly recognizes that market value is not the only measure of just compensation. As Justice Rehnquist ob-

\(^{181}\) *Id.* at 41.

\(^{182}\) See *supra* notes 87-92 and accompanying text.

\(^{183}\) See *infra* notes 176-84 and accompanying text.
served: "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law." Market value will usually track what is equitable since that is the amount required for a condemnsee to purchase a replacement and thereby be made whole. But market value will not invariably be equitable, and where that is the case, courts have diverged from it. In United States v. Cors, a 1949 wartime takings case, Justice Douglas wrote that the

[Fifth] Amendment does not contain any definite standards of fairness by which the measure of "just compensation" is to be determined. The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. But it has refused to make a fetish even of market value, since it may not be the best measure of value in some cases.\footnote{185}

A year later, in United States v. Commodities Trading Corp., Justice Hugo Black wrote that "the dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill? The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity'..." Market value is the usual measure, but when it "has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards."\footnote{186}

In sum, there is support for the claim (repeated outside of the wartime context),\footnote{187} that just compensation is to be understood in terms of fairness and that market value is an appropriate tool so long as it measures what is equitable. However, Cors and Commodities Trad-

\footnote{184} United States v. Fuller, 409 U.S. 488, 490 (1973) (citations omitted).
\footnote{185} United States v. Cors, 337 U.S. 325, 332 (1949) (citations omitted).
\footnote{187} Id. at 123.
\footnote{188} The important cases do not all involve war or emergency. They often concern complex overlapping of private and public property, where the market value is enhanced by its connection to public property. See United States v. 50 Acres of Land, 469 U.S. 24, 35-36 (1984) (identifying the challenges of valuing private property taken for public use); Fuller, 409 U.S. at 493 (explaining that compensation is not required for "that element of value based on the use of...fee lands in combination with the Government's permit lands."); Washington Metro. Area Transit Auth. v. One Parcel of Land, 780 F. 2d 467, 471 (4th Cir. 1986) (holding that "just compensation" for condemned private property is limited to only the value of the unimproved property, ignoring any added value); United States v. Weyerhaeuser Co., 538 F. 2d 1, 1363, 1366 (9th Cir. 1976) (rejecting as "too narrow" the contention that Cors applies only to wartime or emergency contexts, and affirming the principle that it is unfair for the government to pay an enhanced price that its demand has created); see also United States v. Miller, 317 U.S. 369, 374-375 (1943) (explaining the difficulties of determining a fair market value for condemned property when value in the market place is not readily ascertainable).
are also scope of the project cases—that is, cases where a change in market value is excluded because it is traced back to the government’s project—in those cases, war. In *Cors* the Court determined that the requisitioning of a tug boat in wartime need not be compensated at wartime prices. Those prices were themselves the result of government policy: “It is not fair that the government be required to pay the enhanced price which its demand alone has created.”189 In *Commodities Trading* the market price increase was also traceable to war. The government sought to measure just compensation for pepper not by the market price but by the price established through government price controls.190 Thus, while helpful for their statements on equitable principles, *Cors* and *Commodities Trading*, and their progeny,191 do not speak directly to the enhancement of value not created by the government, even though they derive the market value measure and the scope of the project rule from equity. On the other hand, extending the scope of the project rule to war was itself a noteworthy elaboration of the scope of the project rule—one that broke new ground at the time by repudiating a more laissez-faire understanding that required the government to pay the price at the time of taking.192

Court discussion of the fundamentally equitable nature of the Just Compensation Clause emerges in a variety of contexts, but a common theme is that the fairness at issue emerges in a dyadic context. That is, there are only two parties relevant to the Court’s framing of equity. The Flight 93 context is a more complex structure. It is not dyadic. It is triadic, it has a third element: the “added” value of the attacks and the family and public interest. In sum, while it is clear that just compensation is concerned with equity, there are few precedents on which to draw where courts assess what equity demands where the change in value comes from the actions of third parties.

1. The Assassin’s Property

Another national trauma, the assassination of President John F. Kennedy, does provide a precedent where there was a triadic—not dyadic—relationship. The government authorized the taking of the

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189 *Cors*, 337 U.S. at 333.
190 *Commodities Trading*, 339 U.S. at 124.
191 See notes 184-88 and accompanying discussion.
items which the Warren Commission had included in its report—this included a number of personal effects taken from the assassin, Lee Harvey Oswald, including personal letters, a diary, family photographs, a marriage license and the contents of Oswald’s wallet. In a proceeding to determine what compensation was due Oswald’s widow (after Oswald was himself assassinated), experts opined that the value of the items had increased dramatically because of their indirect association with the assassination. There was a collector’s market, and the items were valued at about seventeen thousand dollars, up from three thousand. Thus, this case reproduces the central features we wish to explore in the Flight 93 context: a measurable market enhancement in value; created by an event or third-party (the assassination, Oswald, and public curiosity); and an equitable concern.

In the conflicting opinions of the lower and appellate court we see two approaches. The district court refused to award the market value at the time of taking:

the elements of fair market value of the property involved here resulting from association of the property with the assassination of the President must be excluded from the measure of just compensation. The nation and its people should not be required to pay a bounty for items of evidence upon which the Warren Commission based its report.  

The Fifth Circuit reversed—it did not find that it had the power to take into account the equities of the case.\(^\text{194}\) The court distinguished Cors and Commodities Trading as merely extensions of the scope of the project rule. By contrast, here there was a market for Oswald’s items “quite apart” from the government’s need for them. The Court continued that:

Were it not for the taking, the owner, Oswald’s widow, would have been able to realize a premium for Oswald’s personal effects simply because of their association with the killing of the president, this, regardless of whether this court condones, as a matter of policy, the realization of any premium attributable to such a crime. However, this peculiar interest in the property having vested . . . the court’s function upon condemnation should be limited merely to assessing the value of the interest taken; in this instance . . . the taking deprived the owner of the collector’s value

\(^{193}\) Porter v. United States, 335 F. Supp. 498, 500 (N.D. Tex. 1971). Five Tracts of Land v. United States, 101 F. 661, 663 (3d Cir. 1900), a case concerning a taking at Gettysburg, also has a triadic structure in that added value is described as potentially coming from the historic and patriotic significance of the site. The court rejects the notion that those parts of value can be excluded from an assessment of market value or excluded from determining what compensation is due. Decided in 1900, it precedes the Supreme Court’s subsequent cases concerning equity.

\(^{194}\) Porter v. United States, 473 F. 2d 1329, 1335, 1338 (5th Cir. 1973) (reversing the decision of the district court).
which otherwise she would have enjoyed and for which, therefore, she is entitled to be compensated...

In this exceptional case, the circuit court misreads the many general statements from the Supreme Court about equity, incorrectly treating equity as derivative of the scope of the project rule. The reverse relationship is the accurate understanding of Court precedent: the scope of the project rule is an example of equity. The divide between the district court and the appellate court, then, is not about how to assess the equities, but whether this can be done at all.

Flight 93 is in some (but not all) respects a more compelling case on equitable grounds. The property is not simply “associate[ed]” with the violence of 9/11, it directly partakes of it as the last resting place of the passengers. On the other hand, Svonavec is itself an innocent bystander (this is true for Oswald’s widow too, but here we might also consider the district court’s concerns about the perverse incentive that would be created if an assassin’s relatives could enjoy the enhancement that their crime created). The public interest is also seemingly distinct: the market value that the court awarded was a “collector’s” market that valued the Oswald papers as curiosities. In the Flight 93 context, the market value is derivative of a broad public interest in having a place for memorial and mourning. To put the same point in terms of our central category, Oswald’s property is not described as “sacred” by the court or any of the parties. On the contrary—these objects are somewhat scandalous. Thus while the precedent is helpful in that it is not dyadic or a scope of the project rule case, we should not lose sight of the fact that it is not a case about “sacred” property. In any case, the circuit court clearly inverts the relationship established by the Supreme Court between equity and market value.

The contrast between Flight 93 and Oswald’s case is underscored when we consider the treatment accorded another part of Oswald’s estate: the rifle used to assassinate the President. The district court was simply unwilling to allow anyone to profit from the enhancement in value when it came to the actual weapon used in the assassination. Oswald’s widow sold the rifle to John King, a collector, for $10,000.

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195 Id. at 1335.
196 Id. at 1333.
197 See Porter, 335 F. Supp. at 500 (demonstrating the concern that the court had with incentivizing future presidential assassinations through a windfall compensation to Oswald’s widow).
King demanded compensation in the amount of $5,000,000, while the government contended that he should be paid $51.40, Oswald’s purchase price. The district court avoided the issue of market value altogether by finding that it was not possible to determine what that value would be for such a unique object. In this instance, there is no further appellate history and hence no further Fifth Circuit discussion, even though the district court’s retreat into the impossibility of making a determination of market value seems unconvincing. Rather, it suggests a doctrinally hidden intrusion of equitable concerns. This is the outcome the government seems to desire in the Flight 93 context: a deflection of the direct conflict between market value and equity in favor of a finding that market value is simply too speculative.

2. Illegal Windfalls And ‘Golden Meteors’

Enhanced value also arises from an external event in the case of natural disasters or windfalls, but whether an owner retains that value does not seem to be litigated in takings proceedings. The “negative implication,” writes Gregory Kirsch in his article Hurricanes and Windfalls, is that in “hurricanes and other natural disasters, the established takings compensation rules require compensation at the current emergency market value; the windfall accrues to the owners.” The added value is assumed to accrue to the owner (or to be controlled through some other mechanism, such as price controls and anti-gouging statutes). In this Part, I suggest that the Flight 93 value is unlike most “windfalls” in that it derives from violent and illegal conduct.

Legal scholar Eric Kades defines windfalls as “economic gains independent of work, planning, or other productive activities that society wishes to reward.” He notes the common understanding (which he criticizes) that the beneficiary of a windfall is permitted to retain it:

199 Id. at 774-775 (outlining the contentions of both King and the government).
200 See id. at 775 (holding that the rifle is too unique to derive a value from the market).
201 See Comment, Just Compensation and the Assassin’s Bequest: A Utilitarian Approach, 122 U. PA. L. REV. 1012, 1018 n.27 (1974) (suggesting that the King court implicitly relied on subjective valuation rather than market price to determine just compensation for the rifle).
202 Kirsch, , supra note 13, at 1254 (“Although there are later cases that contain constitutional challenges to price control legislation or seek to characterize regulation as ‘regulatory takings,’ there appear to be no decisions subsequent to Cors and Commodities Trading that bear directly on the interaction of price controls and just compensation in emergency markets.”).
Perhaps surprisingly, Farmer Black receives as much legal protection for manna fallen from heaven or, to use a less religious hypothetical, for a golden meteor that falls onto Blackacre. Most commentators simply presume, in passing, that the law treats property obtained by luck no differently than it treats property earned through effort.  

Kades contests whether the common understanding is descriptively or normatively correct (he finds contrary outcomes regarding windfalls in tax policy and a variety of other contexts), but he leaves the descriptive claim unchallenged in the takings context. Assuming compensation for the value of a windfall, is Svonavec like Farmer Black, and Flight 93 a golden meteor?  

It seems to be a windfall in Kades' sense—the plane crashed on Svonavec’s property and delivered Bell’s intangible value and other people’s sacred value. It was a benefit independent of work or planning. But the differences are interesting as well. Unlike a windfall that is an act of God or cosmological accident, the Flight 93 crash was an act by an enemy against the United States, in the course of which the gain in value is created. If we usually let the recipient retain the windfall because we are indifferent to the allocation (since it comes from god or the cosmos), it seems unlikely that we have the same indifference to the allocation of the value of Flight 93. The increase was in some sense the obverse of the victims’ loss—as the landowner’s counsel observed: “the final resting place of the heroes of United Airlines Flight 93 is situated on the Subject Property.”  

Indeed, we

204 Id. at 1491-92.  
205 Id. at 1528 n.140. Kades seems somewhat skeptical as to whether takings law is so clear. In a footnote supporting the characterization that compensation is awarded for windfalls in the takings context, he writes that “[t]his assertion rests on the seemingly universal belief that the law, including the Constitution, protects property obtained via windfalls just as much as it protects property earned by effort or enterprise.” My own research has not found cases addressing whether or not a condemnee is compensated for the taking of a value that comes as a windfall (defined as a benefit unrelated to planning or any other personal trait and not coming from government action such as a zoning change). The word windfall, in takings cases, typically refers to an incidental, unearned effect of government action (it would be a “windfall” to compensate the owner of land in the Florida Everglades on the basis that the land could be developed, since that right was always uncertain). Thus the term often seems to be used to refer to government “givings,” not value from a third-party. On government “givings,” see Abraham Bell & Gideon Parchomovsky, Givings, 111 YALE L.J. 547, 574 (2001) (contending that givings play at least an equally important role in public life as government takings). Admittedly, it is hard to believe that there is not authority on windfalls unrelated to government action. It may be that leaving the benefit where it falls and thus including it in compensation is so obvious that it does not appear in the case law—hence Kades’ description of the belief in compensation for windfalls as “seemingly universal.”  
206 Svonavec, Inc.’s Response in Opposition to United States’ Rule 71.1(h) Motion and Memorandum to Exclude the Valuation Testimony of Defendant’s Appaiser Randall Bell
might distinguish between two kinds of windfalls: "legal windfalls" which increase wealth "by the legal and proper activities of others and passed on to the individual in question by gift, inheritance or mere chance, and 'illegal windfalls,' where the wealth was generated by the proscribed activities of another and passed on to the individual." In sum, the enhancement in value seems distinct to the windfall in which the public is not implicated, as with Kades' meteor.

Bell’s notion of the intangible nature of the value captures another important point: what fell was not a discrete commodity like a golden meteor that is itself valuable. Rather, the value is tied to the loss of life and property (which were incinerated in the crash and thus largely unrecoverable). It is this absence that is a part of the value. Thus, that windfalls are included in takings awards may not be relevant to the Flight 93 context. Perhaps surprisingly, reflecting on the notion of the sacred helps clarify this intuition, as I suggest below.

3. The Sacred And Just Compensation

The terminology of many of the participants in the Flight 93 dispute is helpful in grappling with how to characterize what has taken place from the point of view of takings and equity. By calling the land "sacred," the parties seem to mean that in truth it no longer belongs to anyone—and yet that it must be taken by the government. Rather than a value that fell from the heavens, the participants seem to think of it as a value that arose from the scene of the disaster. This is the deeper sense in which it is not a windfall—it was not that a pre-existing value fell onto the land, it was in the destruction upon impact and the public response thereto which created the contested sacred and intangible value.

This characterization intersects with my argument about takings. Just compensation seeks to make the condemnee whole, to return to them what is taken from them. It is "the owner's loss, not the taker's gain, which is the measure of compensation for the property taken,"

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208 See generally Restatement (Third) of Restitution and Unjust Enrichment (2011).
as the Supreme Court has observed.\textsuperscript{209} The term sacred should be seen to articulate the intuition that the landowner never owned Bell’s intangible value.

When the land is taken from the owner, we might say, the sacred, Bell’s intangible value, the 9/11-related enhancement, is not. Clearly we need not go as far as the government urged in the case of Oswald’s rifle. There, the government sought to obtain title through forfeiture, not condemnation. The Fifth Circuit described the government’s theory as a “species of Deodands,” that is, “[a] thing which, because it had been the immediate cause of the death of a person, was given to God, that is, forfeited to the crown to be applied to pious uses.”\textsuperscript{210} Svonavec is to be compensated for the value of his land, just not the increase due to the attack. And because he does not own the enhancement, because it was not a windfall like a golden meteor, equity does not require that compensation include its monetary value. One possibility is to avoid the conflict between market value and equity, as the district court did with the assassin’s rifle. But it may be necessary to confront the conflict, and in that case we should openly discuss equity.\textsuperscript{211}

\textbf{B. The Publicly Motivated Private Market}

Thus far, the discussion has focused on the issue of whether the enhancement in market value that comes from an external event or a third party may be excluded from determining just compensation. It accepted the notion that the added value in the Flight 93 context does not fall within the scope of the project rule which states that the determination of value should not reflect changes in value stemming from the government’s plans with regards to the property.\textsuperscript{212} But perhaps this concession misses an important dimension of the problem.

Remember that in the attacks, through killing citizens, an injury was inflicted on the collectivity and the state. In the response to the crash, over a million people have visited the crash site—and the continued public interest is the source of the property’s intangible asset, in Bells’ terminology. Is it certain that this value is separate from the government? Or that when we see such a collective response, that it

\begin{thebibliography}{10}
\bibitem{210} King v. United States, 364 F. 2d 235, 235 n.1 (5th Cir. 1966).
\bibitem{211} As Justice Douglas noted, the “practical standard” of market value is used as a tool in the ultimate pursuit of “substantial justice.” Corz, 337 U.S. at 332.
\bibitem{212} See \textit{supra} notes 159-72 and accompanying text.
\end{thebibliography}
should not be treated—for takings purposes at least—as a value that the public has created, and thus that their agent, the government, should not have to pay for? While this may seem a loose conflation of government and public, it mirrors the same loose conflation in the logic of the terrorist attack on civilians—that in attacking the public in general one is also attacking the state. It is not surprising, then, that we might encounter the same confusion of public and government action in our setting, as we attempt to determine whether the enhancement in value is a government “project.” In this vein, recall that calling war a government project for takings purposes was itself a doctrinal shift that marked the rise of total war in World War II and the Court’s shift from laissez-faire to New Deal understandings of the relation between market and state. Calling the Flight 93 enhancement a government project might then appear as simply updating takings jurisprudence for the war on terror. War as a government project reflected the economic realities of total war; the sites of terror attacks as places of national mourning reflects the symbolic realities of how terrorist attacks impact our society.

We encountered a version of the conflation between public and private value in Colliers Pinkard’s critique of LECG where it found that the “highest and best use conclusion [of a profit-making memorial] differs little from a public interest use for which a narrowly defined buyer will pay a price premium, leading to a result in the LECG appraisal that borders on public interest value.” The market, in my gloss, was composed of private individuals who were publicly motivated. There is a “private” demand that drives up the price, but this can also be seen as a public demand. This confounding of public and private purposes suggests that the Flight 93 value could be characterized as within the scope of the project rule. The problem is rather intricate. There likely is a “private” demand that drives up the price, but should it be excluded because it is specially and publicly motivated? It is commonly said that a special or personal valuation—whether on the government’s or the landowner’s side—is excluded. But what about where the market is in the thrall of a “special” price? This is both a contradiction in terms—what “the market” wants is per se “general”—and yet it seems to be a good characterization of the situation. The “market,” we could say, is acting publicly, that is, like the government. And the government is pursuing the “special” value of the public. As

213 See generally Kirsch, supra note 192, at 1270 (describing the doctrinal shift from World War I to World War II as courts abandoned the strict market value approach).

214 Colliers Pinkard Review of LECG Appraisal, supra note 102, at 14.
we saw, this was precisely the basis for the court-appointed Commission analysis—but it failed to address this issue.

C. Summary

In sum, we have seen that it is well established that the government should not have to pay compensation for an increase in value caused by the government, but that there is little support for extending this to exclude an increase in value created by other, non-governmental action or events (natural disasters, windfalls, the association with the tragedy of Kennedy’s assassination). I have attempted to distinguish those cases and contexts and have argued that the vocabulary of the sacred and the intangible are helpful in formulating the proper legal understanding of the case. Critically, in those contexts where value comes from third parties or external events, we are morally indifferent to the allocation since the value comes from outside the dyadic relationship between the government and the landowner (as with a golden meteor). But that is not the case, it is urged here, where the value comes from the public response to an act of war. Just as the scope of the project rule was expanded to include the effects of total war in WWII, we might contemplate a similar extension for acts of terror.

Cases such as Cors and Commodities Trading concerned the need for items—tug boats and pepper—in times of war. The broad equitable statements in those cases notwithstanding, it seems that would be asking a court to break new ground to explicitly apply an equitable analysis to a triadic context where value comes from a third party or event, such as the Flight 93 context. But this is appropriate. The central question is what compensation is just to the landowner and just to the public. In applying such an analysis, various reasons have been offered why we might withhold any 9/11-related enhancement. Equally important as that outcome, however, is the engagement with the question of what is equitable—which was not raised in the court proceedings, beyond an understanding of equity as market value. The government, landowner, and the court passed seamlessly from just compensation to engage in their debate over market value—but perhaps we would be well-served if they had articulated their broader understanding of what it is that the public is being asked to pay for and why that is appropriate.

IV. Reflections On The Sacred And Intangible Value

This Part steps back from the normative claims about how just compensation should be understood in the Flight 93 case and seeks
to gather together the multiple senses and meanings of the term sacred. What, we still might ask, are people talking about? Is this of any broader theoretical interest? Are scholarly treatments of the sacred helpful in understanding our case study, and vice versa?

In the immediate public response to and perception of the attacks, the term “sacred” captured an uncontained sort of energy and power. The tens of thousands of people who came to the site, many understanding that they were going to see sacred ground, highlight a creative, unpredictable sense of the word. The sense that there was a new, sacred value engendered a “popular eminent domain,” to borrow from law and religion scholar Winnifred Sullivan, and “committed” the land, as the Commission said, to serve as a memorial regardless of what actions government undertook. Many of the now routine definitions from sociological classics seem to dovetail with the actors’ usages: for example, both the French sociologist Emile Durkheim and the appraiser Jones understand the sacred as that which is (in the words of the former) “set apart and forbidden.” At other times the lack of fit with academic treatments draws attention to an important point. For instance, the ancient Roman idea of sacer as property which belongs to the gods seems resonant, although in our time it is the uncertainty around just who “owns” the sacred which is at issue. Indeed, a good explanation for why such a simple case took so long to resolve is because we don’t seem to know who owns the sacred.

Offshoots of the Durkheimian tradition, as law and religion scholar Nathaniel Berman has documented, have focused on another aspect of the sacred: the “right” sacred (“associated with the consecration of ‘social cohesion’ and the ‘preservation of rules and taboos’”) as opposed to the “left” sacred (“associated with ‘dynamic ferment,’ with the ‘explosive violation of life’s rules,’ with collective ecstasy”). This split, between conservative and transformational, between right

\[215\] Sullivan, supra note 68, at 12.
\[216\] See supra notes 161-72 and accompanying text.
\[218\] Asad, supra note 27, at 30.
\[219\] Even the so-called “ambivalence of the sacred,” the notion that it is both august and accursed, high and low, seems helpful as we are told that the land is priceless, and that it is “vacant.” Giorgio Agamben, Homo Sacer: Sovereign Power and Bare Life 75-80 (Daniel Heller-Roazen trans. 1998).
and left, maps some of the usages we have encountered. In the public surge towards the site, claiming the site for the public, and in the individual attempt to access the sacred, and in the fear that this would turn into a “circus,” we see some of the potential of the “left” sacred. In Murdoch and the Park Service’s use, we see more of the “right” sacred, an attempt to tame and harness the overflow of energy and enthusiasm. But, interestingly, it does this through a turn to “nature” – not explicit nationalism or state-worship. This muted version of the “right” sacred left them open to attack, I suggested. They were accused of desecration, of creating an Islamic site.

The relation to religion, and to Christianity, is also important to note. For some, the sacred was explicitly Christian. For others, it was a vague, spiritual, post-religious sensibility. Murdoch’s subdued, pacific, contemplative sacred seems quite distinct to the “epiphany” that greeted an FBI employee when she arrived at the “sacred place” of the crash site.221

All at once, the mist took full shape and I saw what appeared to be angels. There were angels standing in the open area to the left of the crash site. There were hundreds of them standing in columns . . . . This Archangel stood with a stance of confidence and radiance. His aura portrayed that of leadership. He stood with saber in hand . . . I knew instantly this Archangel had to be Michael.222

This is not a benign post-secular spiritualism, but an energetic, charismatic, and even militant, vision. Indeed, there are notable differences between the various actors ideas of the sacred: the popular, wide-spread notions of the sacred which emerged soon after the attack; Murdoch’s sacred, contained within the structure of the Park Service; the fears that Murdoch’s plan was actually a form of Islamic symbolism (which were taken quite seriously by the Flight 93 Commission); and the intense vision of the FBI employee. In urging that the government not pay for the sacred value, this range seems important to take into account. I have been drawn towards denying compensation to the landowner based on the claim that the enhanced value is public value, and thus that the public should not pay for what it itself created—an elaboration, we might say, of the scope of the project rule. But this is a rather benign, Durkheimian sense of the sacred as the social, and the social as the sacred. Durkheim theorized that all societies were organized around such sacred values, values which transcended the everyday divisions of politics (be they reli-

221 LEONARDI, supra note 30, at 37-38.
222 Id. at 37-38.
gious values, or the sacred rights of property). The story of the Archangel Michael gives some pause about such a secularizing reading of the sacred as just a benign social glue and cohesive force. If we understand the sacred in this more sectarian way, perhaps it is not so widely shared, and not best seen as a public value for which the government should not have to offer compensation.

The role of heritage in managing the sacred is also central to the story of the Flight 93 site. Despite the pervasive talk of the sacred, we saw that there was no legal or policy category of "the sacred" (except for Native American sites). To remove the land from the market and preserve the new value present on the site, Congress turned to the categories more readily available: heritage, memorial, National Park. While heritage may dovetail with Murdoch’s sacred, there is a palpable gap between heritage and some of the other conceptions. The FBI agent’s vision is not a historical, contemplative, or nature-remediation-based sacred. It seems far more vital and demanding. In the deployment of heritage at the Flight 93 site, we see a way that the government and other parties have largely contained, sustained, and institutionalized various, but not all, senses of the sacred and intangible value.

CONCLUSION

It is a common refrain that value is increasingly assessed in monetary terms. Public services are privatized. Other vocabularies of worth seem to increasingly slip away, replaced by conceptions of value simply as price, and goods simply as commodities. Some of the responses to the attacks of 9/11 point in a different direction altogether. Rather than seeing a social order grounded in markets and price, many Americans saw something quite different: a society where acts of heroism and sacrifice were important, perhaps even a society where markets were dependent on the state and ordinary citizens for their support and not simply autonomous systems of exchange. On a more local scale, these sentiments were expressed by those who saw that what had been ordinary private property and rolling hills in rural Pennsylvania was now something quite different. The land was decommodified, taken out of its everyday status as an exchangeable resource, and reallocated—"committed" in the words of the Commission—as a place of national mourning. Rather than treating this as a

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223 Durkheim, supra note 217, at 418-19.
simple or obvious outcome, we should approach such a transformation carefully and trace in detail how different constituencies—family members of those killed, real estate appraisers, lawyers, the courts—understood and struggled over that change. More pointedly, rather than thinking we know *ex ante* what is meant by public and private, commodity and its opposite, the approach adopted here insists on seeing these categories as social categories that are reproduced and creatively adapted to novel situations. That is, we should approach these categories much like the anthropologist approaches the fundamental categories of any society. What have we discovered?

First, there was broad societal agreement that some fundamental change had taken place in the status of the land. It was socially obvious to a broad section of the public, as underscored by the act of Congress authorizing and recognizing the memorial and by the million or so people who visited the site. This feature distinguishes this case from a variety of others—for instance cases where members of a religious group see a miracle at an everyday location and seek to turn it into a shrine, but whose perception is not shared by a majority of their fellow citizens nor the government. What was shared in the Fight 93 case was a notion that they were not engaging with a normal commercial space, and that norms of gift giving and the laying of tributes was proper, not the norms of markets and exchange. Thus even the landowner stated that he always intended to donate the “sacred ground” as a memorial.

Second, alongside the broad agreement that the land was no longer a simple commodity, we have documented the multiplicity of competing understandings and vocabularies seeking to grasp precisely what had happened. Where market value may be clear and simple, this non-market value was various and hard to pin down. Some called the land sacred, and this itself meant a variety of things (some tied to recognizable established religions, others more loosely expressive of a nondenominational civil religion, others were vaguely spiritual). Bell described a new intangible value embedded in the land deriving from the important events that had taken place there. Hundreds of thousands of people left a range of trinkets and memorial items—Christian crosses, baseball caps, letters. In sum, there was unanimity that the land was no longer a simple commodity. At the same time, this left a lot of room for disagreement, as well as for fears that the

226 See supra note 128 and accompanying text.
227 See supra notes 35, 46, and accompanying text.
market might improperly reappear (in the form of the circus and the selling of trinkets).

Third, in addition to the variety of meanings, there was no legal or policy category that fit the demands of the moment. This is perhaps what we should expect from a government that (by some understandings at least) is not concerned with matters of transcendent spiritual or religious meaning. Unlike the Catholic who witnesses a miracle in an everyday setting, and can seek to have that miracle recognized through a formal and explicit Church process, the government did not have a category of “sacred” land ready to deploy.

Fourth, although there was no legal category that perfectly fit the situation, there was a clear effort on the part of government and some constituents to bring some order and stability to what the site meant and how it was to be used. Even though the attacks were unbearably recent, the site was declared “heritage” and bureaucratically put in the category of parks and memorials. Here we also saw the architectural profession’s effort to name and stabilize just what this process of decommodification would mean. The architect Murdoch called the site sacred, but did not link this to any specific religion (doing so would have raised establishment clause concerns, not to mention complaints by members of other religions). His initial plans generated a spirited attack that the interpretive openness of his plan was really a cover for Islam. The turn to an idea of nature and the site as a place of natural healing deflected those attacks. In sum, so far as a matter of law and policy, it was heritage and memorials that apparently best fit the situation. In the process of decommodification, a notion of the sacred untethered to religion or nationalism was seemingly too hot to handle, and better replaced by “nature.”

Fifth, as a matter of property law, the transition between the two domains, the market to the non-market, was not as simple as merely declaring that the transition had taken place. Indeed, even though the attacks may have “committed” the land to the zone of decommodification, in the term used by the Commission, as a political and social matter, this was not sufficient as a matter of law. This is

228 See supra note 43 and accompanying text.
229 See generally, PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE (2005).
231 See supra notes 40-41 and accompanying text.
233 See supra notes 76-78 and accompanying text.
an important point to underscore, since it speaks to the importance of law, and property rights in particular, within our cultural order. By contrast, imagine a theocracy where, when “sacred” value appears, it trumps other claims. We might say that the non-market value simply overwhelms the market value. Or in a society where regardless of the other values claimed, there is no way to overcome a claim of private property (other than through consensual sale, that is, where there is no power of eminent domain), we might then say that there is no value higher than private property, that private property, in the words of classical economist and moral philosopher Adam Smith, is itself “sacred.”

But at the heart of the story we have examined, we see neither of these extremes in the relation between market value and non-market value. The land can be decommodified for a public use and turned into a memorial (through the power of eminent domain if need be). But the claims of private property are not discarded as worthless; rather the owner is to receive just compensation. This is obvious, but it helps frame what we have explored in this Article: the precise and exacting efforts undertaken by our legal system in effecting, as a matter of property law, the transition between market and non-market value. We have seen, as it were, the birth pangs of decommodification up close.

Sixth, we confronted the question of how the interface between market and non-market value actually unfolded. On the one hand, it took place in the domain of market value. Again, this states the obvious, but I do so in order to raise the specter of the alternative: imagine that upon the apparition of some sacred value in another society, the owner could be paid in the currency of that religious system (so many miracles or blessings, let us say). Obviously, value, in our case, is measured in market value. What we documented was the effort to determine the market value of the crash site. At the same time, we noted that market value and non-market values were not kept clearly distinct. It was simply taken as a given, without recourse to an assessment of market value, that the crash site land would be set apart as a memorial, as “sacred ground.” In other words, the non-market value, the decommodification, provided the context for the discussion of market value.

Finally, the Article took issue with the understanding that the landowner should be awarded the market value of the land including the enhancement of value due to the 9/11 attacks. The value of the

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234 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS I:10 (1776).
9/11 attacks apparently can be given a market measure. But here, it was argued, the parties lost sight of the explicitly equitable task of giving “just compensation.” That is, the Constitution speaks to how to the interface between market and non-market values is to be done. It does not say follow market value, but just compensation—that is, to engage in an equitable analysis, however unwieldy that may be. Regardless of how one thinks the equitable arguments may be resolved, the first goal of the Article has simply been to urge that such arguments should be made, which did not happen in this court proceeding.

The Article explored a number of factors and arguments as to why it might be appropriate to exclude the “sacred” value from the amount due the landowner. Most simply, the government’s appraiser Jones seems to get the matter right when he mentions, almost in passing, that the “sacred ground” will forever remain as a memorial, and then proceeds to appraise the land as though nothing had happened there. The government attorneys attacked Bell’s claims for their imprecision. Had they focused on the broader equitable question of what constitutes just compensation, however, they might have been able to contest Bell’s premise. Bell, it seems to me, is right that there is an “intangible” attached to the property—but the landowner is not entitled to it. That value was, we should say, embedded in the land, but the landowner never truly had title to it. And yet we should also note the outcome of the case: the landowner did not receive the almost forty-fold increase in value asked for. Rather the Commission and court, showing some skepticism about just how valuable the sacred and the intangible in fact were, awarded far less, somewhat less than three times the land’s value excluding the 9/11 attacks. Even though the doctrine may not have been correctly understood, there was practical wisdom in the result. The broad claim that ours is an era where we can only think in terms of market value seems confirmed by the participants in the legal process, even while the entire exercise concerns taking the land out of the market.