Takings Constraints: Mechanisms to minimize the uncompensated increment and limit the government’s power to take property.

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Introduction:

“Takings” is a dangerous word. Property possession in some form or another is a right exercised by almost all persons. Government’s ability to interfere with private property should not be a topic taken lightly. Homeownership especially is as sentimentalized as it is fundamental to a shared understanding of Americana.

That the decision of Kelo v. City of New London\(^1\) caused so much stir and fervor\(^2\) should have come as no surprise. Legion of media, legislation and academic commentary has appeared in Kelo’s wake.

The Court in Kelo rested its holding only on the definition of “‘public use’ within the takings clause of the Fifth Amendment to the Constitution.”\(^3\) The Takings Clause of the Federal Constitution\(^4\) provides two baseline restraints against government takings: that government take only for a “public use,” and that it not do so without providing “just

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\(^1\) 125 S. Ct. 2655 (2005) (Holding that the Connecticut municipality of New London had the power to condemn private homes and retransfer those properties to the Pfizer pharmaceutical company as a part of an economic development project.)


\(^3\) Kelo, 125 S. Ct. at 2655.

\(^4\) U.S. Const., Amdt. 5 (“Nor shall private property be taken for public use, without just compensation.”); The Takings Clause restricts actions by the States though U.S. Const., Amdt. 14., see Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897).
compensation.”5 But *Kelo*’s effects have been much wider than the legal meaning of the two little words “public use.” Legislative responses in the various statehouses to *Kelo* have generally supplemented the Federal Constitutional baseline, narrowing the circumstances in which government may exercise eminent domain.6 Most of these post-*Kelo* legislative proposals constrain government by prohibiting categorically the taking of certain property, or the taking of property for certain purposes.7

But how are these legislative solutions affecting government decisions to take across America? What ends do they seek to achieve? What values are they purporting to protect or advance?

From a policy perspective, it cannot be enough to restrict takings without evaluating what objections exist to takings.8 Certain restrictions to the government’s ability to take may be appropriate and some may not. Certain takings may provide sufficient benefit to a community as to override concerns that it unfairly burdens a particular landowner, while some takings may be so toxic to an individual that no gain of wider benefits may justify their occurrence. Therefore, policy to restrain the takings power should not be obtuse obstacles to government’s ability to condemn property in all

5 *Id.*

6 *See* Larry Morandi, *Eminent Domain Memo*, National Conference of State Legislatures, at http://www.ncsl.org/programs/natres/EmindomainMemo.htm (Listing and analyzing state legislative responses to *Kelo* decision); see also Part III, *infra*. It may also be the case that the Supreme Court’s decision in *Kelo* did little to change the general law of the land. Instead, the decision may be a mere “focal point in an ongoing societal dialogue about the meaning of our deepest commitments,” and that the legislative responses are appropriate pushback in an ongoing conversation about what takings should be permitted. See generally Barry Friedman, *The Sedimentary Constitution*, 147 U. Penn L. Rev. 89 (1998).

7 At the time *Kelo* was decided, the author was interning in the California State Senate and working for State Senator Christine Kehoe, who was then Chairperson of the Senate Local Government Committee. Some initial inspiration for this article surely came from interacting with Committee staff and advising them on the theory and judicial doctrine underlying modern takings law.

8 Legislators’ fears of an electoral backlash against *Kelo* might justify restrictions of takings regardless of the outcomes of an adopted policy, or without entertaining a critical evaluation of the objections to takings. This article however will address restraints on takings under the assumption that at least some legislators consider policy outcomes as at least part of their decision-making calculus.
circumstances. Constraints on takings should not be blunt instruments to hobble government; instead, they should be tailored measures to ensure that takings occur for the right reasons and do as little harm to property owners as possible. Policymakers must make careful and deliberate judgments to determine which takings are to be restrained, which harms are to be minimized, and what mechanisms are best suited to achieve these ends.

This article strives to make no argument as to which interests in property should be protected and which should not. Instead, this article addresses which mechanisms of government most effectively and appropriately protect interests in property that policymakers and the democratic process choose to value.\(^9\)

In Part I, this article will first examine the objections that exist to takings generally. Part II will identify and categorize the general mechanisms by which government’s ability to take property may be constrained. Part II introduces new terminology to classify the broad array of legal restrictions available to restrict the takings power. Part III will examine proposed and recently adopted responses to the *Kelo* decision among the nation’s various legislatures under the rubric and terminology introduced in Part II. Part IV will suggest a framework by which to evaluate legal structures that limit government’s ability to take property. Essentially, Part IV will essentially argue that certain constraints are appropriate to protect certain values in property, even while many policy makers, jurists and academics sometimes fail to tie specific solutions to specific objectives.

\(^9\) Many articles have been written to argue which values in property should be protected, and which should not. This article does not seek to supplement that rich area of scholarship. Instead, this article is aimed at collecting and categorizing options available to limit the takings power, and advances a new theory on how specific substantive goals for property rights can be advanced by employing specific and tailored options.
Part I – Objections to Takings from the perspective of Property Owners

Before examining the methods by which government can be constrained from taking property, it is necessary to evaluate the concerns with takings generally. “Protecting property rights,” is a laudable goal for post-*Kelo* legislation, but few suggest that the power of eminent domain does not have some valid place in society. A lionization of property rights generally, in all their forms, is not a satisfactory critique of the takings power. This section provides an examination of why we are concerned about takings. Park II will identify and categorize the constraints available to limit the power to condemn.

There remains anxiety over the power to take property. Much of the worry over the takings power revolves around harms its use may inflict on individual owners of property. Concerns other than the interests of property owners are nonetheless relevant to discussions on takings. For instance, if cash compensation for condemned property were awarded far in excess of that property’s market value, taxpayers might be unfairly burdened by that expense. However, this article focuses on an understanding of the impact eminent domain can have on affected landowners, and how their interests can be more effectively protected by constraints on the takings power. From the perspective of property owners, certain or perhaps most takings do not offer sufficient remuneration to fully compensate affected landowners for all of their subjective losses of value in property. Certain takings offend our sense of justice. However legitimate these

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12 See Part II. A. *infra*.
13 See Part II. B. *infra*. 
concerns may be, they are distinct and separate. It will be useful to break apart these concerns.

A. Under-compensatory Concerns

A primary anxiety about government taking property is a concern that affected property owners will not receive sufficient compensation. The Fifth Amendment commands that property may not be taken without just compensation. "Just compensation" is a term given meaning by the courts, and the U.S. Supreme Court has long since decided to use "fair market value" to measure what compensation is necessary under the Fifth Amendment.

But fair market value does not compensate a property owner for all interests possessed in a property. The Court itself recognize that interpreting "just compensation" defined as market value may systematically under-compensate landowners. Fair market value is admitted to be a practical convenience by which courts are able to assess an objective value for a taken property. It is widely understood that fair market value does not compensate property owners for all of their property interests that are extinguished by

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14 U.S. Const., Amdt. 5 ("Nor shall private property be taken for public use, without just compensation.").
17 United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979)
“[T]he Court has acknowledged that such an award does not necessarily compensate for all values an owner may derive from his property. Thus, we have held that fair market value does not include the special value of property to the owner arising from its adaptability to his particular use.”
18 United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979)
“Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule… The Court therefore has employed the concept of fair market value to determine the condemnee's loss.”
Internal citations omitted
a taking. It stands to reason that if utility-maximizing owners did not value ownership of their property somewhere above its fair market value, then they would have sold the property at that price before government had an opportunity to take it. Because market value compensation systematically under-compensates a property owner’s interests, property owners are rightfully concerned with limiting the circumstances under which government may exercise eminent domain. The less often government can take property, the less chance a property owner has of suffering insufficient compensation for the taking of their property.

Professors Dukeminier and Krier suggest in their property casebook that concerns over the purpose of a taking may be diminished, and perhaps drop out entirely, if the compensation provided more closely matches the interests in property taken. Such an insight invites the suggestion that government ought to be allowed to exercise eminent domain for any purpose, so long as property owners are compensated enough to make

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19 Even if owners’ subjective value for their property was the same as the value on the market, the market value would not include transaction costs of selling the property or relocating a home or business. Alternatively, an owner’s subjective value might be thought to subsume an owner’s anticipated transaction costs associated with selling and with obtaining adequate replacement property, costs that the market value would not include.

20 Jesse Dukeminier & James Krier, Property, 874-75 (5th ed. 2002) (Asking “Why is ‘public use’ a matter of concern to property owners, given that they are entitled to ‘just compensation’ if their property is taken?”); See also Hanoch Dagan, Takings and Distributive Justice, 85 Va. L. Rev. 741, 755 (1999) (Citing Margaret Jane Radin, Diagnosing the Takings Problem, in Reinterpreting Property, 146, 153-56 (1993)). (“In some cases, fair market value may well measure the utility lost by the landowner due to the public action at hand. But this is not necessarily so, and, in fact, in many cases, it will be otherwise.”).
them agnostic to the taking.\textsuperscript{21} This is an injury-oriented view of the takings power, and particularly of the rationales for restraining that power.

The concern over the injury suffered by a landowner as a result of a taking is elaborated upon by Professor Fennell, who usefully categorizes the property interests not addressed by fair market value compensation.\textsuperscript{22} Fennell suggests a three-part structure of this “uncompensated increment”.\textsuperscript{23} Fennell’s first two portions of an uncompensated increment are economic interests under-compensated by a determination of a property’s fair market value. The portion of the uncompensated increment that are of an economic character do not necessarily call into question the overall, or end-result social utility of a taking, but instead indicate that the compensation based on fair market value was not enough to make the owner agnostic to the condemnation. Fennell identifies a non-economic interest in the uncompensated increment, “autonomy,” which requires a separate discussion later in this section.

Fennell’s first portion of the uncompensated increment is a “subjective premium,” which is described as “the difference between fair market value and the subjective value that an individual places on her property.”\textsuperscript{24} The subjective premium is not limited to sentimental valuations\textsuperscript{25}, but also includes “hard” out-of-pocket expenses.\textsuperscript{26} The second

\begin{footnotesize}

“The uncompensated increment is made up of three distinct components: (1) the increment by which the property owner’s subjective value exceeds fair market value; (2) the chance of reaping a surplus from trade (that is, of obtaining an amount larger than one’s own true subjective valuation); and (3) the autonomy of choosing for oneself when to sell.”

\textsuperscript{24} Id at 963.
\textsuperscript{25} Id. See also Margaret Jane Radin, \textit{Property and Personhood}, 34 Stan. L. Rev. 957, 965 (1982) (Discussing personality interests in subjective property valuation.).
\textsuperscript{26} Id. (Including “moving to another place, the search costs of finding shops and services in the new location, or on-site improvements that are well-suited to the owner’s uses but do not enhance fair market value.” All manner of other “hard” expenses can be imagined to fit under this portion of the uncompensated
portion of Fennell’s uncompensated increment is a destroyed “chance at surplus from
transfer.”27 Essentially, those whose property is taken by eminent domain lose any
chance to bargain for the sale of their property in the hopes of capturing surpluses created
from an eventual development.28

The first two portions of Fennell’s uncompensated increment are degrees of value
not fully addressed by the traditional interpretation of “just compensation” as fair market
value. Leaving aside for the moment the epistemic difficulty in determining fairly
subjective values or the value of a chance to reap a surplus through transfer, this portion
of the uncompensated increment could be addressed by some legal mechanism that
required increased cash compensation. These two concerns represent the portion of the
uncompensated increment for which a taking as a whole is under-compensated. But
there remains a third portion of uncompensated interests for which additional
compensation may not remedy.

B. Autonomy Concerns

increment, including a business’s loss of good will with a community. Certain uses of property may have
higher hard costs associated with relocating which may not be reflected in valuations by the market. For
instance, an iconic architecture of some McDonald’s or Pizza Hut stores may be particularly valuable only
if those businesses operate within them. The market may prefer a different architectural scheme.
Business which uses unique and difficult to move machinery may not see that machinery and its expensive
installation capitalize into the market value of such a property.

27 Id at 965-66.
28 It is important to note that one of the justifications for the eminent domain power is to under-compensate
the interest a landowner may have in capturing a surplus through transfer as a hold-out. See Richard A.
of the surpluses expected to be created from some public works or land development project by asking for
more money than they subjectively value their property. Land development projects that require
assemblies of smaller adjacent plots can in effect artificially enhance the value on the market of those
smaller plots. Individual landowners will recognize that their small plot may be essential to a project that
includes land that surrounds them, which can allow them to set a selling price above their previous market
value. The eminent domain power allows land assembly at the market rate of the land before the assembly
begins, and subverts this synthetic price inflation.
Professor Fennell identifies autonomy as a lingering concern for property owners worried over the government’s power to take.\textsuperscript{29} Ownership protected by property rules protects the owners “autonomy to decide when and whether to sell.”\textsuperscript{30} Indeed, the eminent domain power is essentially a conversion of an owner’s enjoyment of a property rule protection to only a liability rule protection, as against the government.\textsuperscript{31} Fennell suggests that this conversion from property to liability rule protection is a fundamental part of autonomy-based objections to takings.

Autonomy is a difficult interest to define. But a rough and useful definition could be the interest in making decisions for oneself over the issues for which it is important for someone to make their own decisions.\textsuperscript{32} It may be that certain interests in autonomy are more valuable than others,\textsuperscript{33} or deserve greater degrees of legal protections under the law. Certain policy objectives may be strong enough to overcome even strong legitimate interests in autonomy. But the interests in making at least certain decisions for oneself

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  \item Property - Which among other characteristics, includes the right to sell at whatever price the owner sets.
  \item Liability - Where interference with ownership interests is permitted, so long as compensation is provided at a level set by an impartial arbiter
  \item Inalienability – Where no alienation of ownership interest is permitted by law.
\end{itemize}

\textsuperscript{31} Id.
\textsuperscript{32} See Michael S. Moore, Law and Freedom: The Twenty-Fourth Annual National Student Federalist Society Symposium on Law and Public Policy, 29 Harv. J.L. & Pub. Pol'y 9, 12-14 (2005) (providing a review of the explanations of values inherent in autonomy and liberty). John Stuart Mill’s view of autonomy provides that there is inherent value in the human act of making free decisions for oneself. The act of decision itself is valuable. However, the Kantian view provides that for autonomy “there is value not just in doing the right act, but also, indeed mostly, in doing it for the right reason. The emphasis is on the motives for action, not the processes of choice.” Id. But the Kantian view of what autonomy is valuable is a certain subset of Mill’s definition of valuable autonomy. This invites an ancillary, although important question of what interests in autonomy deserve protection, a question not addressed here. For the purposes of this article, the author relies on Mill’s broader understanding that the ability to choose is itself valuable, at least for certain decisions.
\textsuperscript{33} See Id. at 1 (citing Joseph Raz, The Morality of Freedom, at 13 (1986) (“We feel intuitively that some liberties are more important than others.”)).
remain, and those interests may be infringed when government intercedes with property ownership.

Fennell argues that the “value placed on autonomy may not correlate neatly with the other elements that go uncompensated in exercises of eminent domain.”34 Instead, Fennell suggests that objections to eminent domain can “depend instead on a landowner’s vision of what it means to own property.”35 Autonomy concerns are uniquely problematic for eminent domain because they may not be easily remedied by increasing the cash payment awarded to an affected land owner.36 Instead of being merely under-compensatory, like market value compensation for interests in subjective value or lost ability to gain surplus through transfer, the conversion from property to liability rule offends something in the owner.

Fennell argues that autonomy concerns in part derive from a perception of a right to exclude.37 However, there is something more fundamental in the autonomy objection to takings than the destruction of a discrete interest in the bundle of property rights. A right to exclude is merely a subset of a larger interest in autonomy an individual may have. Autonomy is more fundamentally an ability to make decisions for oneself. To illustrate, autonomy-based objections to a government taking may be experienced by someone who does not own property. Tenants may very well have an autonomy-based objection to a condemnation of their rented property, even though the terms of their lease do not provide for a right to exclude all persons, or for any right to exclude after the

34 Id. at 967.
35 Id.
36 Id. at 994 (“The second problem with simply increasing monetary payments to owners of condemned land is that it does not adequately address the confiscation of autonomy.”).
37 Id. (“The power to exclude, which encompasses the right to refuse to sell, constitutes a fundamental attribute of property ownership.”) Citing, Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998).
termination of their leasehold. Nonetheless, condemnation of a leased property destroys the ability of the tenants to choose for themselves whether to renew or at least to offer to renew their relationship with the property owner. Of course, neither would tenants receive any just compensation for the property’s condemnation.

Lastly, the autonomy interest exists in matters of degrees. The autonomy interest infringed upon by eminent domain may be different, depending on whom it affects. Condemnation of residential property may be of particular concern both because of high expected subjective value for the property by its residents and because the condemnation interferes with resident’s autonomy. Even if residents were compensated for their subjective value and incidental expenses that were consequences of an eminent domain action, the taking would still infringe upon their autonomy to decide to make their lives where they please.

Autonomy interests may not raise as great of a concern if the condemned property was a fungible storefront owned and operated by a successful national chain. Like the residents of the above hypothetical, a national chain could conceivably be fully compensated for its subjective valuations. For such a business concern, the subjective valuations in property are not generally sentimental but economic, and “full” compensation for all lost values in property might include loss of good will, costs of

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38 Some human beings may indeed have subjective personality interests in the ownership and location of their business. Small business owners or closely held corporations may be identified closely with the personalities of their owners. However a stockholder of a large property-owning corporation generally does not have anything more than an economic interest in the function of that business and the details of its property ownership. Employees and other stakeholders of a business interest using property may have autonomy interests that go uncompensated by a taking. These second degree autonomy interests of non-owners are not generally valued in takings law. Just compensation provided for under the Constitution is awarded to owners, not to tenants, or family members who lose access to the benefits of their home. Some mechanisms for protecting the interests of non-owners with interests in property are feasible, like provision of relocation costs for tenants displaced by condemnation, but there must be some outside line drawn to cabin the interests in property that the law will protect.
moving to another location, and perhaps even lost profits if no similarly profitable location were available. If economic interests are otherwise compensated, autonomy interests may not be implicated for such business entities at all. If a corporate entity’s interests in property are entirely financial, and the financial interests were fully compensated, it is difficult to conceive of a corporate entity as being “offended” by an interference with its property rights in the way that a human might value as autonomy. At the very least, assuming full compensation of economic and sentimental subjective values, a corporate business entity may well have different autonomy interests affected by a condemnation than would a displaced family. Whether policymakers do or should protect the autonomy interests of individuals making their private lives where and how they see fit with the same degree of protection.

So, how should policymakers deal with these uncompensated economic and autonomy interests? Should government be restricted from exercising eminent domain? Or should more compensation be awarded to affected landowners? Part II will begin to answer these questions by examining constraints available to restrict the eminent domain power.

Part II. Identifying Constraints on Eminent Domain: Compensatory and Categorical.

Before discussing which methods are most useful to constrain eminent domain, this section will identify and define the types of constraints available. This section will

39 Again, this presumes that the corporate interest is sufficiently separable from some human interests, and would not apply to a closely held corporation. Id. Some organizations or at least members therein, may still experience autonomy interests in property. A religious community might have not only sentimental, but autonomy interests in a particular house of worship. The autonomy interest for such a group could be in their desire to enjoy the ability to choose where to worship. Such valid concerns for autonomy, however, appear less strong for stakeholders in a business, whose purpose is to make money and not to satisfy some personality concern of ownership or agency over the method of making money.
begin by identifying two primary types of restraints on the takings power, compensatory restraints and categorical restraints. Compensatory restraints are those that require government to pay something for the property it takes. Categorical restraints are those that prohibit government from taking in certain circumstances no matter what level of compensation is offered.

The Fifth Amendment of the Federal Constitution provides an illustration of the two basic forms of takings restraints. The Fifth Amendment requires that property only be taken for a “public use” and then only where “just compensation” is provided. Just compensation and public use provide the bedrock restraints on government’s power to exercise eminent domain. But each constraint is separate. If there is no public purpose, then the taking is prohibited categorically, regardless of how just the amount of compensation awarded by the government. The just compensation clause acts as a form of compensatory restraint, providing cash compensation for the taking. This section attempts a bit of legal taxonomy by outlining which constraints on takings are categorical, and which are compensatory.

A. Compensatory Restraints.

1. Just Compensation: The Compensatory Restraint in the Fifth Amendment

Just compensation is a type of compensatory restraint: it requires government to pay owners for the loss of their property. The courts have interpreted the Fifth Amendment’s “just compensation” to require fair market value. One could imagine an

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40 U.S. Const. Amend. 5.
41 Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2084 (2005) (“[I]f a government action is found to be impermissible – for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process – that is the end of the inquiry. No amount of compensation can authorize such action.”).
42 United States v. Miller, 317 U.S. 369, 74 (1943) ("[T]he courts early adopted, and have retained, the concept of market value"). See also, Bauman v. Ross, 167 U.S. 548 (1897); United States v. Virginia Elec.
alternative text or interpretation of the Fifth Amendment reading that property could not
be taken unless an award was made to equal “fair market value of the property, divided
by two”. That too would be a form of compensatory restraint. Both the actual and this
imagined Fifth Amendment would require some compensation to be made as a
consequence of the taking.

The existence of a compensatory restraint does not necessarily imply that
government is required to compensate all losses suffered by an owner whose property is
taken. Instead, to qualify as a compensatory restraint, it must require only some
remuneration to an aggrieved property owner. Even a compensatory restraint that offered
remuneration of more value than a property owner subjectively enjoyed in a property
would be a form of compensatory restraint. The preoccupation with whether or not a
form of compensation is adequate or even too generous derives both from our sense of
appropriateness, and the very text of the Fifth Amendment’s requirement that
compensation be “just”. But this requirement of appropriateness is not inherent in a
compensatory restraint differently formulated, or meant to serve ends other than the Fifth
Amendment’s “justice”.

Much of the valuable literature and debate over compensation revolves around the
appropriate interpretation and application of the Just Compensation Clause. But there is a
broad range of available takings restraints, which are not limited to those found in the
U.S. Constitution. Fortunately, the theories used explain and justify the Just
Compensation Clause are largely applicable to effects and purposes of all compensatory
restraints. While many of the theories referenced below were originally provided with

reference to the Just Compensation Clause specifically, they provide a useful guide to explain the utility of the broad range of compensation restraints generally.

2. Objectives of Compensatory Restraints

Compensation has classically been understood to promote objectives of fairness and efficiency.  

a) Fairness:

At first glance, concerns for fairness may suppose that those whose property is taken should be given full compensation for whatever harms they suffered. From early on in the common law, Blackstone argued that full compensation for taken land was a principle of fairness. This sentiment has at times been echoed by justices on the Supreme Court. But it is understood that market value compensation does not always reach this full indemnification. So can some compensation regime that offers less than full compensation still advance fairness as an objective?

Professor Michleman suggested in his seminal article that compensation rules should be considered fair if they satisfied a Rawlsian test for justice. A social


44 See 1 William Blackstone, Commentaries, 135. (Asserting that a guiding equitable concern prevented government from seizing “[one’s] property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained.”)

45 Olson v. United States, 292 U.S. 246, 255 (1934) (“[A Property owner is] entitled to be put in as good a position pecuniarily as if his property had not been taken.”); Kelo v. New London, supra Note 1 (Thomas, J., dissenting) (“Blackstone rejected the idea that private property could be taken solely for purposes of any public benefit…Only ‘by giving [the landowner] full indemnification’ could the government take property, and even then ‘[the public] was now considered as an individual, treating with an individual for an exchange.’”).

arrangement – like just compensation for takings – is just if it is fair. Rawlsian fairness can be defined by treating everyone the same, or by ensuring that everyone has a chance to attain the different levels of treatment society offers, so that the overall arrangements can reasonably be supposed to work out for the benefit of everyone, especially those that accrue the least advantageous treatment provided for by the arrangement.

It might be problematic to evaluate a compensation regime only to determine if it passed a “fairness test,” as though fairness and unfairness had a binary relationship. Fairness can exist as a matter of degrees. Some systems of compensation can be more fair than others. A legal regime of less than full compensation may still be more fair than a regime that provided no compensation whatsoever. It is more useful to examine whether a compensation regime, however formulated, has as an objective of fairness.

The U.S. Supreme Court understands the fairness objective of just compensation aims to prevent “government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” This characterization of fairness cabins the breadth of just compensation to something possibly less than full compensation. Justice Frankfurter wrote for the Court that the across-the-board refusal to reimburse idiosyncratic valuation of taken property was justified as a

47 *See Id.*

48 *Id* at 1220 (restating Rawls’ second principle of justice). Refusal to compensate anyone for a taking might appear “fair” under a view of horizontal equity, in that it every person who suffered a taking was treated equally. However, no takings regime supposes that all property from all owners would be taken by the government. Instead, only certain property owners are directly affected – when their individual property is taken. In a Rawlsian conception of fairness in takings, the owners from whom property is taken are those with the least advantageous treatment provided for by the arrangement. To be judged fair and therefore just, society’s arrangement must work out for everyone, including specifically burdened property owners. Compensation has a goal then of making the arrangement work out for the property owners burdened by takings.

“burden of common citizenship”, in which all are treated equally and by an objective measure if their property is subject to a taking.

b) Efficiency

Professor Michelman explains that compensation for takings may seek to achieve efficiency if evaluated based on three factors, efficiency gains, demoralization costs, and settlement costs, each of which is explained in a footnote. Compensation is efficient, “whenever demoralization costs exceed settlement costs, and not otherwise.” Were efficiency the only objective compensation was meant to serve, then according to Michelman, not all takings would be compensated (for situations where settlement costs exceed demoralization costs). But perhaps the theory Michelman is expressing can be put more simply by saying that efficiency is more likely to be achieved by government takings, if the government is required to internalize the cost of its actions. Efficiency is encouraged by compensation, it is argued, because it decreases the likelihood that government might exercise its eminent domain power under a false belief that the

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50 Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949).
52 Id. at 1215.
53 Id.
54 Richard A. Posner, Economic Analysis of Law, 54–57 (6th ed. 2003); See also Thomas W. Merrill, Review Essay: Rent Seeking and the Compensation Principle, 80 Nw. U.L. Rev. 1561, 1583. (“[I]f the government is not required to compensate for losses inflicted by its actions, then it will tend to overregulate. This is because the costs of government regulations are externalized to those who are regulated, rather than internalized in the government's budget.”); Hanoch Dagan, Takings and Distributive Justice, 85 Va. L. Rev. 741, 752 (1999) (“compensation is tantamount to a built-in mechanism that verifies the efficiency of public decisions that affect private property.”)
condemnation would provide aggregate benefits to the community, despite the costs of compensation and the costs imposed on the burdened landowners.\textsuperscript{55} However, where compensation does not fully remunerate property owners for their subjective losses, compensation will not allow government to fully take account of and internalize the costs of its actions. So like with fairness, compensation restraints with a goal of promoting efficiency must be judged by a matter of degrees.

3. Federalism and Compensation Restraints on Takings

This section will examine the numerous forms of available compensatory restraints. The Fifth Amendment provides bedrock protections for property owners, but the states remain able to create their own supplementary protections.\textsuperscript{56} The majority in \textit{Kelo} took care to indicate that states were still very able to restrict the exercise of their own takings power beyond the constraints found within the Fifth Amendment.\textsuperscript{57} Principles of Federalism protect the ability of state governments to create and innovate systems of legal protection that differ from the national models.\textsuperscript{58} “New Federalism,” as

\textsuperscript{55} See \textit{Id.}, Merrill at 1583 (“Without some method of internalization, the costs of a regulation will not be factored into the decision to regulate.”); See also Kaplow, \textit{An Economic Analysis of Legal Transitions}, 99 Harv. L. Rev. 509, 568 (1986) (“The fiscal illusion argument relies crucially on the implicit assumption that government decisionmakers treat costs and benefits asymmetrically, with a systematic bias toward discounting costs more than they discount benefits.”)

\textsuperscript{56} See Deborah Jones Merritt, \textit{The Guarantee Clause and State Autonomy: Federalism for a Third Century}, 88 Colum. L. Rev. 1, 6-7 (January; 1988) (“[Federalism allows] state and local governments to check federal authority by regulating areas that the federal government chooses to ignore.”) (Citing examples).

\textsuperscript{57} \textit{Kelo v. City of New London}, supra Note 1 at 2668 (2005) (“We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”) (Citing, \textit{County of Wayne v. Hathcock}, 471 Mich. 445 (2004)).

\textsuperscript{58} See \textit{Gregory v. Ashcroft}, 501 U.S. 452, 458 (1991) (O’Connor, J., Dissenting) (“[Federalism] assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society.”); \textit{New State Ice Co. v. Liebmann}, 285 U.S. 262, 311 (1932) (Brandeis, J., Dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).
it has been described, purports to allow the varying levels of government to separately achieve the ends of government.\footnote{See Erwin Chemerinsky, \textit{Dunwody Distinguished Lecture in Law: The Values of Federalism}, 47 Fla. L. Rev. 499 (September 1995). (Arguing that New Federalism “can be reconceived not as about limiting federal power or even as about limiting state or local power. Rather, it should be seen as based on the desirability of empowering multiple levels of government to deal with social problems.”); William J. Brennan, Jr., \textit{State Constitutions and the Protection of Individual Rights}, 90 Harv. L. Rev. 489, 491 (1977) (arguing that there should be more use of state constitutions to protect individual liberties).}

There are numerous examples of state-based compensation restraints that go beyond the base requirements of market-value compensation. Moreover, the rich scholarship on takings has suggested its own fair share of compensation restraints. Each attempts to make up for the perceived shortfalls of the reigning market-value standard, although sometimes in subtly different ways.

\begin{itemize}
  \item \textbf{a) Percentage Bonuses Based on Actual Value}
  
  One option available is to provide fixed compensation bonuses, tied to the base fair market value. A compensation regime (either a court or an agency of some sort) could evaluate a condemned property’s fair market value, and then increase the compensation awarded based on some regulatory criteria.\footnote{Lee Anne Fennell, \textit{Symposium: The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock: Taking Eminent Domain Apart}, 2004 Mich. St. L. Rev. 957, 993 (“Proposals for delivering larger amounts of compensation to condemnees range from bonus fractions …to restitutionary variations on compensation that would key the condemnee’s payment to the benefits that the private transferee will glean.”) (Citing Richard A. Epstein, \textit{Takings: Private Property and the Power of Eminent Domain}, at 184 (1985), (bonuses fixed to a percentage of market value); Murray J. Raff, \textit{Planning Law and Compulsory Acquisition in Australia, in Taking Land: Compulsory Purchase and Regulation in Asian-Pacific Countries}, 27, 44 (Tsuyoshi Kotaka & David L. Callies eds., 2002) (discussing statutory provision in Victoria allowing for above-market compensation up to 10 percent above the property's market value, "to compensate the claimant for intangible and non-pecuniary disadvantages resulting from the acquisition").} It might also be feasible to structure administrative compensation bonuses on the basis of a property owner’s perceived subjective value.\footnote{See Robert C. Ellickson, \textit{Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls}, 40 U. Chi. L. Rev. 681, 736-37 (1973) (arguing that that flexible percentage increases in compensation, tied to a baseline determination of fair market value would provide an administratively simple – if possibly imprecise – means to compensate for subjective values. Percentage bonuses could be...} An early example of state legislative compensation bonus
existed in early New Hampshire, which provided for compensation for certain takings at
150% of market value.\textsuperscript{62} While flat percentage-based bonuses may help to minimize the
degree of under-compensated value left in an uncompensated increment, they may also
overcompensate.\textsuperscript{63} And for those individuals with very high subjective values of their
property, a flat percentage may not be sufficient to reach a measure of full compensation.

b) Bonuses Tied to Determinations of Actual Condemned Economic Value

Compensation for takings may be adjusted by considering additional factors
within the initial value determination. The U.S. Supreme Court has recognized that loss
of goodwill is not generally protected by the just compensation requirement of the Fifth
Amendment.\textsuperscript{64} However the states retain the ability to award compensation by some
valuation of loss of good will, among other values. While uncompensated subjective

discussing New Hampshire Mill Act, 1868 N.H. Laws ch. 20, which "fixed the compensation payable to
the owner of flooded land at 50 percent above the market value of the land, thereby ensuring a division of
the surplus brought about by the forced exchange"). Epstein presumes that the flooded landowners
compensation bonus was meant to address the second part of the uncompensated increment, loss of chance
to capture surplus from transfer. While this may or may not be true, one could similarly imagine a
percentage bonus provided with the intent to compensate for subjective valuations. \textit{See also, Head v.
Amoskeag Mfg. Co.}, 113 U.S. 9 (1884) (Discussing the act, and upholding provisions of the act allowing
the construction of dams so long as injuries to adjacent landowners were compensated either by a
committee or jury.).

\textsuperscript{63} Lee Anne Fennell, \textit{Symposium: The Death of Poletown: The Future of Eminent Domain and Urban
957, 993 ("Awards that are too generous can create perverse incentives, including overinvestment in
property improvements when talk of eminent domain is in the air.") (Citing several scholarly works on the
subject).

\textsuperscript{64} United States v. General Motors Corp., 323 U.S. 373 (1945) ("[T]he courts have generally held that [the
loss of good will, among other values] are not to be reckoned as part of the compensation for the fee taken
by the Government"); But see also \textit{Michigan State Highway Com. v. L & L Concession Co.}, 31 Mich. App,
222, 234 (Mich. Ct. App. 1971) ("[W]here the value of the leasehold as an estate in land and the value of
the business there conducted cannot readily be separated, the valuation ascribed to the leasehold may
reflect the value of the business there operated"). (Citing \textit{Mitchell v. United States}, 267 U.S. 341, 345
(1925) ("The Court observed that the special adaptability of the land for use in a particular business is an
element to be considered in determining just compensation and that ‘doubtless such special value of the
plaintiff's land was duly considered.").
values in property may implicate efficiency concerns, the sentimentalities of a long-term owner-occupant may not be as easily quantifiable. However, short-term financial implications of a condemned place of business may be relatively simple to calculate objectively, and legislation could be enacted to award such loss of good will to the owners of condemned businesses.

C) Process Safeguards for Compensation

Compensation constraints must not necessarily involve rules to provide above-market compensation. Instead, the process itself may provide a method to establish what compensation should be made available. The California Constitution provides a form of compensation restraint that merely provides that a property owner may have their property value ascertained by a jury. This restraint allows a subject property owner the option of having their property’s market value determined by a decisionmaker that is not an employee of the government. A government assessor may have an interest in

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65 Lee Anne Fennell, Symposium: The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock: Taking Eminent Domain Apart, 2004 Mich. St. L. Rev. 957, 964, n25 (“Because no compensation is paid to make up for [subjective] loss, it may be disregarded in the decision whether to condemn the property; this introduces the possibility that condemnations will be undertaken that are inefficient.”).

66 For a real world example we can look to the law of California, where statutory provisions in the state’s eminent domain code provide compensation for loss of business goodwill. Cal Code Civ Proc § 1263.510(a) (“The owner of a business conducted on the property taken, or on the remainder if such property is part of a larger parcel, shall be compensated for loss of goodwill…”). Goodwill is defined as “the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.” § 1263.510(b). California’s statute requires a business owner to prove that the loss was suffered by either a taking of the property (or a taking of a portion of the owner’s property, leaving a remainder), § 1263.510(a)(1), and that “[t]he loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill.” § 1263.510(a)(2). The California legislature left to the courts to determine the proper way to measure goodwill losses for businesses suffering condemnation. City of San Diego v. Sobke, 65 Cal. App. 4th 379, 388-389 (Cal. Ct. App. 1998) (“[I]n enacting section 1263.510 the Legislature did not specify any particular method for valuing loss of goodwill…. Valuation methods will differ with the nature of the business or practice and with the purpose for which the evaluation is conducted.”) (internal citations omitted).

67 Cal Const, Art I § 19 (2006) (“Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.”).
undervaluing property to provide as little compensation from the public treasuries as possible. Elsewhere in California statutory law is compensation tied to fair market value, but that fair market value is to be determined by a jury weighing evidence submitted by both sides of litigation. Of note, California’s loss of good will bonus is also protected by the same jury process safeguard. Other process safeguards for compensation are imaginable.

D) Progressive Compensation.

Not all compensation restraints imaginable have been put into practice. Many are still the stuff of scholarly theory. Professor Dagan suggests progressive compensation, through which more compensation is awarded to less wealthy subjects of eminent domain actions than to those who are more wealthy. Dagan’s suggestion is premised on the assumption that potential subjects of eminent domain will politically oppose eminent domain of their property unless compensation at fair market value will be sufficient to make them agnostic to the taking. While Dagan concedes that in many cases fair market value may be adequately compensatory, “in fact, in many cases, it will be otherwise.”

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68 Cal Code Civ Proc § 1263.310 (2006) (“Compensation shall be awarded for the property taken. The measure of this compensation is the fair market value of the property taken.”).
69 Redevelopment Agency of San Diego v. Attisha, 128 Cal. App. 4th 357, 368 (Cal. Ct. App. 2005) (“Once these foundational conditions are proven, the trier of fact must determine the amount of compensation ... for ... loss of goodwill, based on whatever evidence is before it.”) (Citing People ex rel. Dept. of Transportation v. Salami, 2 Cal.App.4th 37, 45 (Cal. Ct. App. 1991)).
70 Process safeguards for compensation restraints could include statutory standards of evidence, assignment of the burden of proof, or requirements that valuations be made by certain entities, either governmental or private.
72 Id at 756. (Landowners will not oppose a taking “if receiving the fair market value of the harm done would make each landowner indifferent to the possibility that the public action would infringe upon her own property.”)
73 Id.
therefore attempt to exert political pressure to prevent their property from being taken. Dagan presumes that wealthier property owners will have more means to influence the taking authority, and suggests that increasing compensation awarded to the less wealthy and therefore less influential groups will put a counter-check on the condemning authorities, who might otherwise be influenced to act prejudicially against the interests of the less influential groups. In effect, Dagan’s proposal attempts to “[induce] public officials to base their decisions solely on planning considerations”, and not rent-seeking activities.

Progressive compensation does not seek to remedy the harms that result from a taking by providing more adequate compensation. The additional compensation is intended to be neither remunerative, nor redistributive. Instead the compensation is used tangentially, to affect the decisionmaking calculus of condemning authorities. Perhaps the most glaring difficulty with this approach is the line-drawing question. There is no clear answer to how much extra compensation is necessary to realign government’s incentives such that land owned by the poor is not unjustly preferred for condemnation. The great danger in this proposal would be that the amount of extra compensation decided upon would be too great, or too small, distorting instead of restoring government’s decisionmaking calculus.

E) Gain-Based Compensation:

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74 Id. (“[T]he lobbying efforts of strong landowners are likely to be much more effective than those of the weaker ones.”).
75 Id. Other forms of increased compensation could also be mandated for property owners who, like the poor, are less able to organize politically.
76 Dagan’s proposal is not intended to redistribute society’s wealth from the rich to the poor. Instead, the proposal intends to rework government’s decisionmaking calculus, which it is argued, prefers taking the land of the poor because they are less able to organize politically to prevent condemnation of their property. Dagan’s proposal seeks to prevent government from specially burdening the poor with its condemnation projects, spreading the burden of condemnation more equally through all of society. Id.
Professors Krier and Serkin suggest a mode of gain-based compensation, where property owners are awarded not the fair market value of their property at the time of condemnation, but instead the value of their property after it is taken and developed.\textsuperscript{77} They fear that private-to-private transfers done under the auspices of the takings power contain a “danger that it is the benefit to the public interest that's merely incidental,” and that such takings, only nominally for a public purpose, are “in short, a ruse.”\textsuperscript{78} They note that assembling individual lots through eminent domain often creates surpluses in value, and argue that allocating those surpluses to the owners of condemned lands prevents “the government from benefiting by assembling property for transfer to private parties.”\textsuperscript{79} Their proposal hopes to adjust compensation to prevent distorted incentives for government that can lead to otherwise inefficient decisions to exercise the eminent domain power.\textsuperscript{80} Like Dagan, Krier and Serkin’s proposal seeks to provide extra compensation not to remedy harms, but to change the decisionmaking calculus of government.\textsuperscript{81}

\textsuperscript{77} James E. Krier & Christopher Serkin, \textit{Symposium: The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock: Public Ruses}, 2004 Mich. St. L. Rev. 859, 861-73 (2004). Krier & Serkin propose to award gain-based compensation to owners of property that is condemned and retransferred to a private third party. Instead of adjusting compensation on a sliding scale (to increase compensation as the relationship between a public purpose decreases), their proposal creates a binary evaluation of valid public uses, creating an alternative compensation regime for use categories that involve private-to-private transfers. That alternative compensation regime offers higher compensation for a select category of takings, which they presuppose (probably correctly) to be of a more tenuous relation to public purposes, and which may include fewer implicit in-kind non-monetary compensation components.

\textsuperscript{78} \textit{Id.} at 863.


\textsuperscript{80} \textit{Id} at 871-72 (“[G]ain-based awards would remove the government's incentive to use the power of eminent domain altogether.”). \textit{See also Id.} at n.49 (Noting that Professor Merrill rejected the idea of a gain-based award at least partly on these grounds. Thomas W. Merrill, \textit{The Economics of Public Use}, 72 Cornell L. Rev. 61, 85 (1986) (“In the case of profit-oriented entities, however, restitution could eliminate the use of eminent domain altogether.”)).

\textsuperscript{81} It is interesting to note that the proposal by Krier and Serkin is not expressly meant to address the second component of the uncompensated increment, a loss of ability to capture surplus through transfer. Instead,
Professor Gillette offers a separate rationale for gain-based compensation. Gillette worries that governments may indulge in “undue optimism” and paint the “financially rosiest of futures,” for their eminent domain projects, when there are insufficient guarantees that a taking will provide aggregate economic benefits to a community. Under this proposal, a modified interpretation of “just compensation” would reflect not just market value of property, but “also some percentage of the proposed project’s expected benefits to the municipality.” Like Serkin and Krier, Gillette offers a proposal to provide gain-based compensation in order to create financial disincentives for condemnors’ to take where the ultimate public benefit is less than guaranteed. However, Gillette’s proposal differs in that its concern is more about uses of eminent domain for which public benefit is overly “speculative.” Gillette addresses this concern by tying the cost of condemnation to the aggregate economic benefit government claims to expect (if government has to pay a percentage of the anticipated benefits, government will be deterred from over-estimating those benefits).

Serkin and Krier are most concerned with deterring rent-seeking behavior, limiting gain-based compensation to condemnations where rent-seeking is most likely to occur (private-to-private takings), and forcing government to pay an amount based on the

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83 Id. There is no reason why Gillette’s proposal must derive from a modified interpretation of either a state or Federal constitution’s “just compensation” clause. Instead, a legislative scheme could also require this sort of compensation requirement. This is an example of the preoccupation in takings scholarship with developing takings regimes through interpreting the few short words of the 5th Amendment’s Takings Clause. As this section demonstrates, many nonconstitutional takings restraints are available, and the “best” takings regime need not rely on the constitution nor its judicial interpreters for its enactment.
future projected value of each property. In their proposal, government will pay the amount of future-value of the property, and they presume government will only choose to condemn where the condemnation is not a product of inefficient rent-seeking, i.e., where aggregate social benefits outweigh the costs of the condemnation.

Like Dagan’s proposal, both Gillatte and Krier and Serkin’s gain-based compensation regimes seek to influence government decisionmaking by adjusting the costs of those decisions. Neither aim to adjust compensation to remedy the specific harms suffered from a taking. Instead, they attempt to accomplish their aims indirectly by increasing the costs to government of socially undesirable takings. Also like Dagan’s proposal, neither of these gain-based restraints proposes a specific method to tailor increased compensation to provide proper incentive to government. Krier and Serkin would require condemnors to pay land owners the entire surplus generated from a condemnation, even if requiring payment of a smaller amount would be sufficient to deter government from taking property as a product of rent-seeking. Also, Serkin and Krier’s proposal requires that the entire surplus generated be provided to subject landowners from the public treasuries. Their theory is based on the view that government should not be able to capture the surpluses generated by land assemblages. However, the surpluses generated by land assemblages transferred to third party developers may often be captured by those third party developers, not the government. A more tailored approach might be to require government to pay to subject landowners only the surplus.

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85 Id.
86 Were Krier and Serkin proposal aimed at protecting the loss of a landowner’s ability to capture surplus through transfer, then their requirement of total surplus remuneration would more directly linked to its purpose.
value captured by the government itself, such as increased property or sales tax revenues anticipated from the project.

The difficulties of gain-based compensation regimes on influencing the actions of government are generally line-drawing problems. It is difficult, if not impossible, to discover exactly what monetary constraints are necessary to influence governments. This is especially true in that government decisionmakers do not themselves bear the financial burden of their actions, and may not be adequately influenced by the costs of their actions. 87

4. Judicially Crafted Compensation Restraints

While the Supreme Court may hold that just compensation requires only fair market value, courts have at times given remedies that depart from this black letter maxim. Professor Serkin surveyed different fair market valuation mechanism by courts, which seem to advance disparate takings theories in the context of different factual circumstances. 88 This flexibility demonstrates the wide array of mechanisms available to a court to determine just compensation. 89 While no state court has seemed to do so, the “just compensation” clauses in the various state constitutions could be interpreted to include more than the Fifth Amendment’s entitlement of fair market value. Any subset of the economic portion of the uncompensated increment might be held to be compensable under a state constitution. Another possible judicially crafted compensation

87 Thomas W. Merrill, Review Essay: Rent Seeking and the Compensation Principle, 80 Nw. U.L. Rev. 1561. (“Cost-benefit analysis by government may not occur if the [government]” is comprised of “[agents that] seek to enrich themselves at the expense of society,” or if “the government is subject to capture by rent-seeking factions.”).
89 Id.
restraint might simply be to depart from the fair market value approach where evidence suggests a significant uncompensated increment.\textsuperscript{90}

B. Categorical Constraints

Categorical constraints prohibit government from taking property under certain circumstances. Categorical constraints are distinguishable from compensatory restraints because instead of mandating a certain compensation for a taking, the taking itself is prohibited from occurring.

There are at least two basic types of categorical restraints on takings. The first are “purpose restraints.” Purpose restraints prohibit takings made for specific purposes.\textsuperscript{91} The second form of categorical restraints are “subject restraints.” Subject restraints prohibit takings of certain kinds of property, or from certain types of property owners, or from a combination of both.\textsuperscript{92} Subject restraints are not as easily found within the plain text of the public use requirement of the Fifth Amendment.\textsuperscript{93} This division of categorical

\textsuperscript{90} \textit{United States v. 50 Acres of Land}, 469 U.S. 24, 37 (1984) (O’Connor, J., Concurring) (“When a local governmental entity can prove that the market value of its property deviates significantly from the make-whole remedy intended by the Just Compensation Clause and that a substitute facility must be acquired to continue to provide an essential service, limiting compensation to the fair market value in my view would be manifestly unjust.”). Presumably, judicially crafted rules for determining a significant disparity, and the appropriate remedy could be constructed.

\textsuperscript{91} The text of the Fifth Amendment’s public use requirement suggests a purposeful restraint. The word “use” in the Fifth Amendment, U.S. Const., Amdt., 5, implies that government cannot take private property unless government will “use” it for some public purpose. This is different than a textual limitation on which property was subject to condemnation. This is not to say that other external provisions of the Federal Constitution might nonetheless restrict how governments selected properties to condemn, for instance, it would violate the 14th Amendment to select property based on the race or gender of the property’s owner.

\textsuperscript{92} An example would be a prohibition of takings of residential properties. Another could be a restriction from taking properties occupied by locally-owned small businesses, defined by statute.

\textsuperscript{93} Where public use is at issue, the \textit{Kelo} court explained that the Fifth Amendment did not directly restrict the character of government action, stating “[I]t is only the taking’s purpose, and not its mechanics,… that matters in determining public use.” \textit{Kelo}, 125 S. Ct. at 2663 (Quoting, \textit{Midkiff}, 467 U.S at 244). This suggests a theory of public use in the Fifth Amendment that is concerned only with the purpose of a taking, and not with the property actually taken. Although as we shall see, alternative formulation of state public use requirements may also operate as subject restraints. See Part II. B. 2. a. for a discussion of Michigan’s constitutional subject restraints a public use standard in \textit{County of Wayne v. Hathcock}, 471 Mich. at 468-78 (2004).
constraints between purposeful restraints and subject restraints is not absolute.⁹⁴

Specifically, constraints on the takings power that are mostly procedural, do not limit directly the sorts of prosperities subject to condemnation, nor do they necessarily limit the projects for which property may be condemned. Nonetheless, if these procedures are not followed, takings can be entirely prevented, so they qualify as categorical constraints. Process constraints will be discussed more in depth in Part III.

1. The Categorical Constraints in the Federal Constitution

The Fifth Amendment’s “public use” is a type of categorical constraint. Takings may not occur at all unless the property is seized for some public use. This power to take property is not constrained by a requirement to pay certain moneys to a property owner, instead a non-public taking is prohibited categorically.⁹⁵

The courts have long held that the takings clause’s “Public Use” restriction is broad enough to cover takings for purposes other than roads, government buildings, or other facilities directly used by the government or the public at large.⁹⁶ However broad

⁹⁴ Restraints can incorporate both purpose and subject restrictions. For example, California prohibits taking land for economic development purposes, unless the property is blighted, or in a blighted area. Cal. Health & Safety Code Ann. §§ 33030-33037. This restriction operates as a purpose restraint by limiting the takings power when utilized for the purpose of economic development, by confining its use only to subject properties with the certain characteristic of blight.

⁹⁵ Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2084 (2005) (“[I]f a government action is found to be impermissible – for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process – that is the end of the inquiry. No amount of compensation can authorize such action.”); Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984) (“A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”).

⁹⁶ Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 161-162 (1896) (Interpreting “public use” to allow taking for the creation of an irrigation project) (“It is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in an improvement in order to constitute a public use.”).
the public use requirement may be, limits have been expressed by the Court. It is sufficient to understand as a concept that the Fifth Amendment’s public use restrictions may provide some outside limit to the sort of projects for which government is allowed to take private property.

2. Federalism and Categorical Constraints

The same principles of Federalism that allow states to supplement the compensation awarded from an eminent domain action apply for categorical restraints.
Whatever takings the Fifth Amendment’s public use requirement forbids (if any at all),\(^{100}\) the states may supplement those restrictions with its own.

**A) State Public Use Requirements**

As with any section of a state constitution, state supreme courts are able to construe their public use requirements more strictly than the U.S. Supreme Court interprets its federal counterpart. While some states tie their public use requirements to the federal standard,\(^{101}\) others provide protections that are substantially different.\(^{102}\) *Michigan* specifically requires private-to-private transfers to meet three particular tests to qualify as a “public use.”\(^{103}\)

**B) Statutory Categorical Restraints**

Statutes can also limit the circumstances under and purposes for which a taking may occur.

*Blight Requirements.* Numerous statutes create categorical subject restraints that forbid condemnation of certain properties for private-to-private transfers unless those

\(^{100}\) See supra note 96.

\(^{101}\) *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643, 664 (Cal. 2002) (Explaining that the California Courts “appear to have construed the [federal and state takings] clauses congruently.” citing, e.g., *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal. 4th 952, 957, 962-975).).


\(^{103}\) Id. at 468-78.

- First: “[C]ondemnations in which private land was constitutionally transferred by the condemning authority to a private entity involved "public necessity of the extreme sort otherwise impracticable...”
- Second: “[T]he transfer of condemned property to a private entity is consistent with the constitution’s 'public use' requirement when the private entity remains accountable to the public in its use of that property...”
- Third: “[C]ondemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern..."
properties are blighted. Many commentators have noted that condemnors’ findings of blight may be given the same sort of deferential review enjoyed by condemnors’ claims that takings are for public use.

**Necessity Requirements.** Public necessity requirements such as that found within the Michigan Constitution’s public use requirement can be created by statute. Necessity requirements can work in several ways. First, they might impose a certain standard of need, reviewable in a court, which a condemning authority must meet. Requirements that government actors articulate purposes and goals before exercising of the powers of state are a familiar device.

**Part III: State Legislation After *Kelo*: Reducing the Uncompensated Increment**

This section will examine how state houses responded to *Kelo* to restrict state and local government’s power to exercise eminent domain, and to minimize the

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107 Cal Code Civ Proc § 1245.220 (2006) (“A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of this article.”)


109 *Supra* Note 1.

110 See Morandi, *Supra* Note 4.
uncompensated increment. The discussion will detail how post-*Kelo* legislation fits into a descriptive dichotomy of compensation restraints and categorical constraints, and analyzes how each restraint can be seen as designed to protect property interests found within the uncompensated increment. The legislative responses to *Kelo* are not necessarily unique or different from many of the statutes that existed before *Kelo*. The primary difference between the two is that post-*Kelo* legislation has occurred in a time of heightened public concern over takings policy.

A. Compensation Restraints.

State legislation after *Kelo* to create compensation restraints on takings fit into one of three categories. First, there are compensation restraints that provide compensation for specific injuries suffered as a result of a taking, like moving expenses, loss of business good will, or other discreet collateral costs. Second, bonus payments, as a percentage increase of fair market value, depending on a combination of the original owner’s use of the property and the subsequent use sought by the condemnor. Finally, some states have passed statutes that are not specifically aimed at supplementing compensation, but instead are meant to encourage condemnors to make more accurate determinations of the compensation due to affected landowners. Each of these compensation restraints aims to reduce the economic portion of the uncompensated increment by providing higher cash transfers to affected landowners.

1. Compensating Specific Injuries.

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Some states responded to Kelo by providing increased compensation for actual moving expenses.\(^{112}\) As a form of compensation restraint, moving expenses are “hard,”\(^{113}\) meaning they can be easily quantifiable by receipts, which undercuts epistemic objections to compensating for subjective values.\(^{114}\) Similarly, economic harm to business and the loss of good will can be demonstrated by methods of past accounting and is available for compensation under some post-\textit{Kelo} legislation.\(^{115}\) Indiana also stipulated payment of compensation for specific types of property interference that might not otherwise amount to a compensable taking under state or federal constitutional standards.\(^{116}\)

Compensation for hard economic expenses are among the restraints on taking most easy to justify. They address specific and identifiable harms suffered by affected property owners, and directly remedy them. Compensation for hard expenses promotes fairness because it saves a burdened land owner from having to pay out of their own pocket the collateral consequences associated with the condemnation of their property. Moreover, if government actors’ decisionmaking is influenced by the cost to government

\(^{112}\)2006 Ga. HB 1313 §5 (Inserting §22-2-13 to include actual reasonable moving expenses); H.B. 4048, 77th Leg., 2nd Sess. (W.V. 2006), 2006 W.V. HB 4048 §16-18-6a(d); H.E.A. 1010, 114th Gen. Assem., Reg. Sess. (Ind. 2006), 2006 Ind. HEA 1010 §17 §8, §11(d)(3) (For private to private transfers, although Indiana limits relocation costs to those payable in accordance with the Federal Uniform Relocation Assistance Act, 42 U.S.C. §§4601–4655 (2006), Ind. HEA 1010 §17 §6.).

\(^{113}\)As opposed to “soft,” sentimental, or emotional expenses, which are difficult to quantify objectively.

\(^{114}\)Not all compensation restraints for specific injuries limit increased compensation to harm that is easily proven. West Virginia specified that its relocation assistance would equal “the reasonable costs of obtaining a comparable property… having substantially the same characteristics of the property sought to be taken.” H.B. 4048, 77th Leg., 2nd Sess. (W.V. 2006), 2006 W.V. HB 4048 §16-18-6a(d). This formulation of moving expenses seems to imply additional compensation could be available for a property owner who is unable to find a ready-made substitute for their property available on the market. Indiana also allows for alternative compensation for replacement of lost property by allowing a condeming authority to trade an equal acreage of agricultural property to a landowner suffering a taking of their agricultural property, if the landowner agrees. H.E.A. 1010, 114th Gen. Assem., Reg. Sess. (Ind. 2006), 2006 Ind. HEA 1010 §17 §8(1)(A)(ii).


\(^{116}\)Ind. HEA 1010 §1 (Requiring compensation for the removal of any “lawfully erected sign.”). This sort of a constraint is appropriately characterized as compensatory because it does not prevent the interference with the property from occurring, but merely requires that it be accompanied by some compensation.
of those actions, then the costs associated with these compensation bonuses will be relatively easy to determine and enter into government’s pre-condemnation decisionmaking calculus. If government decisions are influenced by their costs, then efficiency too will be promoted by compensation of hard expenses.

2. Percentage Increases.

After *Kelo*, several states instituted percentage bonuses to increase compensation for certain types of takings. Some compensation restraints include bonuses based on the prior use of the land, specifically for owner-occupied residences, and for agricultural land. Compensation bonuses of these sorts may not be intended to address only one specific part of the uncompensated increment. Indiana’s bonuses for resident and agricultural land apply only for takings that involve private-to-private transfers, which could imply that the percentage bonuses were meant to address the destruction of an opportunity to capture surplus through transfer. However, Indiana’s tiered percentage bonuses award higher compensation for taken owner-occupied residences than for taken agricultural land, and no bonus or any other sort of land. On the whole, owners of residential property would seem no more likely to see a destruction of greater opportunity to capture surplus than would be owners of agricultural land. This suggests that the availability of a higher bonus for residential property is intended to compensate an

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117 S.J.R. E, 93rd Leg., Reg. Sess. (Mich. 2005), 2005 Bill Text MI S.J.R. 5 §2 (For private-to-private transfers, “…if property consisting of an individual’s principal residence is taken for public use, the amount of compensation made and determined for that taking shall not be less than 125% of that property’s fair market value…”); Ind. HEA 1010 §17 §8(2)(A). (“For a parcel of real property occupied by the owner of a residence… payment to the owner equal to one hundred fifty percent (150%) of the fair market value of the parcel…”).

118 Ind. HEA 1010§17 §8(1).

119 Ind. HEA 1010 §17 (“Procedures for Transferring Ownership or Control of Real Property Between Private Persons”).

120 See Epstein, supra note 52.

121 Compare Ind. HEA 1010 §17 §8(1)(i)(125% for agricultural land) with Ind. HEA 1010 §17 §8(2)(i)(150% for land occupied by the owner of a residence) and Ind. HEA 1010 §17 §8(3)(i) (100% for other property).
assumed higher subjective value in the property by the affected landowner. The availability in Indiana of compensation for any business losses, in addition to the bonus percentage, also suggests that Indiana’s percentage bonuses are meant to compensate softer sentimental interests in property.

Lastly, percentage bonuses were made available in Indiana to all property owners whose property is taken for economic development. As with percentage bonuses on the basis of prior use of land, compensation adjustments dependent on the future use of the land may not be meant to address only one specific part of the uncompensated increment. Bonuses tied to land taken for economic development may seek to compensate for a destroyed interest in ability to gain surplus through transfer and/or to remedy a presumed lack of implicit in-kind benefits. For instance, land taken to build a publicly accessible park may provide in-kind benefits of park usage to an affected landowner. While land taken to be retransferred to a private business owner to use as a warehouse for storage may not provide the same type of in-kind benefits. Private-to-Private transfers may in fact create in-kind benefits in the form of bolstering an economy, but those benefits are often diffuse and speculative with respect to the prior landowner.

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122 Destruction of a chance to capture surplus from transfer may still be a part of the rationale behind the percentage bonus scheme in Indiana, but the difference between the bonus for residential and agricultural property cannot be explained entirely by a surplus capture concern.
123 Ind. HEA 1010 §17 §8(1)(B), (2)(B); See also §17 §8(1)(C), §17 §8(1)(C) (Providing other “hard” relocation costs in addition to the percentage bonus, but cabining them within what is guaranteed through federal law by the Federal Uniform Relocation Assistance Act, 42 U.S.C. §§4601–4655 (2006); Ind. HEA 1010 §17 §6.).
124 See Elickson, supra note 51.
125 Ind. HEA 1010 §17 §11(d)(1).
126 Ind. HEA 1010 §17 §11(b).
Increased compensation for economic development condemnation may also be intended to prevent takings in the first place.\textsuperscript{128} Also, compensation bonuses might be seen as an imperfect remedy to the autonomy lost from a condemnation.\textsuperscript{129}

3. Accuracy Incentives.

Some post-Kelo legislation attempts to adjust compensation do not seek to provide more than fair market value; instead, they establish incentives to help guarantee that condemning authorities provide the compensation due under state law. These accuracy incentives award litigation expenses – sometimes including attorney, appraisal and other fees – to property owners objecting to the compensation offered by a condemning authority.\textsuperscript{130} Generally, these accuracy incentives only provide for litigation expenses if the property owner succeeds in convincing a court that the amount of compensation initially offered was insufficient, or the government suspends their condemnation action.\textsuperscript{131} The total amount of compensable litigation expenses may also be capped,\textsuperscript{132} even as a percentage of the determined fair market value of the property at issue.\textsuperscript{133}

\textsuperscript{128} See Id. (arguing that requirements for increased compensation limit incentives government may have to condemn and thus capture surplus from land assemblages), and Gillette, supra note 73 (arguing that increased compensation requirements would deter governments from taking property where the overall societal benefit was speculative).

\textsuperscript{129} See Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain, at 184 (suggesting that increased compensation could act “as a balm for the infringement upon autonomy brought about by any forced exchange”).

\textsuperscript{130} See e.g., S.B. 217, 143rd Gen. Assem., 75th Leg., (Del. 2005), 75 Del. Laws 216 §2 (Allowing a court, instead of an agency, to determine and award reasonable attorney, appraisal and engineering fees, actually incurred because of the proceeding, if the proceeding fails or is abandoned.); H.E.A. 1010, 114th Gen. Assem., Reg. Sess. (Ind. 2006), 2006 Ind. HEA 1010 §12(b) (Allowing a court to award reasonable attorney’s fees, in an amount not to exceed...$25,000; or...the fair market value of the defendant’s property...); Ind. HEA 1010 § 17 §10(b); H.B. 1313, 145th Gen. Assem., Reg. Sess. (Ga. 2006), 2006 Ga. HB 1313 §5.

\textsuperscript{131} Cf., Del S.B. 217 §2.

\textsuperscript{132} Cf., Ind. HEA 1010 §12(b).

\textsuperscript{133} Cf., Ind. HEA 1010§ 17 §10(b).
Like the compensation for hard out of pocket expenses, accuracy incentives are aimed at ensuring that affected property owners’ are awarded compensation more closely in line with the harms they actually suffer. The restraints are not aimed deterring socially undesirable takings by increasing their costs to government. Instead, their purpose is to ensure that government takes account of a more accurate amount of harm caused to subjected land owners.

B. Categorical Constraints

After *Kelo*, the states enacted a host of categorical constraints on takings. Some categorical restraints limited the purposes for which government could take property, and some limited the properties subject to condemnation. Several categorical constraints blur the lines or are a mix between purpose and subject restraints. Process restraints do not neatly fall under the descriptions of either subject or purpose restraints.

1. Purpose Restraints.

*Public Use.* One of the most pervasive restraints created by the states was a tightening of the definition of “public use.” 134 These public use requirements are worded differently, but each includes some demand that takings not occur unless with some public purpose behind them. Some statutes include specific listings of acceptable public

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uses,\textsuperscript{135} while others explain in broader terms what constitutes a public use.\textsuperscript{136} Michigan took the unusual step of including language in its proposed constitutional amendment to lock in the current interpretation of its constitutional public use clause.\textsuperscript{137}

These public use restraints are only more than window dressing if courts interpret them to contain more exacting standards than they do the Fifth Amendment’s public use requirement. Idaho provided an explicit grant to courts to review the stated rationale for a taking, stating that a taking’s purpose “shall be freely reviewable in the course of judicial proceedings.”\textsuperscript{138} This sort of categorical constraint provides a statutory “hook” for a court to take a more searching review of the justification for a taking.

\textit{Economic Development}. Many states instituted categorical limitations on takings for economic development, most of which apply only to condemnations for private-to-private transfers.\textsuperscript{139} These prohibitions were often buttressed by exceptions for certain

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{135} C.f., Ut. SB 117 §1.
\item \textsuperscript{136} Ind. HEA 1010 §1(a) (defining public use for transferring ownership of real property between private persons as … “possession, occupation, and enjoyment of a parcel of real property by the general public or a public agency,” or the leasing of an infrastructure project “by a public agency that retains ownership of the property by written lease with the right of forfeiture.”).
\item \textsuperscript{137} Mich. S.J.R. E, (“Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph” effectively ratifying and making permanent the interpretation of Michigan’s public use clause pronounced in County of Wayne v. Hathcock, 471 Mich. 445 (2004).).
\item \textsuperscript{138} 2006 Idaho Sess. Laws 96 §1(4).
\end{itemize}
\end{footnotesize}
takings projects, such as those involving highway funds, or involving private-to-private transfers for the development of public infrastructure and certain favored economic activities. These restrictions are targeted at preventing takings where there is a greater likelihood that some private interest has captured the takings process and attempted to derive private benefit through a transfer of property disguised as a taking for public use. Like the private gain restraints listed below, these restrictions are not necessarily aimed at preventing the creation of an uncompensated increment, but instead are meant to prevent government from acting for reasons other than the public interest.

Private Gain. Some states tied their categorical constraints directly to whether or not a taking would convey a private gain. Ohio chose to institute a moratorium on takings that resulted in private-to-private transfers for a period, while South Dakota created a permanent ban. Other states created standards that prohibited private-to-private transfers when the public use was a “pretext” to justify takings to convey some private benefit. The pretext language in these statutes is similar to the dicta in *Midkiff*,

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140 H.B. 508, 2006 Leg., Reg. Sess. (Ky. 2006), 2006 Ky. Acts 73 §1(4) (“state road funds or federal highway funds shall be exempted from the provisions of this statute”).
141 S.B. 7, 79th Leg., 2nd Called Sess. (Tex. 2005), 2005 Tex. Gen. Laws 1 §1(c)(1)-(4), (8) (Excepting transportation, port, waste disposal and other public infrastructure eminent domain projects from the statute’s prohibitions on takings that confer private benefit.).
143 S.B. 167, 126th Gen. Assem., Reg. Sess. (Oh. 2005), 2005 Ohio SB 167 §2 (Instituting a moratoria on eminent domain for property that is not blighted and will “ultimately result in the ownership of that property being vested in another private person.”).
144 H.B. 1080, 81st Leg., Reg. Sess. (S.D. 2006), 2006 S.D. HB 1080 §1 (No takings “for transfer to any private person, nongovernmental entity, or other public-private business entity”).
145 S.B. 7, 79th Leg., 2nd Called Sess. (Tex. 2005), 2005 Tex. Gen. Laws 1 §1(b)(2) (Eminent domain prohibited if the taking “is for a public use that is merely a pretext to confer a private benefit on a particular private party”); H.B. 508, 2006 Leg., Reg. Sess. (Ky. 2006), 2006 Ky. Acts 73 §1(3) (Excepts “sale or lease of property to private entities that occupy an incidental areas within a public project or building, provided
prohibiting takings for private concerns.\(^{146}\) By enshrining that sentiment in statute, legislatures allow state judges to strike down condemnations as pretext under state law, without testing the validity of *Midkiff*’s dicta under the Federal Constitution.

Some provisions categorically prohibit any takings where there is a private gain whatsoever,\(^{147}\) which is conceptually difficult to imagine regulating or litigating, if any collateral benefit to a private party were in fact prohibited by the statute.\(^{148}\) However, Texas’s prohibition against any private gain is narrowed by various exceptions,\(^{149}\) and New Mexico’s legislation was vetoed by its governor.\(^{150}\) These prohibitions of takings where any private gain may occur are problematic for a number of reasons. First, government is generally not thought to be opposed to the economic success of individual citizens. A taking that causes private gain does not at all mean that the public will see no benefit. A telling example is the role that privately-owned utilities play in local land use policy. Utility companies operate at a profit, but they are often granted limited powers of eminent domain to install utility poles and other forms of infrastructure. Interpreted literally, some of these very broad private gain statutes would prohibit taking property for that no property may be condemned primarily for the purpose of facilitating an incidental private use.”)); H.B. 555, 58th Leg., 2nd Reg. Sess. (Id. 2006), 2006 Idaho Sess. Laws 96 §1(2)(a) (“For any alleged public use which is merely a pretext for the transfer of the condemned property…”).

\(^{146}\) *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement.").

\(^{147}\) Tex. S.B. 7 §1(b)(1) (Takings are prohibited that confer “a private benefit on a particular private party through his use of the property”); H.B. 1080, 81st Leg., Reg. Sess. (S.D. 2006), 2006 S.D. HB 1080 §1 (No takings “for transfer to any private person, nongovernmental entity, or other public-private business entity”); H.B. 746, 47th Leg., 2nd Reg. Sess., (N.M. 2006), 2006 N.M. Laws 27 (Prohibiting takings for “private or commercial development” if taken property would be transferred to another private entity within five years following condemnation. Passed by House and Senate, and then vetoed by Governor on March 7th, 2006, see 2006 Bill Tracking NM H.B. 746).

\(^{148}\) *C.f.*, Condensation projects to build a park, which while open to the general public, could be expected to increase the property values of nearby privately owned homes. Such a taking could arguably be prohibited by such a blanket ban on private gain.

\(^{149}\) See supra note 146.

\(^{150}\) 2006 Bill Tracking NM H.B. 746.
such widely accepted public uses such as the provision of electricity, only because there was a collateral private benefit.

**Buy Back Provisions.** Two states passed legislation to allow property owners affected by a condemnation to repurchase their property if it was put to a nonpublic use. These restraints can be considered a form of categorical constraint, in that they allow an affected property owner to effectively annul a taking after it has occurred. Importantly, these restraints both allow for the repurchase to occur at the original transfer price, no matter how much improvement has been made to the parcel. These restraints certainly would protect property owners from governments taking property for a private pretextual public purpose only to retransfer them after a time to a private owner. These provisions do create a danger that after a condemned property is improved, its continued ownership by the community may become inefficient or otherwise undesirable, perhaps from unforeseen circumstances. Because the buyback provisions would allow the original owner to repurchase the property at its original price, the owner could capture any value added by publicly funded improvements. The buyback provisions might act as a sort of restraint on alienation, deterring efficient government sale, until the prior owner’s buyback rights expired. Despite possibly harsh consequences, these provisions nonetheless disincentivize condemnors from taking and improving property that cannot be reasonably expected to be put toward a public use for the duration of the buyback provisions.

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151 H.B. 1080, 81st Leg., Reg. Sess. (S.D. 2006), 2006 S.D. HB 1080 §2 (Preventing retransfer of any fee interest acquired by suit of threat of eminent domain without first offering to sell such fee interest back to the original owner, at the lesser of the original transfer price, or the current fair market value.); H.B. 1313, 145th Gen. Assem., Reg. Sess. (Ga. 2006), 2006 Ga. HB 1313 §4(c)(1) (If taken property is not put to public use within give years of the condemnation, former property owner may apply for reconveyance or quitclaim or for additional compensation.

2. Subject Restraints.

States created two major types of subject restraints after the *Kelo* decision. The first sort of subject restraints limited condemnations to blighted properties. The second mandated that subject properties be necessary to achieve some public goal.

**Blight Requirements.** Post-*Kelo* blight requirements may be merely a political reaction to the public backlash against *Kelo*, but that reaction nonetheless affected eminent domain law in numerous states. Like the post-*Kelo* categorical purpose restraints, blight requirements minimize the creation of uncompensated increments by preventing takings in the first place. However, blight requirements confine the takings power to properties or areas that presumably have less market value, and properties that exert negative externalities on their neighbors or communities.

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153 "Blight" was the key difference between *Kelo v. City of New London*, 125 S. Ct. 2655, 2660 (2005) and its predecessor *Berman v. Parker*, 348 U.S. 26, 29 (1954). In *Berman*, taking for economic development through private-to-private transfer was allowed under a statute where blight was found. In *Kelo*, there was no blight. *Kelo* at 2660 (2005) ("There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area."). Legislatures inserting blight requirements for private-to-private transfers could be described as only reinstating the state of the law after *Berman* for their particular state.

154 See A.B. 657, 97th Leg., Reg. Sess. (Wis. 2005), 2005 Wis. Laws 233 §1 32.03(6) (Prohibiting private-to-private transfers unless condemnor makes a written finding that property is blighted.); H.B. 4048, 77th Leg., 2nd Sess. (W.V. 2006), 2006 W.V. HB 4048 §54-1-2(a)(11) (Excepting urban renewal of blight or slums from prohibition against taking for economic development.); H.E.A. 1010, 114th Gen. Assem., Reg. Sess. (Ind. 2006), 2006 Ind. HEA 1010 §17 §1(1) (Prohibiting takings for private-to-private transfer unless at least one of the following is met: (A) The parcel contains a structure that... constitutions a public nuisance., (B) – (D), (G) (H); generally blight descriptions, (E) The parcel (i) is located in a substantially developed neighborhood, (ii) is vacated or unimproved; and (iii) because of neglect or lack of maintenance [has accumulated trash or garbage]...); S.B. 167, 126th Gen. Assem., Reg. Sess. (Oh. 2005), 2005 Ohio SB 167 §2 (Instituting a moratoria on eminent domain for property that will “ultimately result in the ownership of that property being vested in another private person,” unless that property is blighted.); H.B. 555, 58th Leg., 2nd Reg. Sess. (Id. 2006), 2006 Idaho Sess. Laws 96 §1(2)(b)(ii) (Providing an exception to a general prohibition against taking for economic development when a subject property is proven by clear and convincing evidence to suffer blight or create other negative externalities affecting the general health, safety and welfare.); S.J.R. E, 93rd Leg., Reg. Sess. (Mich. 2005), 2005 Bill Text MI S.J.R. 5 §2. (...[If the condemnation action involves a taking for the eradication of blight] the burden of proof is on the condemning authority to demonstrate... by clear and convincing evidence, that the taking of that property is for a public use...); H.B. 4048, 77th Leg., 2nd Sess. (W.V. 2006), 2006 W.V. HB 4048 §16-18-6(b) (Requiring an area to be taken for redevelopment be declared a slum or blighted).

155 Like in *Kelo, supra* note 1, some properties within a larger area slated for condemnation are not individually of poor value. *See also Mesdaq v. Superior Court*, No. D045874 (Cal. Ct. App., 4th App. D.
Blight requirements prevent the creation of uncompensated increments unless certain noxious uses of property occur. Blight exemptions to takings restraints allow condemnation where the economic uncompensated increment may be relatively small. For blighted properties, the chance of reaping surplus through transfer is slight. While the possibility of sentimental attachments to property is at least as high for blighted properties as compared to other property, the subjective economic (the ability for that property to be used to produce income), is generally low. But whether blight exceptions protect autonomy interests is more difficult to examine. Owners of blighted properties presumably have the same autonomy interests in deciding how to use their property as do owners of non-blighted property. The proliferation of blight exemptions to taking restrictions suggests that policymakers do not assign the same value in the decision to own and maintain blighted property as they would other decisions on the use of property. While the owners of blighted property may have an autonomy interest in deciding how they use their property, blight requirements not protect owners’ interests in deciding for themselves, when their decisions have a negative impact on the properties surrounding theirs.

*Necessity Requirements.* Certain states newly require taken property be necessary for some public policy. By limiting eminent domain to situations where the taking is necessary to effectuate a government’s policy agenda, necessity requirements aim to minimize the possibility that a taking that results in a large uncompensated increment

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2005) (where a profitable and popular cigar shop was condemned because it was located in a larger area project area considered “blighted”).

156 *C.f.*, Ind. H.E.A. 1010 §17 §1(1)(A) (Permitting private-to-private transfers where “The parcel contains a structure that... constitutions a public nuisance...”).

157 H.B. 4048, 77th Leg., 2nd Sess. (W.V. 2006), 2006 W.V. HB 4048 §16-18-6a (Requiring condemnors demonstrate necessity to take property not blighted, but surrounded by blight in an area to be cleared.); W.V. HB 4048 §16-18-8 (Requiring condemnors to adopt a resolution declaring the necessity of a taking); H.B. 1313, 145th Gen. Assem., Reg. Sess. (Ga. 2006), 2006 Ga. HB 1313 §10
provides only a marginal public benefit. Necessity requirements may also be viewed as a bulwark against otherwise valid takings that might be unnecessarily burdensome to an individual property owner, when other solutions, or the taking of other subject property might still achieve the same valid public ends. Not all statutory necessity requirements provide exacting standards for compliance by condemnors, or review by the courts.\textsuperscript{158} However, courts may develop processes to review whether necessity requirements are heeded, as they have in the past.\textsuperscript{159} Some statutes might be interpreted as legislatures affirmatively enlisting the aid of courts to weigh in and void takings of questionable need when challenged through litigation.

**Categorical Prohibitions for Insufficient Compensation.**

Indiana now prohibits takings for economic development for which the offered cash transfer is not adequate to compensate the entirety of the owner’s losses.\textsuperscript{160} This special relief is available only for landowners who demonstrate by clear and convincing evidence\textsuperscript{161} that their particular use of property would not be adequately compensated, despite the increased compensation bonuses available under Indiana’s new takings legislation.\textsuperscript{162} Essentially, Indiana provides a safety valve for situations where the statutory compensation bonus regime meant to bridge the gap left in the uncompensated increment demonstrably fails when applied to a certain situation.

\textsuperscript{158}W.V. HB 4048 §16-18-8(b) (Making a condemnor’s resolution of necessity “conclusive evidence that the acquisition of such real property is necessary for the purposes described therein.”).

\textsuperscript{159} See, County of Wayne v. Hathcock, 471 Mich.at 468-78 (2004) (Finding a necessity requirement under Michigan’s public use clause, allowing private-to-private transfers only when for “public necessity of the extreme sort otherwise impracticable...”).

\textsuperscript{160} Ind. H.E.A. 1010, §17 §11(e). (§11(e)(1) categorically prevents takings for economic development when “the location of the parcel is essential to the viability of the owner’s commercial activity” and §11(e)(2) categorically limits the more amorphous economic development taking where “the payment of damages and relocation costs cannot adequately compensate the owner of the parcel.”)

\textsuperscript{161} Id.

\textsuperscript{162} See Ind. H.E.A 1010 §17 §8, §11.
3. Process Restraints

The *Kelo* court limited its decision by explaining that “[a private-to-private] transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.” Professor Gillette explains that “Hanging over [Justice Stevens’] words is the unspoken parenthetical: ‘And when it is presented, I will vote against it.’” Certain procedural baselines, like the existence of an integrated plan, may therefore be constitutionally required before government may take for private-to-private transfers. After *Kelo*, states have taken the invitation to require condemnations conform to updated procedures.

Some states now require that certain condemnations conform to their general land use plans. The necessity requirements of the above section might also be considered a process requirement, whereby condemning authorities must create some reviewable record explaining why they understood some condemnation to be required. Some post-*Kelo* takings legislation also include changes to the condemnation procedures, requiring negotiation, or additional public notice and hearings. Process constraints

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163 *Kelo*, *supra* note 1 at 487.
164 Gillette, *supra* note 73 at 20.
166 C.f., W.V. HB 4048 §16-18-8(b) (Making a condemnor’s resolution of necessity “conclusive evidence that the acquisition of such real property is necessary for the purposes described therein.”).
are appropriately categorical (if the processes are not followed, the taking is prohibited from occurring). Process restraints do not neatly fall under subject or purpose restraints. For example, requiring condemnations to conform to a comprehensive plan constrains the both the properties subjected to the takings power, and limits their use to some broader outline of community planning. Neither negotiation nor notice requirements seem to fit into the rubric of subject or purpose restraints.

Process restraints can serve several functions. On one level, they might be considered protection of autonomy by allowing property owners to voice their concerns into the decisionmaking process, be it through a public hearing or through a mandatory negotiation. Even if owners are not allowed to make their own decisions for themselves, they may still desire an opportunity to participate on some level in the decisionmaking process. On another, process restraints are a means to prevent government from action unless it hears the fullest array of available and pertinent information, to promote efficient and/ or fair decisionmaking. Process restraints in the form of comprehensive planning condemnation projects also ensure that individual properties are not carved out for condemnation ad hoc, but instead allow multiple subject property owners to band together in political opposition against an eminent domain project.  

Finally, process restraints may serve to create a layer of record, by which reviewing courts can determine whether a taking was done for an undesirable purpose, or without sufficient regard for undesirable effects. Some scholars fear that the eminent

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169 Gillette, supra note 73 at 18, arguing that “the presence of a plan implies that multiple current landowners are at risk…. [and] those directly affected, those whose personal landholdings are at risk, have sufficient incentive to become involved that even moderate numbers of them can swamp the political process by which a final determination is made.”
domain may be captured by rent-seeking private interests making ad hoc takings.\(^{170}\)

Others worry that statutory requirements of pre-condemnation determinations are not
given adequate attention by condemning authorities.\(^{171}\) Creation of records allows courts
to fashion doctrine to restrict takings where sufficient tell-tale signs indicate that
decisions to condemn “were motivated by concern for the public interest or the economic
concerns of special interests.”\(^{172}\)

**Part III. A Proposal for Appropriate Restraint of Takings**

This section proposes that the first two components of Fennell’s uncompensated
increment, those that involve economic concerns, ought to be addressed by compensation
restraints, and not categorical restraints. Only those concerns with takings not remediable
with increased compensation (autonomy interests) should justify categorical restraints on
the takings power.\(^{173}\) The reasons why autonomy interests cannot be adequately
addressed through compensation are explained in greater detail below. The purpose of


determine whether properties are “blighted” and therefore subject to condemnation, essentially “tell cities
whatever they want to hear”.)

restraints similar to those regulating “spot zoning,” to “prevent local city councils and planners from
abusing the zoning amendments process for public-choice reasons”. *Id.* at 880. Professor Gillette, *supra*
note 73 at 18, suggests a similar relationship to doctrines that limit “spot zoning.” Gillette argues that the
*Kelo* decision may open the door to mandating similar procedural restraints as a constitutional requirement
when governments engage in private-to-private transfers for economic development.

\(^{173}\) This section does not suggest that every portion of the uncompensated increment must be addressed by
some restraint on the takings power. Public necessity may very well require that some subjective values
remain uncompensated, and expediency may not allow for every person’s autonomy interest to be given
complete protection under the law. But for those interests society does chose to protect or advance, this
article argues that certain methods are more appropriate than others.
this proposal is to maintain the ability to take for socially productive purposes, while
minimizing the injury suffered by the individuals whose property is taken.

This section will not essay a normative view of which takings should or should not occur. Nor will it argue for which interests in property deserve protection in any takings regime. Instead, this section will narrowly propose that those interests in property that society chooses to protect should be protected by specific methods. This proposal ought to be applicable to many other normative and philosophical approaches to takings.

The constraint of takings should not be limited to interpretations of “just compensation” and “public use.” Both of these constraints have their roles to play, but neither may be sufficient to create a takings regime that adequately satisfies concerns over the use of this unique government power. With so many available options to constrain the takings power, scholarship and legislative experimentation, and perhaps even judicial innovation should examine creative ways to strike a balance between the competing concerns of the takings dilemma.

Either of the two economic sections of the uncompensated increment might be difficult to objectively measure, but each can be mitigated, if not completely remedied through some kind of increased compensation. With so many varied options available to constrain takings through compensation, deference to the old fair market value standard, for every situation, seems oversimplified and effectively unjust. Decisionmakers, particularly legislatures, ought to provide additional compensation to decrease the uncompensated increment where possible, both in fairness to remedy the harms created, and to promote efficient takings decisions.
Categorical constraints too can mitigate the chance for large uncompensated increments, but they are strong medicine. Categorical constraints prohibit takings in their entirety, regardless of how little uncompensated interests might remain in the individual instance. Categorical constraints may have their place in takings regimes, but with limitations. Where compensation restraints are not adequate to advance substantive takings goals, only then will categorical constraints not paint with too broad a brush.

This theory can be made consistent with myriad normative takings agendas. Efficiency theories\textsuperscript{174} can achieve their ends by utilizing the vast menu of available compensation constraints to tailor compensation more closely to the costs a taking may create.\textsuperscript{175} Libertarian takings theories, aimed at protecting the individual’s ability to live with minimal government interference\textsuperscript{176} can protect autonomy interests by constraining takings categorically.\textsuperscript{177} While most takings theories represent mixtures of economic, efficiency, fairness and autonomy concerns, each concern can be advanced distinctly by a mixture of compensation and categorical constraints tailored to satisfy specific goals.

A. Compensating Economic Concerns

Compensatory restraints should be used to mitigate the losses described as the first two parts of the uncompensated increment, the subjective premium and the lost opportunity to capture surplus from transfer. Increasing compensation to address

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\textsuperscript{174} See Frank I. Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967) for an example and explanation of one efficiency theory; See also Krier & Serkin supra.

\textsuperscript{175} For example, compensation for the loss of good will can address the “demoralization costs” suffered by business owners under a Michelman analysis. See Michelman, supra. Compensating property owners for the loss of their ability to capture surplus through transfer may prevent government from experiencing distorted incentives and achieve the same incentives for efficient government takings under gain-based compensation. See Krier & Serkin, supra.

\textsuperscript{176} See Epstein, Takings, supra.

\textsuperscript{177} If a taking does not occur because it is categorically prohibited, no autonomy interest of landowners are violated.
}
economic concerns is consistent both with the dual objectives for compensation of efficiency and fairness. As discussed earlier, fairness may easily be served by decreasing the amount of injury suffered on the part of the individual for the good of the larger society.\footnote{178 See \textit{surpa} Part II (discussing compensatory restraints).}

As previously explained, increasing compensation to diminish the economic portion of the uncompensated increment aims to promote efficiency by forcing government to internalize more of the costs associated with a taking.\footnote{179 See \textit{supra} Part II, (discussing efficiency). Efficiency in terms of takings generally means that the net wealth of the transaction is more than the costs inflicted (which are themselves limited mostly to the uncompensated increment suffered by the property owner).} This idea is subject to two major criticisms, neither of which justify limiting compensation of subjective value in all circumstances. First, systems to measure subjective values of property are likely to involve inaccuracies\footnote{180 See \textit{United States v. 564.54 Acres of Land}, 441 U.S. 506, 511 (1979) (“Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule…”).}, which can create perverse incentives, over investment in property, and owners eager for condemnation.\footnote{181 See \textit{Lee Anne Fennell}, \textit{Symposium: The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock: Taking Eminent Domain Apart}, 2004 Mich. St. L. Rev. 957, 993-94.} But these epistemic concerns do not apply to every situation where a taking might occur, nor to every element of the uncompensated increment. These “hard” costs may not address every portion of
the economic portion of the uncompensated increment, especially hard-to-determine subjective sentimental valuation. But compensation of “hard” costs brings compensation closer to full compensation, without unintended side effects. Compensation for loss of goodwill, as measured by market forecasts and several years of past income do not implicate concerns about overinvestment, and would seem prime candidates for inclusion in some more fulsome compensation regime. Perverse incentives can only be a legitimate concern in a certain subset of takings actions. Few argue that residential property owners who have lived in their property for decades will over-invest in the value of their homes with the hopes of capturing some windfall from a taking. Over-investment concerns therefore cannot justify refusal to compensate any and all forms of idiosyncratic value.

Secondly, some argue that increases in compensation requirements may not deter all inefficient condemnations if the individual decision-makers who choose to condemn property do not feel the costs associated with that condemnation. The fiscal illusion theory of compensation “presupposes that the government will perform a correct cost-

182 See e.g., Redevelopment Agency of San Diego v. Attisha, 128 Cal. App. 4th 357, 374 (Cal. Ct. App. 2005) (Describing two forms of valuation for loss of goodwill that involve past statements of income, the first being a “‘cash flow multiplier’ approach, [where] adjusted annual profit is multiplied by the number of years within which a purchaser would expect to recoup the purchase price … [and] goodwill may be measured by the capitalized value of the net income or profits of a business or by some similar method of calculating the present value of anticipated profits.” Citing People ex rel. Dep’t of Transportation v. Muller, 36 Cal. 3d 263 (Cal. 1984)).

183 Moving expenses, validated by actual receipts might be another example.

184 Thomas W. Merrill, Review Essay: Rent Seeking and the Compensation Principle, 80 Nw. U.L. Rev. 1561. Government susceptibility to fiscal illusion exists beyond the amount of compensation it chooses to offer, but also with regard to the social benefits created through the exercise of eminent domain. Merrill, supra (citing Kaplow, An Economic Analysis of Legal Transitions, 99 Harv. L. Rev. 509 (1986). Examples include surpluses created from joining properties in a condemnation project like the one at issue in Kelo. See supra note 1. While government might well expect to enjoy some benefits through developing its own tax base, benefits would be shared with the property’s eventual owners, the workers given new jobs, and the general positive benefits of economic development for the residents of New London. The problem with this externalization of benefits is that compensation requirements force the government to externalize both costs and benefits. Merrill surpa at 1584. Externalization of positive externalities deters government effectively weighing for itself the overall efficiency of its actions.
benefit calculation if all costs of government activity are internalized,” which may not be a fully realistic assumption. Condemnation authorities operate under finite budgets, and, while there may not be a linear correlation between accurate compensation requirements and efficiency of government action, some relationship must exist. While compensation restraints may not be perfect mechanisms for ensuring efficiency, they must have some positive effect, if formulated accurately. Making compensation more accurately reflect the measure of harm may serve the aims of efficiency as a matter of degrees, even if it does not necessarily ensure absolute efficiency in all circumstances. In short, the limitations of compensation to achieve efficiency should not be used to justify abandoning more accurate compensation restraints altogether, for circumstances where more accurate compensation is easily determined.

For the “soft” economic portions of the uncompensated increment like sentimental values, legislatures can choose to establish bonuses to compensate owners based on valued objective criteria. These sentimental values are difficult to determine, and the sentimental interests in property are so diverse and divergent that no unifying

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185 Merill, Id.
186 “Cost-benefit analysis by government may not occur if the state” is comprised of “[agents that] seek to enrich themselves at the expense of society,” or if “the government is subject to capture by rent-seeking factions.” Id. However, Professor Serkin argues that at least for smaller governments, where “government is controlled by [voting homeowners] the same people who foot the bill [homeowners who pay property tax, which makes up the bulk of local governmental budgets], then compensation will, in fact, force the relevant decisionmakers to internalize the costs of their actions.” Christopher Serkin, Big Differences for Small Governments: Local Governments and the Takings Clause, 81 N.Y.U.L. Rev. 1624 (November, 2006).
187 Clayton P. Gillette, Idea & Essay: Kelo and the Local Political Process, Hofstra L. Rev. 13, (“officials can only spend the same tax dollar once, and if we require them to spend more on eminent domain, they may have to forgo some alternative pet project… [thereby inducing] a more meaningful comparison of the costs and benefits of a proposed economic development.”).
188 See Michaelman, supra note 44; Richard A. Posner, Economic Analysis of Law, 54–57 (6th ed. 2003); See also Thomas W. Merrill, Review Essay: Rent Seeking and the Compensation Principle, 80 Nw. U.L. Rev. 1561, 1583. (“[I]f the government is not required to compensate for losses inflicted by its actions, then it will tend to overregulate. This is because the costs of government regulations are externalized to those who are regulated, rather than internalized in the government's budget.”); Hanoch Dagan, Takings and Distributive Justice, 85 Va. L. Rev. 741, 752 (1999 ) (“compensation is tantamount to a built-in mechanism that verifies the efficiency of public decisions that affect private property.”).
principal of law should claim to explain which of these softer interests deserve monetary compensation. Instead, the traditional line-drawing functions and public choice forums of legislatures and the democratic process should determine if and how sentimental interests in property should be compensated above market value.

B. Preventing the Destruction of Uncompensable Autonomy Interests

Broad categorical constraints should be used to prevent the loss of autonomy and not otherwise. Autonomy interests are not purely economic, and are not completely remediable by increased compensation, which leaves only a prohibition on the taking itself to prevent the loss of autonomy.

Categorical takings surely could be conceived as a bulwark against takings that leave uncompensated economic increments. Public use requirements are often characterized as mechanisms to limit the occurrence of takings that provide insufficient in-kind benefits to make fair market value compensation truly just. But such use of a broad categorical constraint is an imprecise tool, given how many more tailored restraints are available to limit takings. If the objection to a taking is not that “no compensation would be sufficient,” but that instead that the offered compensation “is not enough,” then the compensation required should be increased so that the objection drops out. If an objection to a taking is that “no amount of compensation would be sufficient,” at that point a categorical constraint against that sort of taking ought to be considered. Certainly

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189 Lee Anne Fennell, Symposium: The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock: Taking Eminent Domain Apart, 2004 Mich. St. L. Rev. 957, 994 (“The second problem with simply increasing monetary payments to owners of condemned land is that it does not adequately address the confiscation of autonomy.”). However, Professor Epstein argues that compensation could act “as a balm for the infringement upon autonomy brought about by any forced exchange,” even if it cannot completely wash away the loss of autonomy. Epstien, supra note 117.

there may be some circumstances where even the broad array of available compensation constraints cannot be adequately formulated to sufficiently mitigate the economic and compensable portion of the uncompensated increment in a given condemnation. But if compensation restraints are supple and well-constructed, such instances could be rare. Only in these special circumstances, where compensatory constraints fail, should categorical constraints be imposed to forestall economic harms.191

The autonomy component of the uncompensated increment may arise from “a landowner’s vision of what it means to own property.”192 Fennell suggests that the unique vision of property is violated when a right to exclude among other “property rule” protections is replaced with a lesser liability rule protection193 But autonomy is not only a right to exclude, or a right to sell at a price and time of one’s choosing, although it must include both of those rights. Autonomy includes all decisions about oneself, for oneself. And the autonomy interest neglected by fair market compensation subsumes all of these interests in personal agency. Moreover, not only does the reigning standard of just compensation not address agency concerns, but monetary compensation for destroyed autonomy of any sort is insufficient to make someone whole.194

Fennell suggests that the public use clause can be interpreted as a constraint on takings that promotes autonomy by “screen[ing] out takings for which monetary

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191 Indiana’s Ind. H.E.A. 1010, §17 §11(e) provides an example of how categorical constraints might be used appropriately as a last resort against insufficient compensatory restraints.
194 See Margaret Jane Radin, Market-Inalienability, 100 Harv. L. Rev. 1849, 1907 (1987). (“If the discourse of fungibility is partially made one’s own, it creates disorientation of the self that experiences the distortion of its own personhood.”)
compensation is not ‘just.’”¹⁹⁵ For Fennell, public use allows for takings only when “the confiscation of the uncompensated increment produces reciprocal society benefits of the sort that generally justify uncompensated regulatory actions.”¹⁹⁶ Put another way, autonomy is not actually implicated in such a taking, because the taking is the “sort that citizens could reasonable be expected to accede to as part of a social bargain with each other.”¹⁹⁷

This theory of public use leaves a few holes left to be filled. First, it implies that public use is the only constraint available or appropriate to prevent uncompensated autonomy. Second, Fennell’s formulation of public use does not distinguish between the autonomy concerns of the various sorts of property owners. This is problematic when one considers that different owners with different property have different autonomy concerns. An owner-occupied resident has different autonomy at stake for use of their particular property than does the corporate operator of a fungible chain store. While the owner-occupied resident owns property as a part of their autonomy to live how and where they choose. These interests in autonomy are different and may deserve different degrees of protection from government interference. Other forms of categorical constraints may be appropriate to maximize autonomy, outside of the requirement that property taken be put to some public use.¹⁹⁸ A subject restraint over which properties are selected for eminent

¹⁹⁶ Id.
¹⁹⁷ Id at 1003; See also, Justice Frankfurter’s referral to the “burden of common citizenship.” Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949).
¹⁹⁸ Other formulations of “public use” as a subject restraint may more effectively distinguish between the different sorts of possible autonomy interests in property. Michigan’s’ requirement in County of Wayne v. Hathcock, 471 Mich.at 468-78, that the selection of “condemned land… is itself based on public concern” might be interpreted to require a condemning authority to weigh disparate autonomy interests when deciding what lands to condemn.
domain projects could be structured to prefer the preservation of a resident’s autonomy interests, over the autonomy interests of a business owner.

V. Conclusion.

The uncompensated increment is a concern for property owners, academics, judges and legislators. And there exist numerous methods available to structure the exercise of the takings power to minimize the size and frequency of the uncompensated increment. With so many options to address so many different disparate circumstances, no one broad approach need be applicable to every taking. Statutes and even judicially crafted rules of decision can reign in the uncompensated increment in certain situations, without jeopardizing government’s ability to take for valid and socially productive purposes.

In the first instance, legislatures should do their best to decide which substantive values they want to protect from the takings power, and craft takings restraints that promote those values. It may be desirable for legislatures, by statute, to enlist the aide of judges by granting strong review powers over the decisions condemning authorities, to review blight determinations, necessity requirements, compliance with process constraints, and the like. And judges may decide, on their own accord, that constitutional protections of property require certain restraints on the takings power. But for any decisionmaker that restricts the takings power going forward, either by statute or judicial doctrine, care should be taken to tailor restrictions to promote particular values, without unintentionally forbidding different future takings with less objectionable consequences.