Fall September, 2011

What has Love Got to Do with It?: Sentimental Attachments and Legal Decision-Making

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Available at: https://works.bepress.com/david_markell/1/
What has Love Got to Do with It?:
Sentimental Attachments and Legal Decision-Making

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Abstract

Our underlying premise in this article is that a government is likely to bolster its legitimacy when it uses legal decision-making procedures in which the public has confidence. Our findings, which are based on a survey about options for resolving disputes in the land use arena, identify an important anomaly in public preferences. While people generally preferred to resolve disputes through judicial adjudication, they did not prefer to have the courts make decisions involving sentimental value. These findings suggest that it is not possible to paint a simple picture of public procedural preferences because those preferences shift depending upon the nature of the issues at stake.

Our results also offer insights as to why people held different preferences. We found that when monetary values predominated, people were most sensitive to their perceptions of the neutrality of a process and accepted decisions made by an arbiter they perceived to be neutral. When sentimental values were important, people were attuned to their trust in the motives and character of the decision maker. Trust in turn was influenced by the opportunities a process provided for voice and the quality of treatment it provided (the respect it signaled for participants and their rights), as well as by the neutrality of the decision making process. These features of voice and quality of treatment carried much less weight when monetary values predominated. These findings hold promise for procedural reforms that would increase satisfaction with litigation and other procedures when sentimental values are important, for example when the government is trying to take someone’s home for public purposes.

Building upon our findings, we offer a framework for structuring efforts to incorporate public views into the design of legal procedures in order to deal with issues of sentimental value. We also consider how our findings might be used in the field of eminent domain law, where dissatisfaction often runs high and sentimental values frequently are important. Here litigation, a generally acceptable procedure, is being used in a situation in which it needs to take account of sentimental values, something that people feel courts are ill-equipped to do.

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Previous efforts to deal with sentimental value have focused upon trying to increase compensation to acceptable levels, for example via contingent valuation, or upon narrowing the allowable use of procedures such as eminent domain. We propose a new framework based upon designing procedures that produce publically acceptable decisions when sentimental values are at issue. We argue that this approach is a promising one in an arena in which prior approaches have met with at best limited success.
Introduction

There is a burgeoning literature about the “behavioral era” in law – i.e., an era that seeks to conform the law to emerging understandings of what makes people tick. The basic concept rests on two key assumptions. First, individuals are not always rational economic actors. This is, by now, well established as a matter of fact. And, second, as a normative matter, it therefore is appropriate, and important, to structure legal regimes (the law and the institutions that make and administer it) so that they are responsive to this emerging understanding of “behavioral realities.” Better alignment of our legal system and peoples’ desires will build confidence in government and enhance legitimacy.

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2 Id. at 730 (noting that “[a]lthough there are multiple interpretations of [rational choice theory] RCT, a common assumption is that individuals are rational economic actors whose decisions are driven by the desire to maximize utility given resource constraints.” The authors continue: “Ultimately, decisions are made on the basis of a deliberate analysis of the expected payoffs of a set of options, considering both their desirability and their probability of occurring.”) See also Andrew M. Colman, Cooperation, Psychological Game Theory, and Limitations of Rationality in Social Interaction, 26 BEHAV. & BRAIN SCI. 139, 139-43 (2003).
3 See infra Part IV (discussing research in the eminent domain arena).
4 See Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 CALIF. L. REV. 1051 (2000) (arguing that law and economics can reinvigorate itself by replacing the rationality assumption with a more nuanced understanding of human behavior that draws on cognitive psychology, sociology, and other behavioral sciences, thus creating a new scholarly paradigm called “law and behavioral science.”). As Judge Posner and others have recognized, there has been considerable work to bring insights from the psychology and sociology literatures, and empirical findings, to increase understanding of legal regimes. Richard A. Posner, The Decline of Law as an Autonomous Discipline: 1962-1987, 100 Harv. L. Rev. 761, 769 (1987).
5 Emanuela Carbonara, Francesco Parisi, & Georg von Wangenheim, Legal Innovation and the Compliance Paradox, 9 MINN. J.L. SCI. & TECH. 837, 841-42 (2008) (“It is generally recognized that the alignment of legal precepts and decisions of authorities with current social norms and values has a positive influence on
There has been substantial work to improve the understanding of human behavior relevant to design of legal procedures. Significant advances have been made and we know much more about peoples’ interests, behaviors, and biases now than in the past.6 Similarly, we are beginning to “operationalize” this emerging understanding of human behavior in terms of how it might relate to the law and governance mechanisms. For example, the Office of Management and Budget (OMB) is making efforts to foster integration of such insights into the operation of the administrative state, including the operation of our agencies. In its 2009 Report to Congress, the OMB Office of Information and Regulatory Analysis (OIRA) highlights as one of three “potential reforms that might improve regulatory policy and analysis” consideration of “behaviorally informed approaches” to regulation.7 OIRA suggests that “[w]ith an accurate understanding of human behavior, agencies would be in a position to suggest innovative, effective, and low-cost methods of achieving regulatory goals.”8 OIRA identifies the endowment effect, which it characterizes as “loss aversion,” in the sense that people “dislike losses far more than they like corresponding gains,” as an example of an insight from the social science literature that the regulatory state should incorporate into its policy making.9

Our underlying premise is that improving understanding of human motivations, not only in the abstract but also in the context of existing governance mechanisms, is an indispensable building block for operationalizing a behavioral era. In other words, foundational work in understanding human perspectives and in assessing the effectiveness of existing institutions in responding to human concerns is critical to improving our regulatory state and the institutions that comprise it. We have contributed to this literature in previous work,10 in which we have argued for the use of public evaluations as one basis for deciding how (and whether) to regulate decisions with public consequences and explored the effectiveness of different processes based on public preferences.

Our purpose in the study that we present in this article is to build on this previous work by adding important insights about both peoples’ preferences and the responsiveness of different institutions to those preferences. As indicated above, there is a rich literature that strongly suggests that people attach sentimental as well as monetary value to some items and do not look at issues solely from a rational economic

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6 Vandenberghe, supra note 1.
8 Id. at 35-36.
9 Id. at 36-37.
perspective. Our article, which discusses several important findings from a survey we conducted of peoples’ preferences for different decision-making processes for resolving land use disputes in Florida, builds on this foundation in at least five important ways. First, our findings show that people bring a range of values to their evaluation of decision-making processes. That is, our findings show that people bring sentimental as well as monetary values to their consideration of the adequacy of different procedures, and that the amount of weight people attach to monetary and sentimental values affects their views about how well different procedures protect their interests. This finding lends support to those who believe that we should structure legal regimes in light of the reality that people are not always rational economic actors.

Next, we generated several findings about the acceptability of judicial litigation, the process on which we primarily focus in this article. First, our survey respondents viewed judicial litigation as the most preferred process overall, and also as best for protecting economic interests. In contrast, our respondents did not give judicial litigation high marks for protecting sentimental values. Other procedures we studied, including referenda, did much better when sentimental values were important. Thus, our findings provide insights concerning the comparative advantages of different types of decision-making processes, including judicial litigation, in different contexts.

Another series of important findings offers some insights as to why our respondents preferred judicial litigation, notably that the respondents viewed judicial litigation as a neutral process. Related to this, our findings reflect that when monetary interests are important, stakeholders accept decisions made by an arbiter they perceive to be neutral. That is, they define fairness in terms of neutrality. Other features of decision-making, such as voice and quality of treatment, carried much less weight.

A fourth set of key findings sheds light on what it would take for our respondents to believe that judicial litigation would adequately protect sentimental values. Our respondents believed that procedural justice is particularly important when sentimental values are important. Further, we found that a particular feature of procedural justice discussed in the procedural justice literature, notably trust in the decision-maker (the judge in judicial litigation), is key to protection of sentimental values. In order to create
an atmosphere of trust, it was particularly important that judges provide opportunities for voice, make it clear that their decisions had been made neutrally, and show respect for people and their rights. These findings about the process features that are important when sentimental values predominate hold promise for improving satisfaction with judicial litigation by pointing the way for process designers to incorporate and highlight such features when sentimental values are salient.

A final, fifth, finding that is of particular interest for at least two reasons is that preferences for processes depend in part on exogenous factors. Our findings show that one exogenous factor, notably the background level of trust in local government, influences peoples’ preferences for different processes. Those with a high degree of trust proved relatively comfortable with government processes in which government officials have the final say (including judicial litigation), while respondents with low levels of trust preferred processes that left power in the hands of the people (e.g., through referenda). Low trust respondents apparently had more confidence in their fellow citizens than in their representatives, bureaucrats, or judges. This intriguing finding highlights the importance of trust in the litigation setting for issues that have sentimental value. The key issue to people is trust in judges, who are after all government officials.

Further, it suggests the importance of periodic appraisals of process design because polling data reflect dramatic changes (declines) in confidence in government in recent years. Pollster Stanley Greenberg recently found that trust in government is declining substantially, noting that “[j]ust a quarter of the country is optimistic about our system of government – the lowest since polls by ABC and others began asking this question in 1974.” Mr. Greenberg’s polling results are by no means anomalous. A 2010 Pew survey found that “only 22 percent of all Americans . . . say they trust the government in Washington almost always or most of the time, among the lowest measures in half a century.” Pew reports that when the National Election Study “first asked this question in 1958, 73% of Americans said they trusted the government to do what is right just about always or most of the time.” An October 2010 ABC News/Yahoo News poll found that only 33 percent are optimistic about “our system of government and how well it works,” the lowest number in “nearly a dozen measurements [taken] across the decades.” Thus, our finding about the salience of trust in government to process preferences suggests the need not only to pay attention to the predominant values of key stakeholders in designing processes, but also to be mindful of evolving

20 See infra Part III.
21 See infra Part III.
22 See infra Part III.
23 See infra Part III.
26 Id.
community mores. Preferences for different processes may be dynamic – they may shift over time as exogenous factors shift.

The poor performance of judicial litigation in protecting sentimental values, the salience of trust when sentimental values predominate, and declining levels of such trust seemingly creates a multi-barreled challenge to the legitimacy of the court system when it faces decisions that implicate such values.

These findings highlight the potential value and promise of taking action to bolster confidence in litigation when sentimental values are likely of high importance.

The eminent domain arena, in which a government entity may require a party to sell its property, provides an intriguing context to consider our findings. Two key features of this legal domain that are oft-highlighted in the literature are that: 1) sentimental values frequently are of significant importance; and 2) there is considerable dissatisfaction with extant procedures used to resolve disputes. Professors Nadler and Diamond capture nicely the disconnect between peoples’ values and extant judicial processes, observing that “[a]lthough the law of eminent domain does not recognize distinctions among property owners beyond those reflected in the fair market value of the property, public sensibilities include more.”

While scholars and others seeking to ameliorate dissatisfaction typically urge changes to the normative rules by having the

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28 Stanley B. Greenberg, supra note 24 (concluding that “distrust of government . . . is unfolding as a full – blown crisis of legitimacy. . . .”) Greenberg suggests that this declining sense of trust in government is shifting the political landscape in favor of Republican governance and that “many voters . . . are turning away from Democrats, Socialists, liberals and progressives.” Id. We do not take a position on Mr. Greenberg’s claim but include his suggestion simply to highlight the significant stakes associated with trust in government.

29 We are not suggesting that courts uniquely require a hard look in this regard. Indeed, courts fare better than other institutions according to some surveys. For example, we have previously discussed the relatively dismal performance of local government public hearings, the most frequently used form of dispute resolution for some disputes. Tom Tyler & David Markell, The Public Regulation of Land Use Decisions: Criteria for Evaluating Alternative Procedures, 7 J. EMPIRICAL LEGAL STUD. 538 (2010). Nevertheless, our findings point to a gap between citizen expectations and court performance in at least some contexts, notably when sentimental value is particularly salient and we believe this finding deserves attention. Cf., James L. Gibson, Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns, 102 AM. POL. SCI. REV. 59 (2008) (concluding that campaign contributions and election attack ads lead to a reduction in the perceived legitimacy of state courts with elected judges).

30 See infra Part IV.

31 Janice Nadler & Shari Seidman Diamond, Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity, 5 J. OF EMPIRICAL LEGAL STUD. 742 (2008). It oversimplifies to refer to the “law of eminent domain” as a single body of law that consists of judicial litigation or as a single set of procedures. The variability in approaches that governments use to acquire property highlights the importance of paying attention to context in formulating possible fixes. Jurisdictions differ in the procedures they use for eminent domain. See e.g., Nicole Stelle Garnett, The Neglected Political Economy of Eminent Domain, 105 Mich. L. Rev. 101, 104, 126 (2006) (discussing pre-condemnation negotiations and use of “quick-take” authority and noting that “in the vast majority of cases, formal eminent domain proceedings are never commenced” and observing that there has been a “universal disregard for how eminent domain works outside of the courtroom. . . .”); 13-G2A Nichols on Eminent Domain § G2A.03 Taking Procedure in the Fifty States and the District of Columbia, State Procedures (Matthew Bender & Company, Inc. 2010) (summarizing the nature of eminent domain procedures in the different states).
courts give more attention to sentimental values in making compensation decisions or by narrowing the use of eminent domain, our study suggests the promise of a different framework, based on the procedural justice literature, which focuses particularly on identifying and incorporating procedural features that enhance trust. In short, our findings suggest the value and importance of focusing on process as an essential (though by no means exclusive) step in designing procedures that the public will find acceptable.

More generally, our findings highlight the importance of context in process design; if a goal of process design is to have processes that are acceptable to key stakeholders, it is important to understand the values these stakeholders hold concerning the particular decision involved, and more generally towards societal governance structures. Process preferences vary depending on the strength of different values. These findings suggest the value of using tools from the procedural justice literature to understand peoples’ preferences and the process features that are most important to them, and to design processes that align with these preferences.

Part I explains in more detail the different types of values (monetary and sentimental) about which we elicited information from the survey participants. Part II reviews our survey methodology. Part III contains our findings and our review of the implications of those findings for process design. Part IV illustrates the value of our findings by applying them in a particularly controversial context, notably government’s use of eminent domain authority to take land at a market price from owners who are not interested in selling. Ultimately, our purpose is to examine the idea of sentimental attachment and consider how it might enrich our view of the desirability of decision-making institutions such as the courts as community decision makers and the strategies the courts and other institutions should use in performing this responsibility in a way that bolsters legitimacy.

I. Monetary and Sentimental Values

Surprisingly little empirical literature has addressed monetary versus sentimental value. Often when an economist or legal scholar speaks of value, they mean the

32 Garnett, supra note 31, at 110 (noting that “[a]cademic discussions tend to assume that there are two ways to minimize the risk of undercompensation,” referencing the two discussed in the text); Nadler & Diamond, supra note 31, at 742.
33 We recommend this approach in other areas where sentimental values are high as well. We are not taking a position on the appropriate scope of substantive reform in any area. Our process suggestions may be considered independent of substantive reforms, or as complements to them. See infra note __.
34 In their interesting study of concerns with eminent domain law, Professors Nadler and Diamond identify procedural reform as important to address concerns about subjective attachment and begin to “map out” a possible response. Nadler & Diamond, supra note 31, at 748.
35 As the text suggests, a key threshold issue involves identifying the appropriate universe of key stakeholders. See e.g., infra Part IV regarding the views of owners in eminent domain proceedings.
36 One reason for this involves the challenge of adequately creating sentimental value in the laboratory in a relatively short experimental session.
objective monetary value. This is typically operationalized as either fair market value or the closely-related ‘Willingness-to-Pay’ (WTP), which is the amount of money someone will pay to acquire an object. However, despite the implicit assumption that value is some sort of objectively quantifiable component of an object, growing research indicates that a number of factors affect valuation and that “subjective” factors are often quite salient. This is critically important in a variety of contexts, particularly in the legal profession, where juries and judges often make decisions considering the ‘objective’ value of the commodities at hand. The omission of other, more subjective aspects of value may leave all individuals feeling frustrated with the process or outcome, especially if the subjective values predominate.

The best empirical approach thus far to understand sentimental value is the literature on the endowment effect, a term which is used to describe the phenomenon by which individuals value what they have just come to possess more than their expressed value for the item prior to the moment of possession. For example, individuals who earlier expressed a willingness to pay $10 for an item might not be willing to sell it for less than, say, $12 within moments of it becoming theirs. This literature shows clearly that peoples’ perception of value is quite malleable, in this case apparently due to the actual fact of ownership (that is, more so than sentimental value acquired by fact of long possession).

It is difficult to quantify the endowment effect because it varies widely across individuals and contexts. While this has led some to consider the effect an artifact of experimental procedures, many scholars have concluded that such an effect exists.

37 Jack L. Knetsch & J. A. Sinden, Willingness to Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value, 99 THE Q. J. OF ECON. 507 (1984). Note that almost 30 years ago there was evidence that willingness to pay was not always equivalent to compensation value.
38 Id.
39 See e.g., Nadler and Diamond, supra note 31; Vandenbergh, supra note 2.
40 See e.g., Part IV, infra, discussing eminent domain and other areas of law in which sentimental value is important.
Indeed, humans are not the only species which show the behavior, indicating that there has been selective pressure to behave in this way across a number of species (or at least, a number of primates). This indicates that this response is not a cultural or experimental artifact, but an evolved response that affects our understanding of human behavior.

Further, studies have shown that endowment effects appear in contexts in which they are useful, for instance keeping an item in one’s possession when it is valuable, but not keeping the object when it would not be useful. This further highlights the importance of object value and salience to understanding these effects. It may be that possession in and of itself – when the object is worth possessing – is so valuable that, evolutionarily, it was always better to hang on to an object than to risk losing both it and the item that may be acquired in exchange. For instance, in trades or barters, the risk of getting nothing in return may have outweighed the potential benefit from obtaining a more preferred item. This is not to say that a trait’s being widely shared makes it more important or right; that would be committing the naturalistic fallacy. On the other hand, the widespread

46 Owen D. Jones & Sarah F. Brosnan, *Law, Biology & Property: A New Theory of The Endowment Effect*, 49 WM & MARY L. REV 1935 (2007). Evolutionary similarity can emerge through several process, chief among them being homology and convergence. Homology describes the situation in which two species sharing a common trait through a common ancestor, while convergence describes the situation in which two species come to share a trait through common selective pressures, but not common origin. These can be difficult to distinguish; although very closely related species likely share many traits through homology, convergence is a possibility as well. On the flip side, so-called deep homology can exist between extremely phylogenetically distant species which may be difficult to detect. For the purposes of the current argument, whether these similarities are due to homology (behavior shared by a common ancestor to these primates) or convergence (similar selective pressures) is not important. What is relevant is that this behavior emerged in more than one species and operate in what appears to be very similar circumstances. Talbot, C, Williams, L, & Brosnan, SF (2011) (squirrel monkeys’ response to inequitable outcomes indicates a behavioral convergence within new world monkeys. *Biological Letters*. doi: 10.1098/rsbl.2011.0211.) M. Ridley, *Evolution* (3rd ed. Wiley-Blackwell 2003).
50 The naturalistic fallacy describes a situation in which a behavior is considered morally acceptable or in some other way permissible by the fact that other species engage in the behavior. In other words, the fact
existence of the effect supports the view that the trait both exists (e.g., beyond an experimental artifact) and has an evolutionary origin; it may also help to explain why it exists, and it may provide insight into situations in which a trait is sufficiently deeply ingrained in a species’ biology that it will be challenging to change. Beyond the consensus view that people and other species attach greater value to an item once they possess it than to the same item when they do not have it in their possession, much remains to be learned about particular features of the endowment effect, including why it exists and its resilience in different contexts.

While the endowment effect (the act of possession) has received the majority of empirical attention, at least two other factors affect value, notably acquired information about one’s possession, and the formation of an emotional attachment to one’s possession. Closely related to the idea that the act of possession affects value is that an object one possesses for an extended period of time may gain additional value due to the very fact of possession. There is experimental support for the concept that a component of the value of an item stems from value that accrues due to usage or information acquisition. This phenomenon, too, occurs among other species, with individuals, for instance, fighting harder to maintain territories that they possess than to gain territories that they would like to acquire. This is hypothesized to occur due to the additional, very real, value that is acquired when an individual learns the details of one’s territory, e.g., the location of good food sources or nesting sites, or hiding spots from predators. Modern Western humans may have similar emphases, as evidenced by the adverse possession doctrine. Thus individuals very reasonably value a thing that they possess more than do others who do not possess it, possibly due to the benefits provided by additional knowledge of the object.

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that the behavior occurs in nature is somehow seen as a normative justification for said behavior. For an extreme example of this fallacy, consider rape, called forced copulation in the animal literature. This behavior occurs regularly in a variety of animals, including orangutans, another great ape species closely related to humans. Despite this prevalence, and hypotheses regarding the evolutionary function of the behavior, rape in humans is neither acceptable nor necessarily a result of the same mechanisms (e.g. in humans it may be about power rather than reproduction per se).


53 See infra note __.

54 See infra note __. For an excellent recent review of the literature on how property, attitudes about property, and self-identity interact, see Blumenthal, “TO BE HUMAN”: A PSYCHOLOGICAL PERSPECTIVE ON PROPERTY LAW, 83 TULANE LAW REVIEW 609 (2009).


56 Id.

Beyond this, humans also ascribe value due simply to the feelings, memories, and emotions which exist for a possession, typically called sentimental value. Sentimental value is value that is inherently personal and highly subjective. An object may only acquire sentimental value for one or a few individuals, and the presence of sentimental value for one individual does not mean that the same object will have such value for anyone else, although others may recognize this value. This sort of emotional attachment may have particular salience in the case of homes, leading individuals to feel that it merits particular protection, including from government. In scenario studies in which individuals are asked to speculate about how they would feel about various eminent domain decisions, both the length of time during which a family has lived in a house and, to a much lesser degree, the proposed purpose of the new use of the property, affected perceptions of the entire interaction. It is unclear precisely how “sentimental value” as we describe it ties in to the endowment effect. The general consensus seems to be that the endowment effect describes a phenomenon which occurs far too rapidly to be due to information acquisition or for an emotional attachment to be formed, but is instead a predisposition to value what one possesses regardless of other information. Thus it may be that these are additive; humans may value what they own, and then increase the value once they have learned information which makes that possession more useful or have developed an emotional attachment.

Together, these factors influence the value people attach to items, and can be colloquially grouped under the heading of ‘sentimental value.’ Regardless of the precise relationship between and among these types of sentimental value, the key point for our purposes is that the literature in each of these areas supports the existence of such value beyond what is often considered to be an item’s objective monetary value. The question for us in this article is what effect the existence of sentimental value should have on governance decision-making processes. As indicated above, our premise is that decision-making procedures should be structured so that they are responsive to the interests of key stakeholders; thus, the nature of a procedure needs to increase a person’s sense of the legitimacy of the process (and of governance more generally) rather than diminish it. Having shown that there is good reason to believe that procedures that rely exclusively on fair market value as the sole measure of value likely do not capture all of the interests people have, in at least some circumstances, the next question is whether there are ways to improve decision-making procedures so that they better align with peoples’ real interests.


60 For initial studies, see Margaret Jane Radin, Property and personhood, 34 Stan. L. Rev.957 (1982). For a review of subsequent literature and speculation on how this may be particularly important in the area of eminent domain, see Jeremy A. Blumenthal, “To be Human”: A Psychological Perspective on Property Law, 83 Tul. L. Rev. 609 (2009).

61 In fact, some individuals showed a refusal to sell at any price. Nadler and Diamond, supra note 31.

One seemingly straightforward strategy for capturing sentimental value in decision-making is to require decision makers to consider such values. However, even if one were inclined from a conceptual or theoretical perspective to incorporate “subjective values” into decision-making, there are significant challenges to doing so effectively. Two particular difficulties with value, both of which are issues with respect to sentimental value, are that, first, value is subjective, and second, value perception also shifts within the same individual across different contexts. For instance, considering the endowment effect, individuals value the same item differently depending on whether they do or do not own it, and this change takes place rapidly, in the moment or two surrounding the acquisition of possession. In other words, an individual’s willingness to pay (WTP) for an item becomes smaller than the willingness to accept (WTA) the monetarily equivalent offer for that object, apparently at the instant at which ownership is acquired.

In short, sentimental value, defined broadly to include the endowment effect, information acquisition, and traditional or popular notions of sentimental value, may be very difficult to place a monetary amount on due to differences in subjective perception, both across contexts (are you the owner or the would-be purchaser) and within contexts (you may value the home you grew up in more than I do). The dynamic and ad hoc character of value raises significant “rule of law” questions.

An area of the law in which this issue of sentimental value is most pressing is in eminent domain. One of the features of eminent domain that leads to protests and dissatisfaction is that the rulings of what qualifies as “fair market value” are typically not considered such by the homeowner. This provides a challenge as it seems difficult to quantify sentimental value in any reasonable or fair way. Several leading scholars have proposed a variety of strategies to address this challenge of incorporating sentimental value into determination of a property’s worth for eminent domain purposes, but none has gained traction. Given the inherent subjectivity, it remains unsettled whether there are viable ways to ascribe importance to sentimental value when making legal decisions, and if so, how we should go about doing so.

64 See infra note __ for a discussion of this phenomenon in the eminent domain arena. One risk of too much ad hoc’ism is the possible undermining of “rule of law.” See e.g., Melissa M. Berry, Donald J. Kochan, & Matthew Parlow, Much Ado About Pluralities: Pride and Precedent Amidst the Cacophonies of Concurrency, and Re-Percolation after Rapanos, 15 VA. J. SOC. POL’Y & L. 299, 309 (2008) (arguing that “[t]he essential elements to a legal regime based on the rule of law involve: 1) clear and understandable rules; 2) predictability and certainty; 3) procedural validity in the formation of rules; and 4) rules independent of individual whims of government officials and instead with a basis in established law.”)
65 See infra Part IV.
66 See infra Part IV.
67 See infra Part IV.
68 See infra Part IV. There are other challenges to valuation as well that are widely discussed and studied within the literature on the psychology of justice. Studies of perceived justice show that people’s self-interested motivations shape their feelings of justice and entitlement. People in settings in which their perception of entitlement shapes what they will receive are motivated to give in to such self-interested motivations and heighten their feelings of fair value. For example, the equity literature seeks to build employee morale by providing employees with what they view as a fair level of compensation. This
These challenges in practicability – in being able to easily assign “sentimental values” to objects - bring us back to the larger questions that are the focus of this article: 1) does the existence of sentimental in addition to monetary value affect peoples’ views about how well different decision-making processes will protect their interests (the answer is yes); 69 2) if peoples’ views about how well a process protects their interests vary based on whether they want a process to protect monetary vs. sentimental value, which procedures do people find effective (and ineffectual) for the latter (the answer is that referendums do best and judicial litigation was third best out of the five processes we studied); 70 and 3) concerning judicial litigation in particular (the process on which we focused), given that people did not think it was particularly effective in protecting sentimental values, are there process features that might enhance its perceived effectiveness? In short, our hope was to develop insights concerning whether existing procedures do well (or not) in addressing sentimental value; why procedures do well (or not); and, based on these insights, to advance understanding about options for revising procedures to increase satisfaction when sentimental values are important.

As is probably clear already, but we emphasize it here, our focus is not on fair value per se (i.e., upon issues of distributive justice). Instead, we focus on another issue central to designing a legal system: creating procedures that can authoritatively resolve disputes among people about value. Our argument flows from the abundance of evidence that peoples’ willingness to trust the law and the actions of legal authorities is linked to legitimacy. 71 Moreover, legitimacy is created and maintained through making decisions using procedures that people judge to be fair. 72 Hence, in the eminent domain arena, for example, if the government is to have the power to take private property for just compensation, we are concerned about the ability of the legal system to use fair procedures as a way of establishing and legitimating a particular approach to and level of remuneration when the government takes private property. Our findings, and the procedural justice literature more broadly, show that in important respects it is the procedure for determining value that people trust to protect the monetary and sentimental value of their property.

II. Our Study Methodology 73

approach has not been particularly successful and the reasons for that lack of success provide a cautionary message for the situation being discussed here. Studies find that people generally exaggerate the value of their work efforts relative to the ratings of neutral observers. In order to give people what they view as fair pay, therefore, managers need to pay them more than a neutral assessment suggests their work is worth. As a consequence, a focus on giving people what is needed for them to be satisfied with their “value” has negative management implications. TYLER, T.R., SOCIAL JUSTICE IN A DIVERSE SOCIETY (1996 Westview Press). These challenges provide further support for focusing on identifying acceptable procedures for determining value. We suggest, in keeping with the overall procedural justice literature, that the procedure for determining value can help to create the motivation for accepting that value.

69 See infra Part III.

70 See infra Part III.


72 Id.

73 We published results of this study that are not the focus of this article in Tom Tyler & David L. Markell, Public Regulation of Land Use Decision-Making, 7 J. OF EMPIRICAL LEGAL STUD. 538 (2010). Parts of this
Our Sample

The questionnaire was posted on a web site and interested parties were invited to complete it. A number of groups were contacted and shared information about the web link with their members and others who receive their newsletters or are on their list serves. Several leading organizations were very helpful and shared the questionnaire with their constituents via list serves and other means. These included: 1) the leading organization in Florida for lawyers in the field, the State of Florida Environmental Law and Land Use Section; 2) the leading state association for planners, the Florida Chapter of the American Planning Association; 3) the State agency responsible for overseeing land use regulation in the State of Florida, the Department of Community Affairs, which sent the survey to the eleven State Regional Planning councils; 4) the Florida League of Cities, which represents the 400 plus cities of Florida; 5) the Florida Home Builders Association, a leading trade group for developers; 6) 1000 Friends of Florida, a statewide organization with a significant focus on land use; and 8) Tallahassee-Leon County Citizens United for Responsible Growth, a local citizens’ organization interested in land use. Because the information was widely circulated it is not possible to calculate a response rate. A total of 228 people responded to the questionnaire.

Standard demographics were measured: age, gender, income, education and ethnicity. The demographics of the sample suggest that a range of stakeholders responded. The sample was 7% 16-34; 11% 35 to 44; 27% 45 to 54; 39% 55 to 64; and

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74 The authors will provide interested readers with a copy of the questionnaire. Please e-mail any of the authors.
75 The Section is comprised primarily of attorneys and also has affiliate members in related disciplines. The Section representative indicated that the list serve goes to approximately 1200 people. Almost all are ELUL section members. Approximately 100 are affiliate members. These individuals represent the gamut of interests in the land use arena.
76 The Florida APA is a “non-profit organization funded through membership dues and fees.” Its list serve includes a total of more than 3000 individuals. The Florida APA notified its members via its October 30, 2008 monthly bulletin and also included a notice concerning the survey in its quarterly publication, Florida Planning.
77 The Director of Intergovernmental and Public Affairs for the State Department of Community Affairs (DCA) sent an e-mail to the 11 RPC Executive Directors on our behalf and we followed up with an additional e-mail to the RPC Directors. See section 20.18, Florida Statutes (2008) for a summary of DCA’s role as the State of Florida’s land planning agency.
78 The Council published the notice in its Datagram, a newsletter sent to several hundred municipalities. October 10, 2008 e-mail from Rebecca O’Hara to David Markell (on file with the authors).
79 We asked all organization representatives with whom we talked to share with us the note they sent their members/constituents and also to let us know how many people would likely receive the notice. The Florida Home Builders Director of Government Affairs indicated that he was making it available to members who might wish to comment. October 28, 2008 e-mail from Doug Buck to David Markell (on file with the authors).
80 1000 Friends indicates its list serve includes about 1200 individuals.
81 We asked several other groups to send out notice about the survey via their list serve or otherwise, but our understanding is that they did not do so.
17% 65 or over. It was 45% female. The income distribution was 55% under $100,000 and 45% above it. Sixteen percent had some college or less; 21% were college graduates; 27% had Master’s degrees; 8% Ph.D.s; and 21% professional degrees. Finally, 87% were White. As is clear, this was not a random sample of the general population; instead, it was a sample of elites.82

Respondents were asked about their familiarity with different procedures in the context of making land use decisions. Of those who completed the questions, 86% indicated personal experience with private negotiations; 96% with public hearings; 67% with administrative litigation; 52% with judicial legal procedures; and 41% with public referendums. As a result, this sample of elites likely had a relatively good familiarity with the processes we studied.

Our Methodology: A Survey of Land Use Decision Making Procedures

The procedures about which respondents were asked questions were presented at the beginning of the survey. The procedures were:

Informal meetings to negotiate a resolution to conflicts. It is sometimes possible to have informal meetings with . . . interested parties to discuss possible land use changes. Areas of possible conflict are resolved informally among the various interested parties.

Public hearings—Local government officials. Elected local officials typically hold public hearings in considering whether to amend a general comprehensive land use plan and in considering a rezoning request. These hearings allow people to present their views orally and to submit relevant information in writing. Decisions are made based upon the views of elected officials about what is best for the community.

Administrative hearings. A person affected by a comprehensive plan amendment decision may file a petition for an administrative hearing convened by the State’s Division of Administrative Hearings (DOAH). Those who are affected may represent themselves or be represented by counsel and may offer evidence through witnesses and cross-examine other witnesses. Decisions are made based upon the consistency of the proposed land use with rules and regulations about land use.

Court challenge. After a local government body makes a rezoning or other development order decision, in some situations it is possible to go to circuit court to challenge the decision. This challenge would argue that the decision is inconsistent with the comprehensive plan or existing laws on zoning. Decisions

82 We did not investigate whether elites are more or less likely to be involved in eminent domain proceedings. They may be more likely to have property, but they may also be more likely to have the power and knowledge to fight off eminent domain, or to live in neighborhoods that protect them.
are made based upon the consistency of the planned land use with the comprehensive plan or existing laws on zoning.

**Ballot referendum.** Before a land use change is approved in some jurisdictions, the jurisdiction puts the issue on the local ballot and allows the public to vote it up or down. Decisions reflect the desires of the majority of voters.  

**Questionnaire**

Respondents were asked the same questions about each of the five procedures outlined.

**Acceptability.** People were asked about their willingness to accept the decisions made using the procedure to measure the degree to which a procedure was authoritative. They were asked to agree-disagree that: “I would be willing to accept the results of this procedure.” Responses were recorded on a six point scale ranging from “strongly disagree” to “strongly agree.”

**Monetary value.** For each procedure respondents were asked to respond to two questions. The questions were: “This procedure respects the monetary value of the property involved;” and “This procedural adequately protects the monetary value of the property involved.” Responses were recorded on a six point scale ranging from “strongly disagree” to “strongly agree.”

**Sentimental value.** For each procedure respondents were asked to respond to two questions. The questions were: “This procedure respects the sentimental value of the property involved;” and “This procedural adequately protects the sentimental value of the property involved.” Responses were recorded on a six point scale ranging from “strongly disagree” to “strongly agree.”

### III. Results

In this Part we focus on survey results in three key areas: 1) respondents’ views about the extent to which different procedures protect monetary and sentimental value and are acceptable; 2) why respondents favor particular procedures (or are apprehensive about them); and 3) the role of exogenous factors, notably trust in government, in shaping preferences. We then discuss some of the more significant ways in which, at least in our view, these findings have promise for influencing process design – the implications of these results.

A. What did respondents think about different procedures?

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83 There are many variations on each of these forms of dispute resolution. This reality should be kept in mind in reviewing the results. It is conceivable that different variations of different types of procedures would engender different reactions. Our results are obviously based on the description that we provided in the questionnaire of each type of procedure, which we have included in the text.
Respondents were asked how much they felt that resolving land use conflicts using various procedures protected monetary value and sentimental value. To examine this question a combined index was used in which each procedure was rated in terms of its ability to respect/protect monetary or sentimental value. The procedures considered were: judicial litigation; administrative hearings; negotiations; public hearings; and public referendum.

Among the procedures, respondents rated the courts first in terms of respecting/protecting monetary value and third in terms of respecting/protecting sentimental value (Table 1). They were also asked which forums produced outcomes that they would be willing to accept and again, the courts were rated first. This suggests that peoples’ willingness to accept decisions is linked more to the protection of monetary value, not sentimental value. If protecting sentimental value were the key to acceptability people would presumably indicate the willingness to most readily accept referendum outcomes since they rated referendums as most likely to protect sentimental value.

Table 1. How well can different procedures protect monetary and sentimental value?

<table>
<thead>
<tr>
<th>Procedure</th>
<th>Willingness to accept decisions</th>
<th>Monetary value</th>
<th>Sentimental value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial litigation</td>
<td>4.07(1.37)</td>
<td>3.86(1.28)</td>
<td>2.92(1.23)</td>
</tr>
<tr>
<td>Administrative hearings</td>
<td>3.59(1.43)**</td>
<td>3.69(1.28)**</td>
<td>2.83(1.21)</td>
</tr>
<tr>
<td>Negotiations</td>
<td>3.24(1.37)**</td>
<td>3.45(1.15)**</td>
<td>3.16(1.18)^</td>
</tr>
<tr>
<td>Public hearings</td>
<td>3.20(1.53)**</td>
<td>3.27(1.37)**</td>
<td>2.70(1.29)</td>
</tr>
<tr>
<td>Referendums</td>
<td>3.69(1.81)*</td>
<td>3.01(1.50)**</td>
<td>3.47(1.53)**</td>
</tr>
</tbody>
</table>

It is also possible to separately examine whether a procedure would respect a particular value and whether it would provide protection for that value. Although in many senses these are similar, it is possible to respect without fully protecting, or to protect without respecting. Thus we chose to ask about each in case our respondents saw them differently.

Table 1a presents the results of such an analysis. Given that the likelihood of the courts respecting and protecting monetary value was highly correlated ($r = 0.81$), as was the case with respecting and protecting sentimental value ($r = 0.79$), it is not surprising that the ability of particular procedures to do both is very similar. In the case of the courts, for example, the courts were viewed as most able to respect and protect monetary value, but not the most able to either respect or protect sentimental value. Referendums were viewed as best able to achieve both of these ends in the case of sentimental values.

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Entries are the means. The number in parentheses is the standard deviation. The significance levels noted indicate whether ratings for other procedures differ significantly from those for judicial adjudication. ^p < .10; *p < .05; **p < .01; ***p < .001.
Table 1a. Respect vs. protect.85

<table>
<thead>
<tr>
<th></th>
<th>Monetary value</th>
<th></th>
<th>Sentimental value</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Respect</td>
<td>Protect</td>
<td>Respect</td>
<td>Protect</td>
</tr>
<tr>
<td>Judicial litigation</td>
<td>3.88(1.34)</td>
<td>3.83(1.37)</td>
<td>2.96(1.33)</td>
<td>2.86(1.28)</td>
</tr>
<tr>
<td>Administrative hearings</td>
<td>3.69(1.40)</td>
<td>3.66(1.29)</td>
<td>2.85(1.29)</td>
<td>2.86(1.25)</td>
</tr>
<tr>
<td>Negotiations</td>
<td>3.53(1.26)</td>
<td>3.34(1.24)</td>
<td>3.26(1.29)</td>
<td>3.07(1.22)</td>
</tr>
<tr>
<td>Public hearings</td>
<td>3.24(1.50)</td>
<td>3.29(1.41)</td>
<td>2.67(1.43)</td>
<td>2.71(1.32)</td>
</tr>
<tr>
<td>Referendums</td>
<td>3.13(1.64)</td>
<td>2.86(1.54)</td>
<td>3.61(1.63)</td>
<td>3.31(1.61)</td>
</tr>
</tbody>
</table>

B. What shapes respondents’ views about different procedures, with a particular focus on judicial litigation?

In addition to assessing whether our respondents had different perspectives about the capacity of different procedures to protect sentimental and monetary value, we asked what it was about the perceived functioning of the different procedures that influenced our respondents’ evaluations. To do so we contrasted the influence of the perceived control over outcomes and the judgment that fair procedures were used to make decisions. In this section we summarize our findings about what it was about courts that shaped the respondents’ view that courts do not protect sentimental value.

The regression analysis shown in Table 2 indicates that people particularly associated courts’ use of fair, procedurally just procedures with the protection of sentimental value, at least in comparison to protecting monetary value, which was more equally balanced between having control over the outcome and thinking that one might win vs. viewing the procedure as fair.86 In the case of sentimental value the weight given to likelihood of winning was 0.24, while the weight given to procedural justice was 0.38. The key finding is that when people were concerned about protecting sentimental value they focused upon having a fair (procedurally just) procedure for making decisions.

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85 Entries are the means. Numbers in parentheses are the standard deviation.
86 A regression is an analysis that considers the contribution of several factors to explain a dependent variable. In the regression analysis shown in Table 2, each column represents a regression analysis in which both likelihood of winning and procedural justice are entered simultaneously into an equation to determine how much respondents believe the courts can respect/protect each type of value. The number in the final row (adjusted square of the multiple correlation coefficient) indicates the total amount of variance in the dependent variable (respecting/protecting value) explained by both factors considered at one time. Each entry in a particular column is the standardized regression coefficient (i.e. beta weight) reflecting the relative weight of each factor in predicting value judgments. The magnitude of these standardized scores can be compared (i.e. .4 is twice the weight of .2). The stars by each number represent its statistical significance.
Table 2. What features shape the view that courts protect value?87

<table>
<thead>
<tr>
<th></th>
<th>Respect/protect monetary value</th>
<th>Respect/protect sentimental value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Likelihood of winning</td>
<td>.29***</td>
<td>.24*</td>
</tr>
<tr>
<td>Procedural justice</td>
<td>.35***</td>
<td>.38***</td>
</tr>
<tr>
<td>Adj. R.-sq.</td>
<td>35%***</td>
<td>33%***</td>
</tr>
</tbody>
</table>

In our study we sought to unpack this issue still further. In particular, our questions sought to elicit information that would help us to understand, if procedural justice is important in the context of protecting sentimental value, which procedural features people most care about. We looked to the procedural justice literature for insights about the types of procedural justice features that might be salient.88 While procedural justice is a product of voice, neutrality, treatment with respect, and trust in authorities,89 researchers have recognized that these procedural elements reflect two stages of judgment. Voice, neutrality and treatment with respect are responses to things that authorities do. Trust is an inference about the character of the authorities. As Tyler and Huo argue,90 trust can be a consequence of what authorities do. This provides a framework for understanding the results shown in Table 3. In our regression analysis for Table 3, the independent variables were the elements defining the fairness of a procedure. Our findings indicate that it is clear that trusting the motives of the authorities is the key to feeling that they will make decisions in ways that protect sentimental value. In contrast, neutrality is the key to protecting monetary value.

Table 3. Which procedural justice features lead people to think that the courts will protect value.91

<table>
<thead>
<tr>
<th></th>
<th>Respect/protect monetary value</th>
<th>Respect/protect sentimental value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voice</td>
<td>.03</td>
<td>.08</td>
</tr>
<tr>
<td>Neutrality</td>
<td>.32*</td>
<td>-.01</td>
</tr>
<tr>
<td>Trust</td>
<td>-.02</td>
<td>.50***</td>
</tr>
<tr>
<td>Quality of treatment</td>
<td>.28</td>
<td>.03</td>
</tr>
<tr>
<td>Nonfairness issues (cost,)</td>
<td>-.04</td>
<td>.00</td>
</tr>
</tbody>
</table>

87 Entries are standardized regression coefficients. *p < .05; **p < .01; ***p < .001.
89 Id.
91 Entries are standardized regression coefficients.
Our next level of inquiry involved investigating the key process features linked to trust. In other words, if trust in the decision maker is important, the question is what features of a procedure tend to create such trust. The results of a regression of the other procedural elements on trust (Table 4) show that judges are trusted if they provide opportunities for voice; make clear that their decisions are made neutrally; and show respect for people and their rights. As Table 3 reflects, this is distinct from protecting monetary value. When people see decisions being neutrally made they feel that monetary value is being protected.

Table 4. Why do people trust courtroom authorities?

<table>
<thead>
<tr>
<th></th>
<th>Trust the motives and intentions of judges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voice</td>
<td>.25***</td>
</tr>
<tr>
<td>Neutrality</td>
<td>.34***</td>
</tr>
<tr>
<td>Quality of treatment</td>
<td>.35***</td>
</tr>
<tr>
<td>Nonfairness issues (cost, delay)</td>
<td>.04</td>
</tr>
<tr>
<td>Adj. R.-sq.</td>
<td>81%***</td>
</tr>
</tbody>
</table>

The results from Tables 3 and 4 can be combined into an overall model that recognizes that voice, neutrality, and quality of treatment can influence inferences of trust as well as shape views about value protection directly. Figure 1 shows the results of a path analysis that maps the relationship among these variables. It indicates that protection of the monetary value of property is a direct result of having a neutral procedure. However, protection of sentimental value is more complex. It is linked to inferences of trustworthy character. In turn, such character comes from allowing voice, displaying neutrality, and being respectful. Hence, there are different antecedents of protecting monetary and sentimental value.

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92 Entries are standardized regression coefficients.
Figure 1. Direct and indirect procedural influences upon value respect/protection (comparative fit index = 0.99).
The findings of this study point to the complexity of judging. On the one hand, judges show their ability to protect monetary value by being neutral and rule-based in their decision making. Their behavior is rule-based and consistent across people. Our findings lend support for the idea that it is this justice of procedure that helps to legitimate courts and leads them to be acceptable as a mechanism for making decisions.

On the other hand, our findings point to trust in judges as crucial to their ability to acceptably manage sentimental value. People want to feel that the authority they are dealing with is benevolent and caring. That is, the authorities listen to peoples’ needs and concerns; they consider those needs and concerns when making decisions; and they are motivated to be sympathetic toward and caring about the people who appear before them. These latter concerns are especially important when sentimental value is at issue.

Balancing the two objectives of neutrality and trustworthiness makes judging a complex and nuanced activity. The findings of this study suggest that striking an appropriate balance depends upon the nature of the problem before the court. If monetary value is the key issue judges should emphasize neutrality. If sentimental value matters they should focus upon allowing voice; communicating concern and respect for litigants and their stories; and displaying neutrality.

C. What role does trust in government play in shaping views about the courts?

Our discussion in the previous section focused on process features that influence peoples’ views about how well different procedures protect peoples’ interests. Among other issues, we discussed the issue of trust in connection with the particular judges who try cases. In this section we expand our focus to assess the influence of exogenous factors on peoples’ perceptions about different decision-making procedures. As indicated above, we asked our survey participants about several exogenous factors and learned that trust in government has a significant effect on views about decision-making processes. There is a significant literature on trust in government, which reflects that legal and political authorities generally have declining legitimacy in American society.

We explored the question of trust at the governmental level by examining the role of trust in local government in shaping views about different decision-making procedures. Table 5 shows the relationship between trust in government and judgments about whether the courts protect monetary and sentimental value. Interestingly, those who distrust government think it protects neither value: (r = -.19 (p < .05) for monetary value; (r = -.21 (p < .01) for sentimental value. In contrast to trust in the courts, low trust in government leads to a greater belief that referendums protect monetary value: (r = 0.37, p < .001), as well as sentimental value (r = 0.29, p < .001). In other words, there is a

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93 See supra Part IIIB.
94 See supra Part II.
95 See supra Part II.
positive correlation between high levels of trust and protection of value; the higher the level of trust a person had in government the more the person thought the courts protect value. On the other hand, those who had low levels of trust in government thought referendums protect value more effectively.

As we discuss in more detail below, referendums are government by the public and our findings suggest that people who distrust government trust the public to recognize and take account of sentimental values attached to homes and land. People believe that others in their community will make decisions that take account of their values, while judicial authorities will not. This goes beyond sentimental values, people also believe that others are more likely to respect monetary values than are judicial authorities.

Table 5. Correlation between trust and views about what procedures protect values.\(^{96}\)

<table>
<thead>
<tr>
<th></th>
<th>Courts respect &amp; protect</th>
<th>Referendums respect &amp; protect</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Monetary value</td>
<td>Sentimental value</td>
</tr>
<tr>
<td>Trust in local</td>
<td>0.19*</td>
<td>0.21**</td>
</tr>
<tr>
<td>government (H = high)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Monetary value</td>
<td>Sentimental value</td>
</tr>
<tr>
<td>Trust in national</td>
<td>0.20**</td>
<td>0.28***</td>
</tr>
<tr>
<td>government (H = high)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

These findings suggest that judicial procedures do not exist in a vacuum. They are part of government. When people distrust government, they are more distrustful of the courts and of judges. Hence, judges need to work especially hard to legitimize themselves, their proceedings, and their decisions when dealing with a public that is skeptical of the government in general. That is especially true when sentimental values are important.

While this study focuses upon local issues of land use and community and state government, we can extrapolate from these findings to suggest that trust in the federal government is relevant to the likely acceptability of federal decisions. Table 5 shows that the same pattern was observed in terms of trust in local and federal governments.

D. Implications

What are the implications of our findings for policy makers and others who are concerned about legitimacy? These findings suggest that there is benefit to expanding efforts to promote citizen satisfaction with government decision-making procedures beyond outcome-based reforms. That is, the search for procedures that will produce

\(^{96}\) Entries are the correlation coefficient.
better distributive outcomes is important, but it should be complemented by a search for procedures that, *qua* procedures, will engender higher levels of stakeholder satisfaction. This is particularly the case when sentimental values are salient since, according to our findings, stakeholders may place higher value on process in such situations.\footnote{97} In the eminent domain arena that we discuss in Part IV, for example, we argue that it is worthwhile to consider reforms beyond outcome-based improvements such as more effectively estimating the sentimental value associated with homes or land in an effort to compensate people adequately.\footnote{98} In particular, it is valuable to focus upon identifying a procedure (and process features) that produces outcomes that people will accept and that they believe protect their interests.\footnote{99}

A second set of implications involves the role of money as the default in our results. A core concept in economics is the idea of revealed preferences. According to that idea we understand what people prefer by looking at the choices they make. In the case of this paper we are concerned with choices not among outcomes but among possible procedures for reaching outcomes. When people were simply asked to pick a desirable procedure they expressed the highest level of willingness to accept the courts (Table 1). Further, when asked which procedures protect monetary value people also chose adjudication. However, when asked which procedures protect sentimental value people chose other procedures. This suggests that the primary value people had in mind when they chose the courts was protecting monetary value.\footnote{100} These findings raise several questions. Why is people’s default to protect monetary values? Is love always a second hand emotion? Following from our findings, if money is typically the more important value, it will be important for processes to highlight their neutrality, while

\footnote{97} See supra note __.\footnote{98} In some cases procedural reforms may be a palliative. This should be kept in mind in determining an appropriate mix of procedural and outcome-oriented reforms. Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994).\footnote{99} As we note elsewhere, public satisfaction is obviously not the only factor process designers should consider. For example, accuracy of outcome is another; as is the notion that the legal process may help to promote (or impede) efficient policies for fostering innovation and growth. Henry N. Butler & Larry E. Ribstein, *Legal Process and the Discovery of Better Policies for Fostering Innovation and Growth*, forthcoming in KAUFFMAN TASK FORCE FOR LAW, INNOVATION AND GROWTH, available at http://papers.ssrn.com/pape.tar?abstract_id=1739312. See also Nadler and Diamond, supra note __ at 745 (noting that a procedural justice tack is not necessarily a panacea:

The Court in Kelo took notice of what it characterized as the full planning and democratic consideration of the redevelopment plan that led to the taking. . . . Regardless of whether planning is a useful and legitimate indicator of a genuine purpose, researchers who study procedural justice predict that public hearings and opportunities for diverse constituencies to be heard might reduce feelings of dignitary harm. We suspect that while considerations of procedural justice might ameliorate the perceived unfairness of eminent domain for some takings, long-term home ownership may instill an entitlement and provoke an outrage that cannot be avoided with even the most democratic decision-making process. In future research we plan to investigate the potential role of procedure in influencing public reaction).\footnote{100} One way to compare the role of these two judgments is to do a regression analysis looking at the influence of monetary and sentimental judgments upon willingness to accept decisions made by the court. When we do so we find that monetary (beta = 0.41, \( p < .001 \)) judgments dominate sentimental judgments (beta = 0.24, \( p < .001 \)) in an equation that explains 31\% of the variance in willingness to accept decisions.
giving somewhat secondary attention to trust. On the other hand, if there are situations in which the default is typically reversed and sentimental values predominate, policy makers might consider highlighting trust-creating features. More research is needed to help gauge the relative importance of monetary and other values in different situations since the relative salience of different values affects the processes people think will best protect their interests and the process features that are important to peoples’ satisfaction.

A third set of implications from our findings is the framework they provide for identifying in advance situations that are likely to pose problems for the legal system and for identifying process changes that hold promise for ameliorating public dissatisfaction in such situations. Our findings suggest that people generally like the courts, but that the courts are less authoritative in particular types of situations. Although people generally express willingness to defer to the decisions of judges and overall view adjudication as the most desirable procedure for use in resolving community conflicts, this study suggests that they are less likely to apply these feelings to cases where sentimental value is a key issue. This study suggests that when sentimental issues are at stake people focus on the character of the judge – i.e., do they trust the person in authority? When monetary issues are at stake they evaluate the neutrality of the decision making rules. Hence, the context changes how people think about procedural fairness. Since a key virtue of the court is its neutral decision making, the acceptability of the courts suffers when that is not the basis of their legitimacy.

These findings suggest that, in addition to considering revising court procedures so that judges are seen as acting fairly by displaying particular elements of fairness when they conduct their proceedings (through features that provide opportunities for voice, show respect, and reflect neutrality), it might be worthwhile to combine court litigation (the most preferred process and one that does relatively well in protecting monetary value) with processes that are stronger in protecting other values, such as a referendum process, which is perceived as much stronger in protecting sentimental values. Related, these findings help us to understand the pull of referendums. People like them because they leave authority in the hands of the public and are a way that sentimental value can be protected. What would the world look like if people chose procedures based upon the desire to protect sentimental value? People would choose a referendum as a way to make decisions.

101 We are making these suggestions at a framework level. We are not recommending specific procedures for providing voice or other features that our findings suggest are important. We note that the search for useful procedures at an implementation level will be challenging. Our findings that public hearings are held in very low regard, for example, raises questions about voice of the sort provided in such hearings. See supra Table 1; Tom Tyler & David L. Markell, Public Regulation of Land Use Decision-Making, 7 J. OF EMPIRICAL LEGAL STUD. 538 (2010). Concerns about the disconnect between lawyers and their clients in terms of the interests they hold and seek to validate through litigation similarly raise questions about the utility of allowing lawyers a “voice” as a strategy to give such voice to clients. See Tamara Relis, It’s not about the Money!: A Theory on Misconceptions of Plaintiffs’ Litigation Aims, 68 U. Pitt. L. REV. 701 (2007); Gillian Hatfield, In Framing the Choice between Cash and Courthouse: Experiences with the 9/11 Victim Compensation Fund, 42 LAW & SOC’Y REV. 1, 2 (2008).

102 There is a substantial literature on referendums, their advantages and disadvantages. We do not delve into that literature in this article.
Interestingly respondents do not view negotiation as similar to referendums. Those who do not trust government are not supportive of resolving conflicts via negotiation. In this respect negotiation is similar to the courts, both of which are distinct from referendums. Why might this be true? Discussions of negotiation emphasize that private transactions are responsive to market forces. Hence, a negotiation is unlikely to be a situation in which one party pays another more for their home due to sentimental attachment. As a consequence, the courts and negotiation are alike in the sense that they are processes in which sentimental value is likely to be unprotected.

Consider another example of market solutions in a community cooperating to manage a disputed resource: water use during a water shortage. In this study a variety of procedures for allocating water were considered by the respondents. Respondents rejected market solutions because they believed that water should be allocated by principles of need while markets reflected the ability to pay. Interestingly respondents indicated that a market solution would be an effective way to allocate water. They rejected it on justice grounds. Here too respondents are indicating that a negotiated solution would not take account of issues beyond the ability to pay. This is consistent with other findings suggesting that people may be skeptical about market mechanisms of allocation where they feel that justice issues are at stake.

More generally these findings suggest that there is a benefit from moving our focus away from trying to effectively estimate the sentimental value attached with homes or land in an effort to compensate people adequately to create satisfaction. We argue that it is better to focus upon identifying a procedure that produces outcomes that people will accept. And, as we note, courts are generally such a procedure. But, courts are not always equally acceptable and our findings both identify a set of conditions under which courts have problems being authoritative and propose a procedural remedy based upon: (1) judging following procedures that build legitimacy and (2) using other procedures such as referendums which are more responsive to sentimental value.

A related, key issue posed by our findings concerns what the legal system would look like in situations in which sentimental value is the orienting principle guiding institutional design. One clear suggestion is that it would lead people to place power in the hands of the public rather than experts. In this respect we see possible parallels between our findings and the recent discussion of “death panels” in the debate on health care reform. What the public feared in that debate was giving power over decisions about whether they or their family would live or die to untrustworthy uncaring experts who would essentially be neutral and fact-based in their medical decisions. In contrast, people themselves wanted the power to take account of their feelings when making such decisions.

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decisions. For example, they might want to try to save the life of a loved one by spending money to supply an untested drug with no record of success. An insurance company, in contrast, would deny this use of money on factual grounds citing the lack of evidence that the drugs would work and were therefore worth spending money for. To allow such sentimental values to be considered the public wants a decision making system in which the decision makers share their sentimental values and, in the case studied here, that is a referendum. A referendum places power in the hands of the people in the community, not in the hands of experts.

The ideal of a trust-maximizing process raises its own set of issues that deserve attention. A problem with a system based upon sentiment is that it may lack the virtues of neutrality and factuality in which a decision maker applies general rules consistently and without partiality. In a series of provocative studies, Batson has demonstrated that people can allow their sentimental feelings to override principles of right and wrong when faced with choices involving sentiment. In one study Batson asks people to consider moving a cute young child ahead of others in line for an organ donation. He shows that people are moved by their sympathy for a likable victim to violate general rules of fairness and move that person up beyond others who according to neutral factual rules are more deserving of help. Hence, a legal system that gives weight to sympathy is one that can potentially undermine the rules of a neutral fact-based allocation system. People are encouraged to compete on a playing field of compassion, shaping their situation so as to tug upon emotional strings in an effort to increase the empathy they can encourage in others. Who is to say how much losing a home in which one raised children is worth, but a sympathetic picture of a grey-haired old couple tending their family garden is likely to elicit high evaluations. Of course, tugging a people’s emotional heartstrings already occurs in the courts, with lawyers making emotional appeals to juries. Such appeals are generally not found to be successful and juries are found to overwhelmingly rely upon a neutral evaluation of the facts.

Further, a system focused on subjective values has the potential to incentivize less-than-ideal behavior. As we noted, in such a system people are rewarded for allowing their self-interested motivation to exaggerate their own desires and needs to run free. The more strongly people have a sense of (exaggerated?) entitlement the more they are likely to receive. This point has been noted in studies of the role of need in social welfare decisions. When allocations are based upon need peoples’ motivation to exaggerate their needs is encouraged. A key issue then becomes recognizing true need. Ironically this leads to the need for a neutral factual decision making like a judge who can sift through claims. More generally these considerations highlight a central point of this paper: the difficulties in making decisions based upon subjective valuations. It is for this reason that we emphasize the importance of having a procedure that people find

106 Id.
108 Tyler, supra note 68, Social Justice in a Diverse Society.
109 Id.
acceptable. Of course, part of that procedure has to be a mechanism for making valuations. However, rather than focusing exclusively upon the issue of valuations we think that law reform efforts should also focus on ensuring acceptable procedures through which this task can be accomplished.

Our argument is for a contextually-based balance. We believe that both neutrality and trust are important, with their balance depending upon the nature of the values involved. A process that is strong on sentimental values may be better in contexts where those values predominate, while a process that is strong on monetary values may be better in contexts where they predominate. Thus, knowing one’s “audience” is critical to effective process design. Related to this, it may improve process legitimacy to combine elements of different procedures or to offer multiple mechanisms for participation, or to revamp mechanisms to add features. We also believe that as trust in government declines it will be more and more important for authorities to build trust. As our findings suggest, they can do so by using the principles of procedural justice when conducting judicial proceedings, and when articulating reasons for their decisions, among other possibilities. At the same time, it is essential to maintain a reputation for neutrality and consistency.

A final implication involves the salience of exogenous factors to process design. In recent discussions of civic discourse, public distrust of government has emerged as a key theme. Our findings reflect that this issue is important in our discussion. When members of the public distrust government they do not believe that the courts will protect their values, sentimental or monetary. They then become interested in referendums, a procedure which does protect those values. It is also interesting that when people distrust government they do not distinguish between monetary and sentimental value. They think that the courts are less likely to protect either monetary or sentimental value. This goes beyond the prior argument that people distrust courts to protect sentimental value. It suggests that when people distrust government they distrust judges to protect their values overall.

E. Conclusions

People value items, including their property, in different ways. People have a monetary interest in property, of course, but they may also attach a sentimental value, broadly defined, as well. Our study shows that, in contexts related to disputes involving land use, peoples’ views about the effectiveness of different types of decision-making processes in protecting their interests change depending on the salience of these different types of values. Moreover, within this framework, it is different aspects of the procedures (e.g., neutrality and trust) that control respondents’ views. To us, the obvious conclusion that flows from this finding is that process design is a very contextual task, assuming (as we do) that one goal in process design is to leave both involved parties and other participants with the sense that the process has been fair and has given due weight to the values they hold. This seems essential for stakeholders to accept the legitimacy of

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110 See supra note __.
decisions. Our case study of the eminent domain realm in Part IV illustrates how policy makers and others interested in process design might internalize this perspective as they consider how best to make decisions with public consequences that will enjoy public support.

IV. Considering our Findings in the Context of Eminent Domain

The findings from our study are interesting in the abstract in highlighting the important role process may play in promoting good governance and enhancing legitimacy. Our findings suggest that peoples’ values affect their process preferences; that, while judicial litigation fares well when monetary values predominate, it does not fare well in protecting sentimental values; and that bolstering trust through opportunities for voice and respect is particularly important for people to be satisfied with a process when sentimental values are salient. Our hope is that these insights will contribute to improved understanding of public perceptions of different types of process design and ultimately to use of procedures that enjoy enhanced public acceptability.

In this Part we consider these findings in a real world dispute resolution context to which people often bring a range of non-monetary values, notably the exercise of eminent domain authority. In common parlance an eminent domain proceeding entails the government’s providing “fair” or “just” compensation as the quid pro quo for taking ownership of someone’s property. The Fifth Amendment, which provides that private property shall not be taken for public use without just compensation, provides the legal framework for the exercise of eminent domain authority. A wide range of prominent scholars have recognized that exercise of eminent domain authority implicates both monetary and non-monetary values, and the courts have done so as well.

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112 When the federal government makes decisions about issues in which sentimental values predominate, such as social security and health care eligibility, or homes and land, these findings suggest that particular attention needs to be paid to the procedures through which authorities make decisions. Given the extreme polarization that seems to have emerged in politics, it is important to examine the degree to which the use of such procedures can transcend party loyalties, as well as a general distrust of government.
113 See supra Part III. Prof. Elis discusses the “pervasive economic assumptions of the civil justice system.” Id. at 6. To the extent that this is true and remains so, and peoples’ objectives are non-material, disaffection seems unavoidable. To the extent that the civil justice system continues to focus on economic issues, procedural refinements geared toward responsiveness towards other interests seem to hold promise for reducing dissatisfaction. While we think this is a good thing in general, there are downsides to focusing exclusively on process-oriented reforms. See David L. Markell & Tom R. Tyler, Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens’ Roles in Environmental Compliance and Enforcement, 57 KAN. L. REV. 1 (2008); Tom R. Tyler & Gregory Mitchell, Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights, 43 DUKE L.J. 703, 703-814 (1994).
114 U.S. CONST. amend. V.
115 U.S. CONST. amend. V. provides: “nor shall private property be taken for public use, without just compensation.” The Fifth Amendment is made applicable to the states through the Fourteenth Amendment.
116 For a recent effort to unpack these non-monetary values, see Nadler & Diamond, supra note __, at 725 (reporting on an experiment that focused on the nature of the values at issue in an eminent domain setting.
The reality is that the public has not enthusiastically embraced, or even calmly acquiesced in, the governments’ use of eminent domain authority in many cases. The scholarly commentary is replete with references to the enormous controversy eminent domain has engendered despite its incorporation of just compensation as a core feature. Professor Ilya Somin notes that the *Kelo* decision, a case in which the Court signaled its acceptance of widespread use of eminent domain authority, “was greeted with widespread outrage that cut across partisan, ideological, racial, and gender lines.” Professor Nicole Stelle Garnett observed that *Kelo* set off a “firestorm of popular outrage.” The ABA Section of Real Property, Probate and Trust Law review of condemnation law suggests that most Americans “were aghast” about the condemnation that the Supreme Court upheld in *Kelo*: the “backlash . . . was unprecedented;” and the public was “outraged.”

At first glance at least, there are reasons to wonder why eminent domain has triggered such public outrage. In a sense eminent domain is the flip side of regulatory takings law and, when viewed through that lens, seemingly has some advantages for the party whose property rights are being uprooted. In the regulatory takings context, the government may, as a practical matter, dramatically curtail an individual’s ability to enjoy his property while hoping *not to pay* for the privilege. The government pays up,
reluctantly, when a court directs it to do so (or when the threat of such provides sufficient motivation). In contrast, in the eminent domain arena the government is not seeking to avoid compensating the land owners. Instead, the government is offering to make the landowners whole economically. The government is not taking something for nothing nor seeking to do so. From a landowner’s perspective, in short, in some cases being on the receiving end of an eminent domain action might be preferable to having one’s property rights limited through regulation.

Further, in many circumstances critical public policy objectives (e.g., providing essential infrastructure such as roads, sewer systems, utilities, or community resources such as hospitals) cannot be accomplished without the government’s intervening in private property rights. Undoubtedly because of this reality, virtually every contemporary government includes in its tool box the power to take private property for public purposes.

Finally, there should be a degree of public acceptance of the use of eminent domain authority since, in theory, government should only exercise it when the social utility of transferring the property exceeds the social utility of not doing so. As Professors Nadler and Diamond put it:

From one economic perspective, government takings of private property are theoretically unproblematic because the owner is entitled to just compensation under the Fifth Amendment. The assumption is that government will only force the sale of property if the benefit is higher than the cost of compensating the owner. Thus, if the owner is fully compensated and the public is left better off, there will always be an overall social improvement resulting from a taking.

124 With the qualifications discussed infra.
125 For example, see Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Lingle v. Chevron USA, Inc., 544 U.S. 528 (2005). It is not our purpose in this article to address the appropriateness of takings law and we leave such issues aside with the qualifications discussed infra. 126 For example, the Court concluded in Kelo that eminent domain can be indispensable when depressed economic conditions exist and progress in addressing them is jeopardized by a handful of property owners. Kelo, 545 U.S. 469, 504 (2005); Garnett, supra note 31, at 138 (noting that “[t]he primary objective to substantive limits on the eminent domain power is that holdouts may impede social beneficial projects.”)
127 Nadler & Diamond, supra note 31, at 714. On the other hand, as Professor Nicole Garnett and others have pointed out, determining whether a project is efficient is “difficult at best” and “would-be beneficiaries . . . have a substantial incentive to engage in rent-seeking” because eminent domain may reduce transaction costs and generate a substantial economic surplus that beneficiaries need not share. Garnett, supra note 31, at 139. Local governments may have an incentive to respond favorably to such rent-seeking as well, adding to the argument for monitoring the scope of eminent domain and not “over-using” it. Professor Garnett also makes the point that government may favor overinvestment in some projects and they overestimate the benefits of condemning property. Id. at 140. This is a reason to be cautious about increasing compensation since such increases may not deter governments and put the public fisc at greater risk. Id. at 140-41. In Kelo, for example, the New London Development Corporation planned to lease the condemned property to a private developer for $1/year for ninety-nine years. 545 U.S. 469, 476 n. 4 (2005). Further, in some cases the “takers” are spending other governments’ money, so the takers have little incentive to behave rationally economically. The Poletown project, in which the City of
What accounts for the “unprecedented” and “outraged” public backlash that exercise of eminent domain authority has nevertheless engendered? Scholars and others have offered several explanations. First, there are what Professor Garnett and others have referred to as “dignatory harms.” For example, people are suspicious that government is playing favorites and advantaging some private parties at the expense of others. In *Kelo*, many critics believed that the government was giving a break to a powerful actor. Some scholars have suggested that this can cause resentment. To some extent related, an owner may feel that it is being required to give up something of importance even though the owner will not share any benefits of the new use, because the owner’s displacement makes it unlikely the owner will enjoy the benefits of the project. Further, Professor Garnett suggests that “[o]wners may feel unsettled and vulnerable when they learn that the government plans to take their property” – eminent domain “eviscerates the physical autonomy” inherent in ownership of private property and it deprives an owner of the “most essential right” to exclude others. In short, “the nature

Detroit was receiving financing almost entirely from the federal and state governments, and the funding was non-fungible (it was available only for this project), is an example. William A. Fischel, *The Public Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 943-44 (2004); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101,141-42 (noting that *Kelo*, in which State funds were a significant part of the financing, is another example and that eminent domain would become a “much less attractive economic development tool” if local governments internalized the cost of their takings).

128 Garnett, supra note 31, at 109-11 (referring to emotional reactions that stem from condemnations that depart from traditional public uses as “dignatory harms.”)

129 Garnett also characterizes this as an “expressive harm,” the owner may perceive the taking as an insult. *Id.* at 145 (2006). The ultimate use involved obviously affects the existence and extent of this type of dignitary harm. In their study Professor Nadler and Diamond hypothesized that it mattered to people whether their property was being taken for an archetypal public use like a school or hospital rather than for a use that benefits private parties. Janice Nadler & Shari Seidman Diamond, 5 J. OF EMPIRICAL LEGAL STUD. 713, 726 (2008).

130 Michael Rikon, *Bulldozers at Your Doorstep: The Debris of Kelo v. City of New London*, in CURRENT CONDEMNATION LAW: TAKINGS, COMPENSATION, AND BENEFITS (2nd ed. 2006). The focus of much of this criticism has been that the government has inappropriately expanded the concept of “public use” and that existing procedures, including judicial review, do not provide adequate constraints. See e.g., D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 295 (2006); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2101 (2009). (noting that “Kelo’s holding that the Public Use Clause of the Fifth Amendment allows the taking of private property for transfer to new private owners for the purpose of promoting ‘economic development’ was denounced . . . “). However, there also is evidence that the plaintiffs were “holdings:” they simply wanted to sit in their homes because of their strong, subjective attachment to the property. Janice Nadler & Shari Seidman Diamond, 5 J. OF EMPIRICAL LEGAL STUD. 713, 721 (2008).


of the government's action. . ." provides several grounds why its exercise of eminent domain authority may be of concern to citizens.\textsuperscript{134}

Further, concerns about the fairness of eminent domain may be amplified because it disturbs peoples’ “subjective attachment” to their property, especially homes. There is a growing literature on the special status of homes in American culture and the “subjective value” people attach to them. The concept of “home” “evokes thoughts of . . . family, safety, privacy, and community.”\textsuperscript{135} The common-law adage “A man’s home is his castle” captures the cultural attachment to homes; Professor Barros suggests that the “psychology of home” has roots beginning in the Middle Ages.\textsuperscript{136} Scholars have suggested that because homes are “sources of feelings of rootedness, continuity, stability, permanence, and connection to larger social networks”\textsuperscript{137} dislocation from a home can have a “strong negative psychological impact on many people.”\textsuperscript{138} Feelings of loss may be particularly significant or severe when the move is involuntary.\textsuperscript{139} Some scholars have argued that retaining possession of a home represents a particularly important value that deserves embodiment in the law. Margaret Jane Radin’s “personhood theory,” for example, urges that possession of homes deserves priority against competing interests because of the personal connection people form to their homes.\textsuperscript{140} Lending empirical support for the idea that people often attach subjective value to property, in their experiments Professors Nadler and Diamond found that “it is clear that a significant portion of the participants in their experiments did view the land as possessing substantial additional subjective value. . .”\textsuperscript{141}

In a wide range of areas of the law, our legal system tailors its treatment of homes to the special affinity we attach to them. In other words, we give special legal status to homes in a broad spectrum of settings.\textsuperscript{142} Thus, constitutional protections against

\begin{itemize}
\item \textsuperscript{135}D. Benjamin Barros, \textit{Home as a Legal Concept}, 46 SANTA CLARA L. REV. 255, 259-60 (2006). Barros points to special constitutional protections for homes, special tax treatment, special protections under debtor-creditor law and landlord-tenant law.
\item \textsuperscript{139}Barros suggests that Radin overstates the personal connection people have to homes. He also points out that different people relate to homes differently and in some cases people may not suffer from dislocation.
\item \textsuperscript{141}Janice Nadler & Shari Seidman Diamond, 5 J. OF EMPIRICAL LEGAL STUD. 713, 731 (2008). \textit{See also} Gideon Parchomovsky & Peter Siegelman, \textit{Selling Mayberry: Communities and Individuals in Law and Economics}, 92 CALIF. L. REV. 75, 77 (2004) (noting that property may be worth more or less because of a sense of community and that property should not be viewed atavistically).
\item \textsuperscript{142}See generally D. Benjamin Barros, \textit{Home as a Legal Concept}, 46 SANTA CLARA L. REV. 255 (2006) supra note ___ (providing in-depth coverage of situations in which homes are treated differently (and more favorably) than other property).
\end{itemize}
searches have special salience when a search involves a home;\textsuperscript{143} the tax code affords special treatment of homes in order to encourage home ownership;\textsuperscript{144} and post-
foreclosure laws protect possession of a home, to name a few.\textsuperscript{145} Courts in divorce cases have recognized the \textit{sui generis} nature of homes, in some cases making it clear that they want the custodial parent to retain the home in order to minimize the disruption the divorce causes to children. As one court put it:

The value of the family home to its occupants cannot be measured solely by its value in the market-place. The longer the occupancy, the more important these non-economic factors become and the more traumatic and disruptive a move to a new environment is to children whose roots have become firmly entwined in the school and social milieu of the neighborhood.\textsuperscript{146}

One scholar concludes that “the pervasiveness of the special treatment of homes [in multiple areas of law] suggests the existence of a strong cultural consensus that homes are uniquely important. . . .”\textsuperscript{147} In short, the subjective value that people attach to homes may be another reason for the outrage that governments’ exercise of its eminent domain authority sometimes occasions, particularly when a government uses its authority to uproot someone from their home.

A third commonly invoked explanation for disaffection with use of eminent domain authority is the limited amount of compensation paid. In eminent domain cases, “fair market value” is typically the benchmark or measure used to determine the amount of compensation to be paid to the owner.\textsuperscript{148} Fair market value may undercompensate


\textsuperscript{144}D. Benjamin Barros, \textit{Home as a Legal Concept}, 46 SANTA CLARA L. REV. 255, 304 (2006). (“A focus on home ownership and citizenship is reflected in the favorable treatment given to homes in the Internal Revenue Code, most notably by the deduction allowed for interest on home mortgages and by the large exemption given to capital gains realized on the sale of homes.”)

\textsuperscript{145}D. Benjamin Barros, \textit{Home as a Legal Concept}, 46 SANTA CLARA L. REV. 255, 283 (2006). (“All states recognize the debtor’s right to purchase the home prior to foreclosure and many states have redemption statutes that allow the homeowner to buy the home back from the foreclosure-sale buyer within a period of time after the foreclosure sale is completed.”).


\textsuperscript{148}See Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988) (Judge Posner noting that “‘Just Compensation’ has been held to be satisfied by payment of market value . . .); Fla. Stat. § 73.071; Cal. Code Civ. Proc. § 1263.310 (“Measure of compensation: Compensation shall be awarded for the property taken. The measure of this compensation is the fair market value of the property taken.”). The IRS defines fair market value as “the price that property would sell for on the open market. It is the price that would be agreed on between a willing buyer and a willing seller, with neither being required to act, and both having reasonable knowledge of the relevant facts.” I.R.S., Pub. No. 561, Determining the Value of Donated Property (Apr. 2007), available at http://www.irs.gov/publications/p561/art02.html#doc216. Cf. Garnett, supra note 31, at 103, 121-1328, 130, 143-148 (noting that fair market value is what is required but in at least some cases payments exceed FMV).
owners for several reasons, as many scholars have emphasized. First, fair market value may not include relocation costs, goodwill (for businesses), or various displacement costs, such as the unavailability of comparable housing. In addition, the “inability to say no” prevents an owner from enjoying the ability to hold out if the owner thinks that the property may increase in value in the future and this expectation affects the owner’s valuation of the property. Under a property rule owners would have the ability to insist on negotiating this expectation into the purchase price and to reject a deal if the terms did not do so. Fair market value also does not include compensation for dignatory harms. In addition, fair market value typically does not include more “subjective” factors that lead owners to attach value to a home that differs considerably from the “market” price. As Professors Nadler and Diamond and many others have pointed out, “[i]n many instances . . . the value of the property to the owner, or the subjective value, might exceed – and in some cases greatly exceed – the fair market value of the property.” Or as they put it more pithily, “[a]lthough market pricing sees real property as fungible, people do not always share that view.” Nadler and Diamond offer a series of reasons why a property owner might attach to a home “subjective value” that exceeds the fair market value, including:

the improvements they have made over the years using their own labor and design ideas; the memories inexorably connected with the property, including milestones like births, birthdays, and weddings, along with mundane but no less important memories of everyday living; proximity to friends and family; connection with others in the neighborhood that leverage social capital; expression of personality; and the ability of a home to provide the opportunity to maintain and express personal and group identity.

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150 Garnett, supra note 31.


153 Janice Nadler & Shari Seidman Diamond, Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity, 5 J. OF EMPIRICAL LEGAL STUD. 713, 721 (2008) (citations omitted). For a discussion of the impact of community on property values, see Gideon Parchomovsky & Peter Siegelman, Selling Mayberry: Communities and Individuals in Law and Economics, 92 CALIF. L. REV. 75 (2004). Some of the variables that commentators have suggest increase sentimental value include its use as a residence and the length of time of ownership. See e.g., John Fee,
In sum, law in the eminent domain arena not only does not “protect possession of a home” because it inherently rejects a property rule approach, its liability rule underpinnings sometimes enables governments to under-compensate the owner by paying only fair market value for requiring the owner to give up his property. The valuation of property taken by eminent domain is “problematic” because it fails to address subjective value, dignitary harms, and other values.

In fact, courts in eminent domain cases have recognized that “fair market value” does not fully compensate an owner in many cases because of sentimental values the owner holds. Justice Posner, for example, notes that “[w]hen the taken property is a home... market value compensation fails to compensate the owner for the personal interest in the home.” Even as it has upheld the market value standard the Supreme Court has recognized that this standard fails to provide full compensation to the owner.

In light of these concerns with the use of eminent domain authority, “[i]t is no wonder that the eminent domain legal regime has spawned disaffection with the legal system that has caused commentators to characterize the legislative and public response to eminent domain law as ‘loud and furious,’” as one scholar puts it. Reflecting this

Referring Eminent Domain, in EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT 125,133 (Dwight H. Merriam & Mary Massaron Ross eds., 2006) (“It is common for many people, particularly those who have lived in their home for many years, to value their own homes at significantly more than assessed market value.”). As indicated, eminent domain turns on its head the “property rule” concept that a person has autonomy to make decisions concerning ownership and possession of a home. See supra note __. In upholding a broad definition of public use in Kelo, the Court made it clear that states have the flexibility to impose more stringent limits on public use than required by the Fifth Amendment. Kelo v. City of New London, 545 U.S. 469, 478 (2005).


Janice Nadler & Shari Seidman Diamond, 5 J. of Empirical Legal Stud. 713, 723 (2008) (noting that valuation is problematic because it tends to set compensation at fair market value, which does not consider subjective value and dignitary harms); cf. Nicole Garnett, supra note 31, 105, 121-26 (suggesting that “the risk of undercompensation has been overstated. . . .” and questioning whether undercompensating is a “serious problem” and also summarizing various federal and state “legal entitlements to above-market competition.”).

Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988) (noting that “[c]ompensation in the constitutional sense is therefore not full compensation, for market value is not the value that every owner attaches to his property.)


D. Benjamin Barros, Home as a Legal Concept, 46 Santa Clara L. Rev. 255, ___ (2006). Nadler and Diamond found that their participants thought it was “less moral for the government to ask [people who had owned a land for a long time (100 years)] to move than those who owned the land for [a brief period of time (two years)].” Janice Nadler & Shari Seidman Diamond, Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity, 5 J. of Empirical Legal Stud. 713, ___ (2008). Related, term of ownership and type of proposed use affected the extent to which participants thought the government’s motives were good. Those who owned the property for a long time were
disaffection forty-three states have adopted post-Kelo revisions purportedly to limit eminent domain authority. The “Kelo backlash,” as one scholar has characterized it, “probably resulted in more new state legislation than any other Supreme Court decision in history.” Yet disaffection persists.

Our findings about the salience of procedural justice features, discussed in Part III, offer an alternative framework for reducing dissatisfaction with governments’ exercise of eminent domain power to the normative recommendations for reforming eminent domain law that are commonly in play. We briefly summarize below three other options for reducing disaffection before offering some thoughts about how our findings might help to ameliorate concerns.

One strategy to reduce dissatisfaction with eminent domain is to abandon use of such authority. Conceptually, eminent domain transforms property ownership from what one might characterize as a property rule to a liability rule. That is, instead of a property owner’s being able to make the decision to retain or sell his property on his own (a property rule), eminent domain divests an owner of the power to make this threshold decision, leaving the owner with a liability rule-based remedy of compensation. As Nadler and Diamond have nicely described it:

The vulnerability associated with being targeted for a nontraditional condemnation violates the traditional understanding of land that gives the owner a right to exclude all others, to give up ownership only if he or she chooses, and to set the price at which the owner is willing to sell. . . . Eminent domain, as a


165 See supra note 8 (discussing the variability in approaches that highlights the importance of paying attention to context in formulating possible fixes. Jurisdictions differ in the procedures they use for eminent domain, and also in the alternative procedures they have established). Actions to operationalize our proposed procedural justice-based framework in particular contexts obviously should occur with this variability in mind. To extend Professor Garnett’s observation, jurisdictions have developed processes for eminent domain that incorporate several “procedural justice” features of the sort we discuss in this article. We do not purport to evaluate particular procedures in use in different jurisdictions, or the extent to which such procedures address the issues we raise in this article. Garnett, supra note __, at 104.

general matter, violates that expectation by both forcing the sale and setting the price. The property owner faced with an exercise of eminent domain has a right only to compensation – a liability rule that entitles the injured party to damages – rather than the right to prevent the transfer – a property rule that would enable the property owner to avoid being injured at all.  

An extreme default position is to flip the status quo completely from a liability to property rule on the ground that personal interest in property should trump other interests and, therefore, only willing sales should be allowed. This “fix” would effectively eliminate use of eminent domain authority. Such an approach raises obvious efficiency concerns, as has been discussed elsewhere. This extreme default position, which has won few adherents, seems unlikely to be put in place and we do not spend more time on it. Our focus, instead, is on whether there are ways to “save” eminent domain in terms of public acceptability without abandoning it as a policy option.

Professor Garnett notes that the fixes attempted to date to address complaints about eminent domain authority have primarily focused on one of two strategies – narrowing the scope of eminent domain authority (e.g., by defining “public use” narrowly) or making it more expensive for governments to exercise such authority by increasing the amount of compensation required. Beginning with the former, the Fifth Amendment only allows a government to take private property for “public uses.” Commentators have offered a broad range of creative approaches to limit the public uses for which governments may use eminent domain authority. Barros, for example, cites

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167 Nadler & Diamond, supra note __, at 723.
168 Radin seems to argue for this default position. Margaret Jane Radin, Property and personhood, 34 STAN. L. REV. 957, ___(1982); D. Benjamin Barros, Home as a Legal Concept, 46 SANTA CLARA L. REV. 255, 282 (2006). Nadler and Diamond speculate that the lack of a property rule, and the resulting limits on an owner’s leverage, may explain the “general antipathy to eminent domain and why the public found Kelo so objectionable.” Nadler & Diamond, supra note __, at 723.
169 See e.g., Gideon Parchomovsky & Peter Siegelman, Selling Mayberry: Communities and Individuals in Law and Economics, 92 CALIF. L. REV. 75, 77 (2007) (summarizing the literature that identifies concerns with a property rule and favors a liability rule approach). Despite the significant amount of legislative activity following the Kelo decision, no jurisdiction has abandoned eminent domain authority entirely. Professor Somin’s criticism is to the opposite point – that such legislation has done little to circumscribe such authority. Ilya Somin, The Limits of Backlash: Assessing the Political Response to Kelo, 93 MINN. L. REV. 2100, 2105 (2009). Professor Garnett alludes to this fix in the limited context of properties with high subjective value. Garnett, supra note __, at 111-19 (noting that a “third possibility” is that governments “simply may avoid taking properties with high subjective value.”)
170 We acknowledge the possibility that the use of a liability rule rather than a property rule, and the power distribution it represents may be a significant cause of dissatisfaction. Nadler & Diamond, supra note __, at 723 (NOTING THAT “[t]he difference in power . . . makes it understandable that property owners prefer a property rule to a liability rule [and] . . . [i]t may also explain the general antipathy to eminent domain and why the public found Kelo so objectionable”).
171 Garnett, supra note __, at 110 (noting that “[a]cademic discussions tend to assume that there are two ways to minimize the risk of undercompensation,” referencing the two discussed in the text).
172 See supra note __.
arguments that eminent domain could be made available only after a finding that the property could not be purchased voluntarily and that there is no reasonable alternative course of action that would achieve the same public goal (this is in some ways similar to the Clean Water Act § 404 “no practicable alternative” approach). The Kelo facts, in which the government exercised its eminent domain authority to buy out private land owners whose homes could in no way be considered “blighted,” in order to re-sell the property for redevelopment to another private party, Pfizer, the world’s largest pharmaceutical manufacturer, embody some of the variables that critics have recommended be addressed in urging that use of eminent domain authority be restricted - no resales to private parties, a requirement that properties be blighted as a condition precedent for use of eminent domain, etc. Conceptually, limiting the scope of eminent domain by narrowing the circumstances in which a government may exercise such authority qualifies as a property rule approach to reform because it enables an owner not to sell his property unless he chooses to. While narrowing the scope of “public uses” for which eminent domain may be used is clearly an option and has received considerable attention, Professors Nadler and Diamond’s finding that respondents were “only moderately sensitive to the purpose” of a taking raises questions about the extent to which reforms based on limitations in uses may be enough on their own to address disaffection.

A third strategy to address disaffection involves a normative fix to eminent domain law that focuses on the other key requirement in the Fifth Amendment for use of eminent domain authority, notably the requirement that “just compensation” be paid. Increasing compensation qualifies as changing the content of the liability rule that governs use of eminent domain authority. This fix involves changing how just

Garnett suggests that “most of the state and federal proposals under consideration would impose substantive limits on the eminent domain power . . . .” Garnett, supra note __, at 105.

175 Kelo, 545 U.S. at __. For one of many summaries of the Kelo facts, see Nadler & Diamond, supra note ___ at 718-19 (2008).


177 Garnett, supra note __, at 137; Nadler & Diamond, supra note __, at 723.

178 Garnett, supra note __, at 103 (noting that Kelo “prompt[ed] federal and state efforts to impose legislatively the restrictions on eminent domain that the Supreme Court rejected in Kelo.”); Somin, supra note __.

179 Nadler & Diamond, supra note __ at 742-45 (noting that they found “little effect of the purpose of the taking on willingness to sell . . . .” and that the plaintiffs’ relationship to their property in Kelo, even more than the nature of the public purpose at issue, may have encouraged public outrage.”). Along the same lines, they suggest that the owners’ relationship to the property may be more salient than the public purpose at issue to the legitimacy of the action. Id. at 745. Other commentators have similarly suggested that narrowing public use will not ameliorate dissatisfaction with use of eminent domain authorities because the “real problem” has to do with the requirement of “just compensation.” John Fee, Reforming Eminent Domain, in EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT 125,126 (Dwight H. Merriam & Mary Massaron Ross eds., 2006) (suggesting that “the current injustices in eminent domain are not primarily the product of an unreasonably broad concept of public use. Rather, the root of the problem lies with the current system’s failure to require adequate compensation.”)

180 See supra note __.

181 Garnett, supra note 31, at 137; Nadler & Diamond, supra note 31, at 723.
compensation is measured. A variety of prominent scholars have suggested that “more money” is an answer to the eminent domain conundrum. For a few proposals, see e.g., Robert C. Ellickson, Alternatives to Zoning: Covenant, Nuisance Rules and Fines as Land Use Controls, 40 U. CHI. L. REV. 681, 736-37 (1973) (urging a system of legislatively-defined schedules that would provide additional compensation beyond market value); D. Benjamin Barros, Home as a Legal Concept, 46 SANTA CLARA L. REV. 255, 300 (2006) (suggesting as possible additional sources of compensation providing moving expenses, providing reasonable attorney’s fees if an owner successfully challenges the government’s valuation, and providing a sliding scale premium based on the length of residence in the home. Barros contends that each approach would “come closer to making the homeowner whole” and would “provide incentives for governments to obtain property through voluntary market transactions rather than through eminent domain and to take homes only when truly needed for the public interest.”); John Fee, Reforming Eminent Domain, in EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT 125,134 (Dwight H. Merriam & Mary Massaron Ross eds., 2006) (suggesting a “tort”-like, case-by-base approach, or a “statutory formula that approximates certain damage elements” such as a formula that establishes emotional damages as a percentage of market value based on length of ownership). Cf. Nicole Garnett, The Neglected Political Economy of Eminent Domain. 105 MICH. L. REV. 101, 104 (2006) (concluding that “universal disregard for how eminent domain works outside of the courtroom may have led previous commentators – again, including me – to overstate the undercompensation problem.”

With some exceptions, however, proposed fixes to this valuation conundrum have largely founndered to date. Because of the significant challenges in incorporating “sentimental value” and other factors into the eminent domain process, the Supreme Court has been reluctant to switch from the obviously second best extant scheme of market valuation. In 564.54 Acres of Land the Court highlighted the “serious practical difficulties in assessing the worth an individual places on particular property at a given

182 For a few proposals, see e.g., Robert C. Ellickson, Alternatives to Zoning: Covenant, Nuisance Rules and Fines as Land Use Controls, 40 U. CHI. L. REV. 681, 736-37 (1973) (urging a system of legislatively-defined schedules that would provide additional compensation beyond market value); D. Benjamin Barros, Home as a Legal Concept, 46 SANTA CLARA L. REV. 255, 300 (2006) (suggesting as possible additional sources of compensation providing moving expenses, providing reasonable attorney’s fees if an owner successfully challenges the government’s valuation, and providing a sliding scale premium based on the length of residence in the home. Barros contends that each approach would “come closer to making the homeowner whole” and would “provide incentives for governments to obtain property through voluntary market transactions rather than through eminent domain and to take homes only when truly needed for the public interest.”); John Fee, Reforming Eminent Domain, in EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT 125,134 (Dwight H. Merriam & Mary Massaron Ross eds., 2006) (suggesting a “tort”-like, case-by-base approach, or a “statutory formula that approximates certain damage elements” such as a formula that establishes emotional damages as a percentage of market value based on length of ownership). Cf. Nicole Garnett, The Neglected Political Economy of Eminent Domain. 105 MICH. L. REV. 101, 104 (2006) (concluding that “universal disregard for how eminent domain works outside of the courtroom may have led previous commentators – again, including me – to overstate the undercompensation problem.”)

183 Nadler & Diamond, supra note __, at 724 (summarizing several proposals).


186 Nadler & Diamond, supra note __, at 724. See also James E. Krier & Christopher Serkin, Public Ruses, 2004 MICH. ST. L. REV. 859, 865-68 (2004) (suggesting that compensation should be tied to the “publicness” of a project – the more public, the less compensation should be provided). For one review of laws that require payment of more than fair market value, see Garnett, supra note __, at 105.

187 There are, of course, some exceptions. As noted above, see supra note __, there is enormous variability in eminent domain processes and in valuation approaches. For examples of several communities that provide for compensation well above market value, see e.g.,Timothy J. Dowling, How to Think About Kelo After the Shouting Stops, 38 URB. LAW. 191, 198 (2006); John Fee, Reforming Eminent Domain, in EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT 125,133, 136 n. 25 (Dwight H. Merriam & Mary Massaron Ross eds., 2006) (noting that “[s]ome eminent domain statutes provide additional elements of compensation, such as relocation expenses, but [also noting that] even these usually come far short of fully compensating affected owners.”)

188 See e.g., Garnett, supra note 31, at 147.
time” and justified using market value as a proxy as a result. Judge Posner makes this point as well:

Many people place a value on their homes that exceeds its market price. But a standard of subjective value in eminent domain cases, while the correct standard as a matter of economic principle, would be virtually impossible to administer because of the difficulty of proving . . . that the house was worth more to the owner than the market price.”

Process changes that bolster legitimacy may be helpful even if changes in valuation formulae are implemented that lead to more compensation and increase satisfaction as a result. Nadler and Diamond opine that while increased compensation might help diffuse public outrage, Kelo and “its accompanying backlash” suggest that “the divide between the law of property and the psychology of property is about more than just money.” Based on their experiments, they conclude that, for some people, increasing compensation to incorporate subjective valuation was “wholly insufficient.”

The bottom line is that, to date, none of these three fixes to ameliorate public “outrage” with exercise of eminent domain authority has succeeded. We haven’t eliminated use of eminent domain in order to save it; efforts to limit use of eminent domain authority have been uneven and there is some evidence that such a strategy is not likely by itself to significantly ameliorate disaffection; and the methodological challenges associated with increasing compensation has complicated use of such an approach.


190 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 531 (6th ed. 2003) ; Merrill, 72 Cornell L. Rev. 61, 83 (identifying a “subjective premium” that owners may place on their property).

191 Nadler & Diamond, supra note __, at 715.

192 Id. at 715, 723 (concluding that in some cases “no amount of money” would compensate for loss of a person’s property, and finding that the strength of the owner’s ties to the property, including length of time of ownership, was a significant factor concerning willingness to sell); Garnett, supra note __, at 150 (suggesting that “at best,” compensation reforms may minimize dignitary harms).

193 See supra note __.

194 See Nadler & Diamond, supra note __, at 723 (2008). Professor Somin concluded that many of the responses to Kelo have been “largely symbolic in nature, providing little or no protection for property owners.” Ilya Somin, The Limits of Backlash: Assessing the Political Response to Kelo, 93 MINN. L. REV. 2100, 2105 (2009).
Our findings, discussed in Part III, suggest that revamping eminent domain processes so that participants and others view them as more “fair” or “just” may help to promote satisfaction. 195 Rather than focus exclusively on the concepts that have received most of the attention to date, notably adjustments to property rules (e.g., limits on public use) or liability rules (e.g., changing regimes for determining compensation), 196 attention to process holds potential for ameliorating high levels of dissatisfaction with eminent domain procedures, 197 and others that involve highly salient sentimental values. 198

Nadler and Diamond suggest the promise of a procedurally-oriented approach as well, while acknowledging that much remains to be learned to determine which changes will be most effective. After concluding that subjective attachment affects perceptions of justice, and in particular “reveal[s] the limits of case law and traditional economic analysis in understanding Kelo and eminent domain,” they suggest that “a more democratic model for the law and policies dealing with takings” holds promise for enhancing legitimacy. 199 They continue:

195 As Professor Garnett suggests, given the variability of eminent domain practices and their opaqueness, “[m]ore study is needed to understand how eminent domain works in practice” in particular jurisdictions in developing specific plans for reform. Garnett, supra note __, at 149. Many eminent domain situations are resolved through precondemnation proceedings, in some cases because the law obligates the government to negotiate before using eminent domain. Id. at 126 (noting that the compensation an owner receives “almost always results from a bargain between the owner and a Taker, rather than a judicial determination of the property’s fair market value. State and federal laws require Takers, in most instances, to seek to purchase property on the market before resorting to eminent domain.”).
196 See supra note __.
197 Our approach is not exclusive; we are not proposing an either/or set of strategic options in which policy makers have to choose one of changing their methodologies for calculating a “just” compensation; restricting the use of eminent domain authority; or our third approach. Instead, we view our approach as complementary in the sense that it gives policy makers an additional tool to consider in attempting to improve decision-making when sentimental values are highly sentient. It goes without saying that the value of new or revised procedures in bolstering the procedural justice of the procedures used depends on the extant procedures as well as on the changes made. As indicated above, procedures vary considerably throughout the country. See supra note __; Garnett, supra note 31, at 105, 126-30; 13-G2A Nichols on Eminent Domain § G2A.03 Taking Procedure in the Fifty States and the District of Columbia, State Procedures (Matthew Bender & Company, Inc. 2010). Our article provides a framework-level review of litigation as a procedure rather than a review of particular procedures used in particular jurisdictions. As Professor Garnet has noted, “the negotiations between property owners and Takers are opaque and decentralized, [so] it is difficult to obtain information about how the bargaining process works.” Id. at 130. She suggests that “quick-take” procedures, which permit the government to obtain title before a final judgement in an eminent domain action, may be particularly problematic from a procedural justice perspective because they do not include a right to be heard before the government acts and may “preclude the effective exercise of ‘voice. . . .’” Id. at 128. In terms of possible complementarity of approaches, Garnett recognizes that more money may often not be enough when dignitary harms are high, such as when the government requires the sale of land from one private party to another. Id. at 137.
198 It is well established that plaintiffs in a wide range of settings often have non-monetary interests, including in the medical malpractice, torts, divorce, general injury, and small claims arenas. Tamara Relis, It’s not about the Money!: A Theory on Misconceptions of Plaintiffs’ Litigation Aims, 68 U. Pitt. L. Rev. 701 704 n.2 (2007); Gillian Hatfield, In Framing the Choice between Cash and Courthouse: Experiences with the 9/11 Victim Compensation Fund, 42 LAW & SOC’Y Rev. 3 (2008) (describing reasons why the 9/11 victim compensation fund is another arena in which non-monetary values are of substantial importance).
199 Nadler & Diamond, supra note 31 at 748.
In particular, our findings bear on previous discussions of how sentimental value or attachment to homes affects eminent domain proceedings. Based on our results, we propose that the best solution might not be to attempt to define value, but instead to alter the procedures to those that are widely perceived as being more protective of sentimental value. This change in procedure may result in a system that is perceived as being superior without the challenges inherent in defining each individual’s sentimental value for their home.200

Our study lends support to this conclusion and also offers some specific guideposts about the types of procedural changes that are likely to be most effective in persuading people that the process is fair and protects sentimental as well as monetary values. As we discuss in Part III, those features should include meaningful opportunities for voice, neutrality, and treatment with respect.201 Beyond this, our findings suggest that the search for voice must be a careful one because there are pitfalls if the “wrong” types of processes are adopted. Some opportunities for voice appear to be remarkably ineffectual, notably the types of voice provided by public hearings. Our respondents viewed public hearings to be relatively unacceptable as mechanisms for making decisions; further their view was that such hearings did not do an effective job of protecting either monetary or sentimental value.

Other scholars have offered insights about the types of “voice” that may be effective as well. Professor Relis, for example, in her study of different types of litigation, found a significant disconnect between the objectives of plaintiffs and their attorneys.203 This suggests that simply allowing lawyers for a party a voice may not be enough to satisfy the party that his or her views have been heard. Professor Relis’s findings that a client’s sentimental values are especially likely to receive short shrift from the client’s lawyers and, as a result, from the relevant tribunal, reinforce the need to think twice before concluding that voice for a lawyer will be deemed by a client to be voice for the client.204 A plaintiff for whom sentimental value is important is unlikely to have those
issues vetted effectively by his or her attorney and is unlikely to feel that (s)he has had a voice.\footnote{205}

Gillian Hatfield makes some of the same points in connection with administration of the 9/11 fund. She reported finding that potential claimants (people who had been injured by the 9/11 terrorist attacks or lost a family member) “saw much more at stake than monetary compensation.”\footnote{206} Hatfield noted that some, including Ken Feinberg, who served as Special Master for the Victim Compensation Fund (VCF), had effectively “equat[ed] . . . litigation interests with monetary interests” and suggested that such a characterization is “increasingly common in the legal profession.”\footnote{207} Like Professor Relis, Professor Hatfield suggested that while lawyers often see issues in terms of a “financial calculation,” for some potential claimants that was not the case.\footnote{208} Instead, she suggests that in the VCF context “litigation represents more . . . than a means to satisfying private material ends; it represents principled participation in a process that is constitutive of a community.”\footnote{209}

Our study both supports and builds on the foundation that Nadler and Diamond have laid in the eminent domain context, and which Relis and Hatfield have helped to create in other legal arenas in which sentimental values are salient. Their work, in different arenas, suggests that a reality of the legal process is that it does not focus particularly well on non-monetary values and that this had led to dissatisfaction by participants. Our findings both lend support to that view, and also offer a promising path for improvement by suggesting that careful incorporation of key procedural justice features may help to reduce disaffection.

\footnote{205} Professor Relis found that even when plaintiffs’ putative objectives are “transformed” into aims that their lawyers believe are legally realistic, “plaintiffs’ extra-legal aims of principle do not dissipate after dispute transformation by their lawyers. . . .” Id. at 706, 728 (noting that her findings “negate arguments that lawyers’ conditioning of plaintiffs on legal system ‘realities’ results in claimants materially revising the aims of principle they seek from the justice system.”). Relis acknowledges that her data, while “providing one of several windows on motivation,” adds to the “scant depth research on the needs of plaintiffs and why they sue.” Id. at 707 n.14 (2007). Our study should be viewed in a similar light: we provide a window on peoples’ perceptions that adds to the research on the perceptions of stakeholders.

\footnote{206} Hatfield, supra note __, at 2.

\footnote{207} Id.

\footnote{208} Id. at 4, 21-24 (noting that “[i]t was clear that [for some respondents], litigation was not about pursuing a pot of gold. . . . Rather, the choice as they saw it was about relinquishing gold in favor of something they saw as more important.” People chose to litigate, rather than be compensated for losses from the VCF, because they wanted information about the terrorist attacks and related events, because they wanted accountability for wrongdoing that had enabled the attacks to occur, and because they wanted to promote change so that the “system” worked better. Fairness or reasonableness of Fund payments played a relatively small role in at least some respondents’ decision as to whether to accept such payments. Non-monetary payments played a much more significant role).

\footnote{209} Hatfield, supra note __, at 6. Hatfield’s focus is on prospective plaintiffs in litigation which is, to use her term, a different framing than for owners in eminent domain situations. Id. at 21-23.
Conclusions

The findings of our study provide support for several important insights into policy design. First, process design needs to be approached contextually. Stakeholders value processes differently depending on the values at stake. As a result, the values held by relevant stakeholders should influence policy design. Second, as a normative matter, when sentimental values are important, procedural justice is particularly important to stakeholders. Moreover, a particular aspect of procedural justice, notably trust in the decision maker, is especially important to engender satisfaction with the procedures used. In contrast, when monetary values predominate a different aspect of procedural justice, notably neutrality, stands out in importance in influencing satisfaction. Third, our findings indicate that people do not view the acceptability of decision-making procedures in a vacuum. Instead, an exogenous variable, notably a person’s degree of trust in government, affects the person’s satisfaction with resolving disputes using a particular type of decision-making process. A person with low levels of trust in government is likely to distrust a process that vests power in a government decision-maker; instead, processes that vest power elsewhere are likely to be attractive (such as the referendum process we asked about). We consider our findings in the context of a particularly contentious legal arena, eminent domain law, and suggest that our findings offer a framework based in the procedural justice literature for reducing extant levels of public outrage that may complement the search for outcome-based reforms that has received the vast majority of attention so far.