Just Compensation and Just Politics

Saul Levmore
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Perhaps no area of law is as well-known and as little understood as takings law. Most citizens know that when the government takes a piece of property it must compensate the previous owner, but only lawyers know the extent to which courts have struggled with the question of regulatory takings, or what to do when government actions burden, rather than completely displace, property owners. In this article, I explore some of the mysteries of takings law, and I develop both a positive theory about some of its rules and a normative argument about modern interest group politics.

I. BURDENS AND BENEFITS

Consider, first, an issue that is seemingly far removed from any cases or statutes that we study as the law—the puzzle of the location

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and nature of the dividing line between politics and markets. Governmental projects often include some actions that involve market participation of the familiar private sort, some that involve the power of the state to take private property while compensating for its pre-taking value, some that draw on powers of the state, such as the police and taxing powers, to burden without compensation, and some that might best be described as treating some citizens more generously than others through a process we call politics. Thus, a decision to build new missiles may involve contracts for the production of these armaments that resemble purely private procurement contracts, and it may require the use of the condemnation power (combined with the obligation to compensate condemnees) to acquire land on which these missiles will be placed. It will almost surely draw on the familiar taxing power for financing. And it may make use of the police or some other power when it burdens neighbors of the new missile sites whose properties may drop in value as a result of the increased traffic on the nearby government land or of the perceived danger of living near a military installation. Finally, although the major contracts entered into for the production of these missiles may be negotiated at arm’s length, there are substantial economic benefits that may “spill over” to noncontracting parties. As such, the decision to award the contracts to some manufacturers, rather than to others, and the larger decision concerning the number of missiles to be built or, indeed, whether to build these missiles at all, is normally influenced by the elected representatives of the localities that expect positive spillovers from these contracts.

In short, governmental decisions generate burdens and benefits, some of which are compensated and some of which are not. Can anything be said that is descriptively useful or normatively defensible, either about when the government pays for the burdens it imposes or when the government is itself paid for the benefits it bestows? The traditional answer is that the government may always (subject only to the gentlest judicial review for arbitrariness) impose taxes or user fees through the appropriate legislative or other process, that it must al-

1. See, e.g., United States v. Miller, 317 U.S. 369, 377 (1943) (“The owners ought not to gain by speculating on probable increase in value due to the Government’s activities.”); Olson v. United States, 292 U.S. 246, 256 (1934) (“[V]alue to be ascertained does not include, and the owner is not entitled to compensation for any element resulting subsequently to or because of the taking.”).

2. See L. Tribe, American Constitutional Law 318-20 (2d ed. 1988) (discussing possibility that a “regulatory” tax will be invalid but noting that the Court’s modern interpretation of the commerce clause reduces the likelihood that even a regulatory tax would be struck down); Bitkover, Constitutional Limits on the Taxing Power of the Federal Government, 41 Tax Law. 3, 3 (1987)
ways pay fair compensation when it physically takes or invades private property, and that the law regarding compensation for "regulatory" decisions that reduce the value of private property is a mess.

By and large, the government can impose serious burdens without compensating citizens, such as those who must suddenly listen to highway noise or those who find their property values dropping as a result of zoning decisions, because courts will find that there was no taking of property, but rather the mere exercise of police power, often in the interests of health and safety, or of emergency power, or of the simple power to

(No limits on income taxation). For a modern example of the Court's willingness to allow a tax that is not evenhanded across states, see United States v. Ptasynski, 462 U.S. 74 (1983) (upholding exemption of Alaskan oil from windfall profits tax on account of the difficulty of its extraction).

3. L. Tribe, supra note 2, at 603 ("[Court's] obsession with permanent physical invasions of even the most de minimus variety borders on fetishism.").

4. On this, there is wide agreement. See, e.g., Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) ("[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."); Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Sup. Ct. Rev. 63, 63 ("a crazy-quilt pattern of Supreme Court doctrine on the law of expropriation"); Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149, 149 (1971) ("Few legal problems have proved as resistant to analytical efforts as that posed by the Constitution's requirement that private property not be taken for public use without payment of just compensation.").

There is reason to think that recent decisions have exacerbated the problem. See, e.g., Epstein, Takings: Descent and Resurrection, 1987 Sup. Ct. Rev. 1 (describing ways in which recent decisions will generate vexing litigation).

5. A classic statement of this justification is in Miller v. Schoene, 276 U.S. 272 (1928), where the Court said, "And where the public interest is involved preference of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." Id. at 279-80; see also Agins v. City of Tiburon, 447 U.S. 255 (1980) (upholding zoning regulations as exercises of city's police power to protect residents from the ill effects of urbanization); Village of Euclid v. Amberly Realty Co., 272 U.S. 365 (1926) (zoning ordinance must find its justifiation in some aspect of police power).

6. See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (ordinance regulating dredging and pit excavation as a safety measure held not to be a taking); Pierce Oil Corp. v. City of Hope, 248 U.S. 498, 500 (1919) ("The power [of a state to prohibit the sale of dangerous chemicals] is a continuing one, and a business lawful today may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good."); Reinman v. City of Little Rock, 237 U.S. 171 (1915) (regulation of livery stable upheld as within the range of state's power to legislate for the health and general welfare).

7. See, e.g., United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) ("War . . . demands the strict regulation of nearly all resources . . . . Its economic restrictions, temporary in character, are insignificant when compared to the widespread uncompensated loss of life and freedom of action which war traditionally demands."); infra text accompanying notes 76-78.
be rid of "noxious uses," or that the burdens were only consequential or pecuniary or the product of "change" or sufficiently minor so as not to deny a reasonable rate of return to private investors. But even if one avoids the variety among state constitutions and state courts and limits the generalizations to federal law, there are numerous exceptions and constraints, along with a cottage industry of commentary on the seemingly inconsistent results in each area of government intervention. As such, the safe answer to the question of when the government must compensate for the burdens it imposes is to say "always" when (discussing city's use of its "emergency powers" in time of financial difficulty to declare moratorium on redemption of bonds).


9. See, e.g., Bowles v. Willingham, 321 U.S. 503 (1944); Mitchell v. United States, 267 U.S. 341 (1925); Omnia Commercial Co. v. United States, 261 U.S. 502, 510 (1923) ("The conclusion to be drawn from these and other cases which might be cited is, that for consequential loss or injury resulting from lawful governmental action, the law affords no remedy."). The "consequential" label is, of course, an ambiguous one.

10. See, e.g., Joslin Mfg. Co. v. City of Providence, 262 U.S. 668 (1923) (injury to business carried out on taken land generally not an element of just compensation); A.G. Davis Ice Co. v. United States, 362 F.2d 934 (1st Cir. 1966) (evidence of lost profits too speculative or remote to be counted in condemnation proceeding).

11. See, e.g., Barbian v. Panagis, 694 F.2d 476, 486 (7th Cir. 1982) ("The Fifth Amendment does not insulate homeowners from bearing the costs of urban change.").

12. See, e.g., Agins v. City of Tiburon, 447 U.S. 255, 262-63 (1980) ("[T]he appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied appellants the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments."); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 136 (1978) (Penn Central able to obtain a "reasonable return" on its investment).

13. The just compensation requirement is, of course, applicable to the states. See Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897). State constitutional provisions are sometimes written or interpreted so that compensation is more generous to property owners affected by governmental actions. Forty-seven state constitutions expressly provide for compensation when land is taken (the remaining three—Kansas, North Carolina, and Virginia—have been judicially interpreted to do the same), and twenty-six require compensation when property is "damaged." R. Cunningham, W. Stoebuck & D. Whitman, THE LAW OF PROPERTY 510-11 n.4 (1984); Guy, Land Condemnation: A Comparative Survey of North Dakota Statutory Law, 51 N.D.L. REV. 387 (1974) (comparing constitutions, statutes, and judicial procedures); Comment, Rethinking Regulatory Takings: A View Toward a Comprehensive Analysis, 8 N. ILL. U.L. REV. 113, 113 n.2 (1987) (reporting variety in state constitutions). Although most of the arguments in this article, and in the larger positive theory of which this is a part, apply as well to state constitutional law, I will for the most part limit the discussion and the evidence to federal decisions and to federal politics.

14. It is also interesting to ask when the government chooses to compensate those who are burdened by its actions, even though courts would not have required it to do so. See, e.g., Hagman, Compensable Regulation, in WINDFALLS FOR WipeOUTS 256, 266-67 (D. Hagman & D. Misczynski eds. 1978) (discussing several examples of legislated compensation, in excess of that required by contemporary courts, such as that called for in the Highway Beautification Act, which
it physically takes property,\textsuperscript{15} and is not to respond otherwise. If one must guess as to the result in these cases of regulatory takings, the received wisdom is, first, to complain that the Supreme Court has created an area of law that is chaotic at best, and then to say that compensation is not normally required, but that it is more likely to be so compelled the more the government's actions affect "traditional property rights" and the more they reduce the value of the property in question down close to zero.\textsuperscript{16}

Although the question of when the government must pay for the burdens it imposes is one of the most familiar topics in the legal literature, the question of when and how the government extracts payments from localities and other minorities it benefits is virtually ignored.\textsuperscript{17} One can hardly question a majoritarian government's legal power to require payments. In the first place, the government need not do much at all, and it may be able to wait until the minority expresses a willingness to pay for benefits with one currency or another. And a clever government has many ways of raising revenue from all citizens while distributing benefits to favored constituents and denying similar benefits to citizens who are not part of the governing coalition.\textsuperscript{18} But more generally, the government can choose to finance some projects out of general taxes or borrowing while it decides that others should be paid for either through user fees, through specific taxes that fall roughly on those who enjoy a given set of projects, or through "special assessments" levied on those who (sometimes roughly and sometimes quite

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\textsuperscript{15} See supra note 3.


\textsuperscript{17} Broadly speaking, there is an enormous literature on this subject, much of it arising out of J. Buchanan & G. Tullock, The Calculus of Consent (1962). But at the level of real law, where the question is how much could be extracted out of some groups, and with what means, there is very little written. In the area of takings law, there is one well-known strand of work on expanding the tradition of special assessments, discussed below, in order to finance payments to those who are burdened by governmental actions by collecting from those who benefit. See generally Windfalls for Wipeouts, supra note 14.

precisely) will benefit from the specific project at issue. Thus, we find some roads and bridges paid for out of general revenues, some underwritten with tolls collected from actual users, many financed through taxes on motor vehicle fuels so that motorists in general pay for roads in a way that only roughly corresponds with marginal (or other) costs, and a very few funded by the owners of property adjacent to these roads through special assessments. A safe answer to the question of how a majoritarian government may raise money to build or maintain roads and other projects is to say that it has many options and that it can do pretty much as it pleases, subject only to familiar, distant constraints, such as those that bar obvious discrimination against interstate commerce and against groups that might successfully raise equal protection claims.

But the more difficult question is not when governments may extract payments for the benefits they provide, but rather when governments, in fact, do extract payments from those who specifically benefit from governmental actions. The only thing that can easily be said about this question is that governments could use special assessments and user fees more than they currently do, but little is known about why and when these devices are used.

19. I do not mean to insist that the true incidence of these or other taxes is an easy matter to analyze. Thus, fuel taxes may be passed through by truckers to those who consume the products transported on the highways. On the other hand, the higher shipping costs may stimulate substitution to more locally grown or manufactured goods, so that the real incidence of the original fuel tax is divided between consumers and some producers in an unknown way.

20. Fuel taxes (when used to finance road construction and maintenance) are perhaps the very best example of indirect user fees. Still, inasmuch as some roads are enormously more expensive to build than others, there must be a fair amount of cross-subsidization from some motorists to others. The winners are those who drive (or purchase goods that are shipped across) relatively few miles over expensive (mountainous, perhaps) roads. See R. Musgrave & P. Musgrave, Public Finance in Theory and Practice 197 (1973).


22. User fees are occasionally employed to raise funds for highways (toll roads), museums, parks, airports, courts, and a variety of other projects managed by governments. It is difficult, however, to generalize about why some of these charges are more popular in some jurisdictions than in others, and there are obviously many more areas where charges could be assessed. Unfortunately, there is little theoretical or empirical work on the subject and its possibilities. See generally Tax Found., Special Assessments and Service Charges in Municipal Finance (1970); Goetz, The Revenue Potential of User-Related Charges in State and Local Governments, in Broad Based Taxes 113 (R. Musgrave ed. 1973) (noting that, aside from charges related to higher education and roads, user fees are not of great quantitative importance and that the de-
In setting up these problems, I have alluded to the relationship between, or even to the symmetry of, these questions of revenue raising and of takings law. Perhaps the most straightforward way of expressing the connection between the topics is to think first of a framework in which politics and markets are regarded as entirely separate arenas. The fifth amendment\textsuperscript{23} can then be understood as providing that there are at least some actions, decided in the political arena, that must be carried out in a way that imitates the market. Condemnees entitled to compensation will, after all, receive value as it can best be deduced from previous or similar market transactions. One might say, in economic terms, that the government, a political entity, is forced to enter the market arena and purchase (certain) rights, but that, because its intentions can rarely be kept secret and because there are likely to be holdouts, the government may take, rather than bargain, if it pays a price that resembles that which would have been paid in a more ideal market, or bargaining, situation.\textsuperscript{24} For the present, it is sufficient to say that potential inefficiencies and abuses of the political process are averted by precommitting (otherwise political actors) to the market. Analogously, when a government project is financed through user fees, special assessments, and other means that charge beneficiaries, rather than citizens at large, one might again say that markets are substituted for politics. If the government were committed both to a broad view of takings law, so that it paid for many of the burdens it imposed, and to the regular use of user fees and special assessments, rather than to a broad tax base, then the government might be seen as operating under rules that were conceptually consistent. In such a case, majoritarian politics would consistently be checked by marketplace bargains. Citizens in such a society would be wary of lobbying for projects they did not wish to pay for, and, in this sense, politics would resemble markets.

\textsuperscript{ductibility of local taxes and not of user charges may have much to do with the small role played by these charges).}
\textsuperscript{23} The relevant part of the amendment reads: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
A good economic argument for eminent domain, although one with greater application to railroads and other right-of-way companies than to the government, is that it is necessary to prevent monopoly. Once the railroad or pipeline has begun to build its line, the cost of abandoning it for an alternative route becomes very high. Knowing this, people owning land in the path of the advancing line will be tempted to hold out for a very high price—a price in excess of the opportunity cost of the land.

\textit{Id.}
This relationship between the law of governmentally imposed burdens and that of governmentally provided benefits suggests that every theory of takings law should explain or at least struggle with the question of why the power to tax—without compensation, of course—is not fundamentally inconsistent with the constitutional obligation to compensate condemnees. If, however, a given tax were a good deal (even on average\textsuperscript{25}), so that, in return for the tax paid, one received benefits of equal or greater value, there would be nothing to explain. Takings law itself never requires like-kind exchanges, it simply requires the taker, in some instances, to return equal value. Specially assessed taxes (on beneficiaries) and, certainly, user fees can, thus, be described as takings (of money) that are coordinated with compensatory payments (in the form of services or other benefits).\textsuperscript{26} Broadly based taxes that are used to finance a range of projects, however, do not pretend to strike fair bargains with all taxpayers, but, instead, benefit some citizens and burden others. Thus, it seems sensible to wonder whether there is not some correlation between the degree to which compensation is required and the extent to which broader taxes are disfavored. In short, a system that strongly protected individual property rights would require compensation when an individual’s property was burdened for the public good and would also minimize the use of broadly based taxes, which also threaten to benefit some citizens at the expense of others.

Needless to say, the consistency just sketched between burdens and benefits, or takings and broad taxes, is not one that is much in evidence in the politics and markets we know. Our legal system might

\textsuperscript{25} We do not, after all, generally compensate for idiosyncratic tastes or values so that it may be enough if benefits on average, or at least roughly, matched up against costs, or taxes. See Noble State Bank v. Haskell, 219 U.S. 104, 111 ("[I]t would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume."), opinion amended, 219 U.S. 575 (1911).

\textsuperscript{26} Indeed, the more general theory of takings law, alluded to in this article, makes use of this idea that the ability of governments to identify beneficiaries and to assess user fees is relevant to understanding the judicial decisions in this area. On the traditional and sensible notion that governmental actions are not compensable takings because they are accompanied by the delivery of in-kind benefits, see Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (denying compensation where mine-owners were all required by statute to leave a pillar of supporting coal for their mutual safety because the regulation "secured an average reciprocity of advantage that has been recognized as a justification of various laws"); Epstein, supra note 4, at 5-23 (arguing convincingly that the reciprocal advantage idea must be applied, as it was in Mahon, within the reach of a single statutory scheme, and not used, as in Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470 (1987) (upholding limits on mining), as a general justification where the party whose property was taken did not receive in-kind compensation in the same transaction).
be described as requiring compensation for a "medium" amount of burdens that the government imposes, but not requiring any significant connection between taxpayers and beneficiaries of governmental expenditures.

In the balance of this paper, I consider both the benefit and burden sides of this formulation and show that we can learn something about each from the other. In Part II, I emphasize that it is indeed mysterious that in politics we do not resort more regularly to markets, and I explore a number of reasons why this may be so. I suggest that as a positive matter our legal system finds certain kinds of conflicts between political majorities and minorities more troubling than others. And I will argue that as a normative matter we might be better off injecting more explicit market transactions (of a novel kind) into politics, although professional politicians may not share my enthusiasm for this kind of reform or experimentation. In Part III, I return to takings law with the perspective offered by the positive analysis in Part II. I try to show that a fair amount of takings law can be understood as reflecting the particular concern I describe about the bargains and tensions between majorities and minorities.

II. Markets and Politics

A. Special Bids

Two closely related puzzles affect my argument. Consider, first, a modestly surprising evolutionary development in tax policy. Governments tend to raise money through a variety of taxes, rather than through one "best" tax. There are many explanations of this phenomenon, but I think the most important is that this shotgun approach keeps down the marginal rate of any of the taxes. If, for instance, income taxes or property taxes alone bore the entire brunt of governmental budgets, then there would be serious lock-in effects on property, because transfers would trigger income taxes, or severe incentives to underinvest in improvements to property, and so forth. Virtually all

27. It is likely that each kind of tax brings with it new administrative costs; nevertheless, our governments generally use some combination of property, sales, and income taxes in order to raise the bulk of their revenue. Indeed, additional funds are raised through excise taxes, franchise taxes, and other sources—each of which again adds administrative costs—but the simple point is that governments rely on a multiplicity of taxes despite the transaction cost disadvantage of such a tax policy.

28. There is reason to think that high marginal rates encourage inefficient substitutions away from the consumption or production of that which is heavily taxed. As such, the best strategy might be to tax many things lightly, despite the administrative costs associated with such a plan.
taxes distort behavior, but, since higher taxes distort more than lower taxes, it is probably sensible to have many lighter taxes, rather than fewer, heavier levies.\textsuperscript{29}

Is it, therefore, not odd that our government uses special assessments \textit{less} than it did in the past? There was a time, between twenty-five and one hundred years ago, when a fair number of large public projects were financed through intricate assessment mechanisms that sought to collect more tax from those who benefited more from these projects—and when it seemed as if the inevitable trend was toward greater use of such assessments.\textsuperscript{30} Such assessments are hardly unknown today (in the city in which I live, for instance, a sales tax was levied on bills at restaurants within the city limits in order to help pay for the subsidy given to assist in the construction of a downtown hotel, which, in turn, was expected to help rejuvenate the business district and draw tourists and small conventions), but they are a less important part of fiscal policy than they were some time ago.\textsuperscript{31} This is odd because government spends and, therefore, taxes far more now than it did when special assessments were more popular, and, to the extent that much of our tax structure can be understood as employing many taxes in order to keep down distortions (or complaints about historically high rates), one would think that special assessments would be more popular than ever. Such taxes, like user fees, would serve to keep down property, sales, and income tax rates. It is possible, of course, that the administrative costs associated with special assessments proved so great that they were not worth the advantages they imparted with respect to other taxes.

A related and far more complex problem concerns the virtual absence of assessments that I will call “special bids”—that is, assessments voluntarily offered in return for government benefits.\textsuperscript{32} What puzzles

\textsuperscript{29} A more technical way of expressing this idea is to note that there is a tradeoff between marginal rates and the number of different taxes and that the optimal mix probably does not involve the corner solution of one high tax.


\textsuperscript{31} For some historical material on municipal service charges, see \textit{Tax Found.}, \textit{supra} note 22, at 6-10 (from 1940 to 1960, charge revenues, such as collections from users of water and sewer services, grew from 4.0 to 15.6\% of municipalities’ revenues from own sources).

\textsuperscript{32} Once we come to realize that special assessments must most often be voluntary—at least in the sense that taxpayers probably have or had the option to call off the expenditure in question (and, therefore, the assessments)—the difference between assessments that are “imposed” by governments and bids that are offered by taxpayers largely disappears.
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me is that politics often generates winners and losers, while markets have a more unlimited range of bargains. There is, therefore, a large untapped middle ground in politics, where winners could have been made to bargain and pay for a portion of their windfalls.

The puzzle that I have in mind is best described with one of the many available modern examples. The National Academy of Science studied proposals from many states for the construction of a superconducting supercollider, which, if completed, will be the largest and most expensive scientific research tool in history. The Academy delivered a "short list" of sites to the Department of Energy, from which the Secretary then chose a location in Texas surrounding the town of Waxahachie.\textsuperscript{33} The runners-up were said to have included Illinois (where relevant facilities and personnel associated with Fermilab were already in place), Tennessee, Michigan, Colorado, and North Carolina.\textsuperscript{34} Other relevant facts include the point that at the time of the decision the President-elect, the Speaker of the House, and the Chairman of the Senate Finance Committee were all Texans—and that funding for the project ultimately required not the decision of an academy or cabinet secretary but congressional votes; that the Texas location would require much less condemnation of private homes and other property; and that geologic conditions at the Texas site may have been most favorable.\textsuperscript{35}

In any event, there was rejoicing in Texas, disappointment in Illinois, and bitterness on the part of a number of politicians.\textsuperscript{36}

The result is, in many ways, no different from many other political decisions about government expenditures. There are winners who apparently enjoy enormous windfalls, and there are losers who are excluded from these windfalls and who join the rest of us in financing the various projects. Studies indicate that some states take in far more federal money than they contribute to the federal government, while others must obviously pay more in taxes than is spent in their jurisdictions.\textsuperscript{37} There are obvious problems with these reported calculations, if

\textsuperscript{33.} Washington Post, Nov. 11, 1988, at A1, col. 1.
\textsuperscript{35.} Lemonick, A Controversial Prize for Texas, TIME, Nov. 28, 1988, at 79; Washington Post, supra note 33, at A14, col. 1.
\textsuperscript{36.} See, e.g., Big D Harveses a Superior Plum, U.S. NEWS & WORLD REPORT, Nov. 21, 1988, at 18 (quoting Senator Donald Riegle (D-Mich.) as detecting "a strong smell of White House politics"); Washington Post, supra note 33, at A14, col. 1 (Senator Alan Dixon (D-III.) "appalled" that "two days after the 1988 presidential election, the campaign continues").
\textsuperscript{37.} The information that is readily available is interesting but difficult to interpret. There are clearly states from which Internal Revenue collections vastly exceed the amount of federal funds
only because not all federal expenditures are as desirable as others. But no one pretends that it all balances out and that prosperity within every state is completely unrelated either to the power wielded by its congressional representatives or to the installations that historically happen to be located within its boundaries. A larger Navy, for example, means more jobs in Connecticut, where shipbuilding is a major industry, and in Virginia, where naval bases and sailors spend their money, and we have come to expect that the disposition of budgetary requests from the Secretary of the Navy has something to do with the seniority and committee assignments of these two states' elected representatives.

Why did not the Illinois delegation, on the eve of its "defeat," announce that, should the Supercollider project be awarded to Illinois, the state would pay the federal government two billion dollars, or some other amount that is sufficiently large to have caused decisionmakers to believe that, from the national perspective, Illinois offered a better deal than Texas? Interested states did need to guarantee the availability of electric power and water, and Texas is reported to have promised one billion dollars to help pay the Supercollider's electric bills and building costs, but Congress reportedly sought to avert a bidding war by ruling distributed. Thus, for the most recent year of available data, about $1.5 billion was collected from Alaska while $2.8 billion was spent there. The numbers are not comparable because the collections were in fiscal year 1988 while the distributions are for the year ending September 30, 1987, but I think the numbers are fairly suggestive. Other seemingly fortunate states, on a per capita basis, include New Mexico (the most fortunate), North Dakota, South Dakota, Virginia, and Utah. The unfortunate states appear to include Illinois and Michigan. Compare Bureau of the Census, Department of Commerce Statistical Abstract of the United States: 1989, at 312 (109th ed. 1989) with Department of the Treasury, Treasury Bulletin 24 (Mar. 1989). Unfortunately, the data do not quite get at the importance of political representatives. Many federal expenditures concern long-term investments or reflect demographic shifts (such as the location of retirees), so that we would expect spending to be high in California, for example, where there are important military installations and contractors, even if that state's political representatives were completely ineffective. It is, after all, the marginal expenditures and their windfalls that constituents crave. Texas, for example, turns out to be a state with a substantial net outflow of federal funds, although most observers would insist that, to the extent that some states do better at attracting federal money, Texas is second to none. These observations are not necessarily inconsistent because the question is what a state enjoys compared to what it would enjoy if there were no favoritism or politics and if decisions were made only on the basis of national cost-benefit calculations and the like.

Finally, it should be noted that the data are unhelpful because they report flows and not the projected windfalls from or even simply the multiplier effects of federal spending. It is most unlikely that these windfalls are the same for all varieties of spending. It is therefore theoretically possible that there is an egalitarian (or competitively bargained) distribution of windfalls across jurisdictions, despite the fact that the differential between tax dollars paid out and dollars spent locally is strikingly negative in some states and positive (to very different degrees) in others.
out consideration of direct financial incentives. Why isn’t such bidding encouraged, rather than avoided? At the very least, an explicit bid from one state would draw attention to the government’s decision and create pressure not to award the project to another state with obvious political connections, unless there were concrete reasons with which the decision could be explained. The question raised by the prospect of such “special bids” for governmental benefits, or windfalls, can be framed either from the perspective of the decisionmaker (in this case, the federal government) or from that of the winning and losing states. Given that governmental expenditures often have such large positive spillover effects on local economies, why does the fiscal policy of governments not regularly include special taxes on those who benefit most from major projects or, more pragmatically, obligations on recipient jurisdictions to raise money in whatever way they like in order to help finance these very projects? From the perspective of the winners and losers, the question is more evolutionary in nature and concerns the fact that eager states (or localities in the case of state appropriations) simply do not bid for projects in the suggested manner. Either way, the question is why so many political decisions as to the allocation of burdens and benefits are all-or-nothing ones, with no custom of partial payments for benefits (or for burdens). Such bargaining over benefits—or division of the pie—is obviously the central feature of bargains in markets, and the question is why politics is so different.


39. Although the discussion in this essay focuses on bids or bargains between states or other organized interest groups and the federal government, it is easy to imagine similar transactions between states and local governments, and it is even possible that businesses could make completely private special bids for the windfalls that come from other private businesses. Thus, when a business contemplates liquidation, it may try to renegotiate contracts with its suppliers, but it rarely goes to firms outside the range of its contractual orbit to suggest that the firm’s continued operation is worth something to this potential “bidder” (unless there is some chance that the outsider will go the whole distance and take over the failing firm). Thus, a theater may be able to extract payments from a nearby restaurant that will suffer financially if the theater closes its doors. I mention this sort of relationship in order to note that the decisionmaker, referred to in the text, need not be the federal government. On the other hand, I do not pursue this question of side payments for windfalls because it confuses, rather than clarifies, the line between markets and politics.

40. I limit the discussion below to bids for benefits, although it is also possible to imagine jurisdictions’ bidding to avoid undesirable projects, or other burdens. Such schemes would be more difficult to organize than special bids for windfalls, however, because of the obvious strategic behavior possibilities, such as a majority’s (sometimes empty) threat to place a project in a given location in order to extract promises or payments from nearby residents.
B. Explaining the Absence of Special Bids

It is impossible to deal here with all reasonable explanations of this separation between markets and politics, but before turning to what I think are the two strongest alternatives—that politicians prefer this separation or that political decisions are fully bargained out—it is useful to comment briefly on a few mechanical explanations of the non-existence of special bids and the rarity of special assessments. It is not helpful, I think, to insist that states or localities would be unable to raise the necessary funds in advance and that elected representatives are unable to promise future payments. States could simply promise to raise funds for their bids through familiar taxes, special assessments, or, most easily, bond issues. More creatively, a state might offer to enrich the fisc by agreeing to federal legislation that, for example, over a specified number of years, denied the bidding state’s taxpayers the usual deduction on their federal tax returns for state and local property taxes. Such promises would obviously be contingent on the actual completion of the federal project, or on specific expenditures in the host state, and on the willingness of the state’s own legislature or other decisionmaking body to acquiesce in the bid. But these contingencies are no more complicated or difficult to incorporate in an agreement between the state and the federal government than any number of other contingencies that are the regular stuff of commercial contracts and intergovernmental agreements. There are, of course, mechanical problems in facilitating cooperation among a state’s representatives at the local, state, and national levels, and such cooperation is necessary in order to make special bids. Without minimizing these problems, I think it is unlikely that special bids have failed to materialize because elected representatives have somewhat different agendas. The transaction costs among these politicians should be especially low, so that there is room for bargains and for many opportunities to share the credit for delivering large windfalls to the voters at a modest price.

Similarly, it is not the case that special bids would be a disaster (and perhaps, therefore, have been suppressed) because poor states could not compete with wealthy states in the bidding process. The positive economic effects of a given level of expenditures in a poor state may well be greater than in a wealthier state. A state with more unemployed workers and more depressed land values has more to gain from new jobs and new investments and ought to bid more for a project than a state in which the same infusion will have less of a marginal impact. So long as capital markets work well, states can issue bonds to finance
economically beneficial projects that will eventually generate income and revenues with which to repay creditors. Alternatively, special bids could be in the form of promises about future payments or tax concessions. In any event, there is little reason to believe that wealthy or large states would dominate special bidding. And, inasmuch as there is no reason to think that the political process generously redistributes wealth from the poor to the rich, by placing important projects in poorer states, the absence of special bids can not be explained as part of a larger egalitarian scheme.

Nor is it convincing to say that the transaction costs of making a (special) bid in the face of competitive bids from other states are sufficiently great to discourage bids in the first place. It is true, of course, that, after a bid is made by Illinois, Texas and other states may put in offers, and Illinois may counterbid, and so forth, but, if this process discourages (rather than encourages) bids, nothing stops the federal government from demanding or disallowing sealed bids, or encouraging bids by announcing a short list of states in which a given project may be placed. And when the decision is more about the size of a federal appropriation, such as the question of how many submarines to order, rather than about a choice among locations, as in the case of the Supercollider, it is hard to muster a transaction costs argument at all.

It should be noted that in the system I have in mind the government would not be required to accept the highest bid (unless it chose to precommit to such an auction); decisionmaking would simply proceed in a way that would be influenced both politically and financially by the bargains that have been offered by the potential host jurisdictions. In the case of the Supercollider, for example, it is quite plausible that the actual decision has thus far been in the public interest, but that it would have been still better to award the project to Illinois in return for a sum of money—or, better yet, to locate the project in Texas, but to receive from that state an especially large share of the construction costs.41 In short, bargains and auctions are sufficiently popular and flexible outside the political arena to make it unlikely that they could not work well within the context of political decisionmaking.

41. That is, larger than what Texas offered in what might have been regarded as merely the first round of bidding. See supra note 38 and accompanying text.

It should be noted that the special bid mechanism I have in mind is only somewhat similar to the familiar practice of state and local governments' offering tax concessions or various services in order to induce migration into the jurisdiction or in order to encourage significant employers not to emigrate. Among other things, the intergovernmental character of special bids is a distinguishing feature that draws attention to the (sometimes thin) line between markets and politics.
A more promising explanation of the absence of special bids draws on the observation that people "irrationally" value what they already have and undervalue diffuse opportunity losses. A classic example is that many people who would never purchase an expensive painting or bottle of wine would also not sell such a painting or bottle if one were found in their own cellars. It seems to be psychologically more difficult to alter the status quo than to hang on to the assets with which one is already endowed. Correspondingly, it is possible that citizens and their politicians do not make special bids because they underestimate the economic benefits they can derive in the future from some governmental project, and, at the same time, they are psychologically disinclined to part with assets they already enjoy. I do not put much stock in this "perception-based" argument because it raises more questions than it answers. If people overvalue what they have and undervalue future benefits, then why do we run budget deficits rather than surpluses? One would think that governmental expenditures themselves would seem unattractive because they require current outlays and often promise only diffuse future benefits. But this is not the place to explore the cognitive psychology literature and its relevance to legal or even to political theory, for in this literature I see no easy explanation for the absence of special bids.

In the end, I believe, there emerges a pessimistic and an optimistic explanation of why we do not allocate projects through special bids. As alluded to earlier, the pessimistic possibility is that there are electoral rewards to incumbents who can secure windfalls for their constituents and that lavish attention is paid to politicians whose efforts are needed to secure such windfalls. To the extent that politicians serve as intermediaries in the quest for such projects, it is natural that they would disfavor a system in which their influence played somewhat less of a role, while bids played more of a role. Without emphasizing the cognitive aspects of risk aversion, it is possible to note that risk averse politicians might not be much tempted to buy windfalls for their constituents through special bids because of the fear that occasionally a project would produce much less of a windfall than had been expected, so that

42. One might think of this "endowment effect" as related to "anchoring," or the tendency to adjust inadequately away from the starting point one is given. See Scott, Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices, 59 S. Cal. L. Rev. 329, 338-42 (1986).

43. Id. at 340; see also Kelman, Consumption Theory, Production Theory, and Ideology in the Coase Theorem, 52 S. Cal. L. Rev. 669, 678-79 (1979) (introducing example of offer-asking differential for expensive bottle of wine).
their constituents would have overbid and been burdened by the award of the project. It is possible, of course, that the politicians who brokered the original bargain could be blamed for such a disappointment.

There is reason to be dubious about this simple, pessimistic explanation. The argument requires us to believe that voters do not notice that there are losers on the other side of the ledger from winners and their windfalls, because at the root of the argument is the sense that politicians may not chase windfalls on behalf of their constituents because they prefer to leave well enough alone. And constituents could only be satisfied with this state of affairs (and not elect new entrants who proposed bidding for windfalls) if they believed that they received at least their “fair share” of windfalls. It is hard to believe in a novel kind of “fiscal illusion,” under which virtually all citizens believe that they gain from a system in which windfalls are dispensed at low cost. Surely politicians will sometimes be blamed for not bringing home the project, so that politicians as a group might just as well prefer not to intermediate (with special bids or other market mechanisms) among potential windfall recipients. The easy life for a politician might be one in which constituents did not believe that there were free lunches out there for their representatives to secure for them. Moreover, a system that included special bids would enable the elected representatives of the “losing” states, which were not awarded projects because their characteristics and bids together proved less attractive than some other state’s package of political, technical, and financial offerings, to boast that they had been instrumental in landing bargains for the taxpayers. Thus, a shipbuilding program currently allows politicians from Connecticut, Virginia, and a few other states (including some where subcontracting is done) to boast of their political effectiveness. With special bidding, however, many states’ politicians would no doubt be able to claim that they were instrumental in extracting larger payments from the host states (thus, reducing their own constituents’ tax burdens or freeing federal funds for other projects of local interest). And these claims may even be made while Connecticut and Virginia politicians boast that they brought home the shipbuilding program with low special bids. Everyone is obviously not better off than in a world where there are no special bids and most projects go forward, but the point is that bargains falling on the “contract curve” make everyone better off than they would be with no bargains at all, and such bargains allow politicians to insist that they superbly negotiated a healthy share of the gains from trade. Much as politicians now take credit for introducing
and sponsoring some pieces of legislation, they could be expected to take credit for extracting huge sums in return for projects that clearly needed to be undertaken (even without special bids). To the extent that politicians are most interested in short-term results, for their electoral, careerist, and other selfish aims, it would seem especially likely that a reputation for extracting bids and for getting something done for "nothing" would be most advantageous. In short, it seems possible that politicians would be better and not worse off in a system with special bidding. As such, it is difficult to be convinced by the pessimistic explanation as to why special bidding, or a similar mechanism, is not part of our political landscape.

There is obviously a great deal more that might be said about the self-interest of politicians as it pertains to the evolution of (what might be thought of as) markets in politics, but, rather than extending this discussion, it is fair to say that it is possible, but hardly certain, that we do not see special bids (and more special assessments, perhaps) because they are not in the interest of politicians. My own view is that it is unlikely that politicians are more than a small part of the story. I have already suggested that it is far from clear that special bids are not in their self-interest, and, even if it were clear, there would remain the question of why so many institutions and political rules that are not in the self-interest of politicians have evolved while this one did not. Moreover, the short-run attraction of special bids seems quite powerful. When all is said and done, I believe that, on the eve of the Supercolider decision, I would have advised Illinois's politicians to offer a special tax or payment in a bold step on behalf of both their constituents' economic interests and their own careers.

A variant of the pessimistic explanation focuses on the majority coalition itself, rather than on the incentives of politicians. A ruling majority coalition may be able to exploit a minority by taxing all citizens while awarding benefits to themselves. There is political bargaining among the constituents of the majority coalition, but, the argument runs, there is no need to give much to the out-of-power minority—and special bids would allow the minority to get some of the gains, because the majority would have insufficient information with which to extract full value from the minority bidders. The problem with this version of the argument is, first, that the ruling majority, if government can be thought of as that, is not forced to award projects to the highest bidder so that, in fact, the majority should welcome the institution of special bids because projects will be awarded either to members of this major-
ity or to minority bidders (who may value some projects more than do members of the ruling coalition) when the majority prefers to receive what is bid, rather than to award the project to one of its own. Moreover, majority coalitions can not be terribly stable if only because outsiders will constantly compete to displace members of the coalition. As such, the mystery is why interests not included in governing coalitions do not make special bids and also why marginal members of the ruling coalition, who may receive few of the benefits of power (because they are easily replaced by others who are eager to receive even very little in return for their votes), do not make special bids in order to get more windfalls than the logrolling process deals their way.

The optimistic explanation for the way things work is, as usual, that they already work well. In particular, politicians are not (and, in most circumstances, obviously should not be) above bargaining with the currency at their disposal: political support and votes for expenditures and other matters of interest. Connecticut and Virginia may not bid or pay directly for shipbuilding programs, the argument runs, but their elected representatives must build coalitions with politicians from other states and must vote for projects in other states "in return for" shipbuilding programs, or at least increases in such programs. The optimist might say that in markets hard currency dominates as the means of exchange because the overwhelming majority of participants have nothing more useful to offer, whereas in politics, votes, especially those cast in the immediate future, are more popular because they are as useful as cash (or better) and, perhaps, because logrolling entails lower transaction costs than bidding (of the sort we are exploring). The explanation is not, it should be emphasized, simply that logrolling is a good thing or that rampant logrolling is better than none (a proposition most modern political theorists and observers would find easy to defend, I think), but rather that logrolling works so well that it dominates the alternative of logrolling plus bidding. The argument must be that explicit and implicit political bargaining works so well that windfalls and burdens come close to balancing out across jurisdictions. Politics is a market, in other words, and it is one where bidding with hard currency has no substantial comparative advantage.

It is hard to brush by this argument without trying to link it to various strands of public choice theory, some of which limit its claim. Most of the complexities, I think, come to light once one realizes that coalitions do not need to satisfy all enfranchised voters, or their repre-
sentatives, but rather a set large enough to control things (at the expense of the minority, one presumes) under the prevailing decisionmaking rules. If, for example, governing political coalitions tend toward their minimum necessary size—the argument being that a supermajority coalition could do better for its remaining members by casting out the unnecessary and most expensive extra members—then it may well be that their members bargain efficiently with one another but that nonmembers ought to make explicit, or special, bids when competing for windfalls with other nonmembers. The same may be true if there is intense competition to be part of the decisionmaking coalition so that there are rather lean windfalls for coalition members and their constituents. Unfortunately, ideas and questions are more plentiful than are answers about the dynamics and efficiency of political coalitions, and, in the face of these unknowns, my instinct is to suggest that of course there is logrolling, or bargained-for exchanges, in politics but that it is only remotely possible that there is such perfect bargaining that we live in the best of all possible worlds. It seems most unlikely that a state is not really better off when its elected representatives enjoy longevity and exalted positions and most implausible that expressions such as "a powerful committee chairperson" completely miss the mark of what politics is about. It goes almost without saying that evidence of large interstate windfalls or of truly powerful politicians—evidence, in other words, that the political market is not as efficient as many observers believe the stock market to be—does not

44. For the idea that winning coalitions may tend toward the minimum necessary size, see W. Riker, The Theory of Political Coalitions (1962). Further applications of the "size principle" are discussed in W. Riker & P. Ordeshook, An Introduction to Positive Political Theory 176-201 (1973). Even if coalition insiders have bargained smoothly among themselves, I would expect interest groups that are outside the ruling coalition to bid against one another for the windfalls available to them from projects agreed to by the governing coalition. And the governing coalition will sometimes recognize that the windfalls generated by locating a project in a jurisdiction not represented in the governing coalition are sufficiently greater than those available to coalition members that it is worthwhile to favor outsiders and to extract some of the windfalls through these special bids.

45. The idea is that insiders do not necessarily live luxuriously because their colleagues stand ready to exclude them from the ruling coalition and to admit, instead, a less greedy outsider into membership. As such, insiders compete, as it were, to enjoy some of the surplus—but not so much that they are regarded as expendable. In this climate, insiders may well be expected to bid for windfalls. Perhaps the easiest way to see this point is to think of the marginal product. In equilibrium, each member of the ruling coalition has already extracted whatever it can from the coalition, and, now, if it wants more, it must offer something in return (and, indeed, must compete with nonmembers who bid for similar benefits).

46. In both the stock market and the political "market," there is room for argument about strong and weak forms of efficiency. If a few investors or mutual funds regularly outperform the
prove that what I have called the optimistic explanation for politics as we know it is wrong. It remains to be seen whether special bids and assessments can find a place alongside pork-barrel legislation.\textsuperscript{47} Meanwhile, I think it fair to say only that the truth probably lies somewhere in between the optimistic and pessimistic explanations. It is possible, as the optimistic explanation suggests, that political bargains have occupied at least some of the space that more traditional market transactions might have filled. But it may also be the case that imperfections in the political marketplace have blocked the evolution of special bids or other political bargains. My goal in this article, however, is not to explain the absence of special bids. I emphasize the puzzle of the absence of special bids, with no claim as to its solution. Indeed, I take a normative approach below and suggest that we ought to encourage the use of special bids as part of an attempt to improve the quality and the product of our political life. Meanwhile, my plan is to gain some understanding of the law of takings by contemplating the optimistic explanation of the absence of special bids and by accepting the fact that it provides some real insight, even though it may not entirely explain the absence of special bids. In thinking about the separation between markets and politics, insofar as the distribution of benefits is concerned, there is something to be learned about the imposition of burdens.

C. Protected Minorities

In Part I, we considered the questions of why the government is sometimes required to pay for the burdens it imposes; virtually never interested in collecting payments, or “reverse compensation,” from the parties it especially benefits; and regularly able to burden citizens with taxes without more than the slightest danger of having such levies branded as (compensable) takings. The optimistic explanation of why we have not seen special bids offers a real clue, I think, to answering these questions. If this optimistic explanation is restated as suggesting that in large part politicians bargain on behalf of their constituents to

stock market, then one might need to retreat to a claim that on the margin given all the effort already put in to gathering information, it is impossible to outperform the market. Similarly, evidence of powerful politicians or of horizontally enriched jurisdictions suggests that there may be some hurdles to perfectly competitive bargaining in the political arena, but it leaves room to argue that on the margin special bids may not materialize because bargaining that is internal to the political process competes away all the available windfalls.

47. On the virtues of logrolling, see J. BUCHANAN & G. TULLOCK, supra note 17; on the conflict between logrolling and party discipline, see W. RIKER & P. ORDESHOOK, supra note 44, at 112-14.
such a degree that explicit market transactions in the allocation of public goods and their side effects are unnecessary, then it becomes more apparent why taxes are fundamentally different from public projects, and, in turn, why such expenditures are completely unlike most regulatory burdens. If our task is to understand why the fifth amendment deals with some burdens by bringing markets into politics (by giving market-like protection against political action), while on the expenditure side markets are separated from politics (or are regarded as already contained in politics), we can build on the idea that the optimist's claim that politics is a market rings true to the extent that well-established interest groups and coalitions do seem to bargain with sophistication at least equal to that possessed by most consumers in the economic marketplace. In short, although we may not have a complete answer as to why political bargains are not supplemented with market transactions, such as special bids, it is useful to build on the idea that at least some political bargains are the products of extensive bargaining and trading. And politics is most likely to resemble perfect markets when affected interests are organized, repeat players.

With coalition politics as the focal point of our understanding of the relationship between markets and politics, the asymmetry, or inconsistency, highlighted in Part I is explained as follows: states, professions, and other organized interest groups are meant to take care of themselves in the political arena, in contrast to an individual whose property is taken for the building of a highway or other public purpose, who is obviously ill-equipped to engage in logrolling bargains. I am suggesting that the legal system regards an organized interest group, however much in the minority it may be, as very different from an individual or collection of citizens that but once in a lifetime face a common burden. Easily organized interest groups are regarded as protected in the main by the political process in which the group will

48. The optimistic argument could be extended to the point of insisting that large campaign contributions are tools that can sometimes promote the public interest by measuring intensity of preferences. I do not, however, mean to suggest that such optimism is the least bit justified. Special bids involve wealth transfers to other citizens and permit the society to enjoy more public goods while keeping down tax rates (and, therefore, distortions created by high tax rates), while campaign contributions (like some corrupt payments) may involve wealth transfers to politicians—and, in the quest for such payments, it may well be in the interest of politicians to favor larger spending programs and higher tax rates. In any event, note that the pessimistic explanation for the absence of special bids is that politicians intentionally suppress markets in order to expand the reach of politics.

49. I allude here to the well-known and well-articulated point that some groups may have been sufficiently excluded for so long that it will not do to say that they can now strike deals
learn to organize and compete. In contrast, "occasional individuals" are protected by the takings clause. It is unlikely that such individuals can compete effectively in the political arena and it would be undesirable for them to try; the transaction costs of individual involvement in politics is, after all, quite great. While I do not pretend that this distinction has any strong historical basis, for this is a theory not about original intent but about how the law has evolved and should evolve, it is tempting to ground the distinction in the fifth amendment itself and to suggest that when the final clause of the amendment instructs that "nor shall private property be taken for public use, without just compensation" it contrasts "private" with "public" to hint at the distinction between isolated and organized owners or interests. The organized ones are less private and more public, in the same (familiar, rather than legal) sense that a state or the American Medical Association is a fairly public entity.

In sum, I have suggested that we may not find "special bids," or other examples of markets in politics, either because they are not in the interests of politicians or because bargains among political coalitions offer a successful enough substitute for more explicit market transac-

within the political process. See J. Ely, DEMOCRACY AND DISTRUST 75-87, 135-79 (1980).

50. For some discussion of the historical context of the "just compensation" clause, see Sax, Takings and the Police Power, 74 YALE L.J. 36, 58 (1964) (concluding that there is not much available information or analysis of the historical context or original meaning, but that the clause can be understood as "designed to prevent arbitrary government action, rather than to preserve the economic status quo").

51. The distinction developed in the text will remind administrative lawyers of the difference between Londoner v. City of Denver, 210 U.S. 373 (1908), and Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915). An adjudicative hearing is likely to be required when few people are burdened, while rulemaking is usually permissible when large numbers of people are affected or when individualized facts are not relevant to the rulemaking. See generally Rubin, Due Process and the Administrative State, 72 CALIF. L. REV. 1044, 1123-27 (1984) (contrasting "general action," or rulemaking, with more individualized adjudication, where due process protection is required).

The connection between political bargaining ("pluralism" as opposed to "republicanism") and the fifth amendment is touched on in Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29, 50 (1985). In discussing the relationship between conceptions of the political process and administrative law doctrine, Professor Sunstein points out that normally the processes of representation are a sufficient guaranty of legitimacy, in the sense that representation will ensure adequate responsiveness to the public at large. By contrast, in adjudicative proceedings—when a single person or small group is singled out for special treatment—participation is required. When a personal or narrowly held interest is at stake, the processes of representation are unlikely to be of sufficient help. Hence the rule, fundamental to administrative law, that the due process clause requires the right to participate only in adjudicative proceedings.

Id. at 67.
tions. But whether or not politics generally works well enough to make markets unnecessary, it is arguable that the law might import market mechanisms into politics precisely where there is reason to think that political coalitions will not form or will not bargain effectively. The argument, in short, is that politics works least well when it affects citizens who have difficulty influencing political bargains, and that it is just when politics is least perfect that our legal system insists upon the use of markets. In contrast, when politics works well, there is no constitutional resort to markets. Thus, the requirement of explicit compensation (in imitation of market transactions) for some takings might be understood as protective of individuals who can not easily make politics part of their business. On the other hand, it is not puzzling that taxes are not takings, because taxes are generally levied on such bases as corporate revenues, all real property owners, cigarettes, fuels, and retail sales, which either draw in to the tax base an enormous number of citizens (so that there is every reason to think that the magnitude and design of each tax will be of great interest to politicians) or affect interest groups that can be well organized. Inasmuch as taxes are likely to be the subject of careful political bargaining, the positive argument goes, there is no need to import an explicit market mechanism as protection against exploitative majoritarian rule. Put differently, the distinction between organized interests and relatively powerless individuals (and groups)—a distinction that comes close to one used in other areas of law—can yield real insight if applied to takings law.

III. Takings and Politics

A. Takings from Unprotected Minorities

1. Political Coalitions and Takings Theory

Although this is hardly the place to develop a complete predictive theory of all of takings law, especially because such a theory must surely have more pieces to it than the one I have here suggested, my argument requires some evidence that takings law is actually sensitive to the ease with which those who endure politically imposed burdens can bargain within the political arena. What seems true about taxes and politics in broad perspective must bear further fruit in the details of takings law and practice, where burdens and benefits are truly meted out.

These details may seem more interesting and easier to organize if the positive theory I am about to explore is set against a background
JUST COMPENSATION AND JUST POLITICS

containing the history and theoretical justifications of takings law. In a much compressed nutshell, this context can be described as follows: A central theme of takings law is that protection is offered against the possibility that majorities may mistreat minorities. A paradigmatic case is that of a community of landowners who combine to expropriate the property of one landowner for their community's enjoyment. Such majoritarian, or gang, law is thought unfair because of an equal treatment principle, which is especially compelling when the community's needs would be met just as well by using any piece of land, or because of the realistic fear that the ganging up will too often be at the expense of the neighbor who is most different or most nonconforming. It is also inefficient both in terms of the behavior of property owners and that of majorities. Property owners will be somewhat discouraged from investing in their property to the extent that they fear uncompensated losses. The argument seems relatively convincing when it contemplates risk aversive owners, and, indeed, commentators have suggested (mostly as a normative matter) that takings law be viewed as insurance. The argument is on its most solid ground when long-term investments, or activity levels, are at stake, rather than one-shot investments. Thus, it is easy to see that if governments do not pay for the crops they take from farms located near a frontier to feed wartime troops then farmers will neither plant nor harvest (and the government had better hope the war is a short one). In contrast, a government that does not pay the going market wages of doctors and lawyers who are drafted in time of war is unlikely to have a major negative effect on the rate at which young citizens enter these professions. Finally, as far as governmental behavior is concerned, a majority or bureaucratic structure that can do as

52. The discussion in the text is informed by the rich and varied literature on takings law. See, e.g., R. Epstein, Takings (1985); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Sax, supra note 50; Sax, supra note 4. For a recent statement of the point, see Nollan v. California Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987), where it is noted that if one landowner had been singled out to provide views of the ocean to the public then a statute otherwise valid might violate the takings or equal protection clauses.


54. Of course, a sensibly run government would pay for these crops even if it were not governed by a constitutional amendment precisely because without such compensation supplies will dry up. In this light, the fifth amendment, and its counterparts in other legal systems, is best seen as a precommitment strategy through which the government is able to signal potential suppliers that they need not wait and see whether this government is sensible.

55. The same might be said of investment in oil refineries if the government does not pay for a refinery it destroys in order to prevent its fall into enemy hands. In both cases, a given investor (or
it pleases with no budgetary consequences is likely to do too much, while one that must internalize the costs it imposes, by paying the market value of what it takes or destroys, will be more likely to resist projects that fail a cost-benefit test.

All of these familiar explanations of the core of takings law are consistent with the argument developed earlier regarding minorities that need protection, groups that can bargain for themselves within the political arena, and the relevance of this distinction to understanding taxes and takings. The fairness argument can be restated simply to say that the law reflects a concern for minorities that are unlikely to be able to take care of themselves through the political process. There is no reason not to incorporate some equal protection law into this point, so that, if a “discrete and insular” minority were overtaxed, or if its properties were especially burdened with a regulation, it would not be surprising or inappropriate for the law to resort to takings law (although other law may be more attractive for this purpose) in order to protect the minority that had a history of being the odd group out in political bargains. When the possibilities of coalition politics are included in the efficiency argument, it is plain that investment is not discouraged by rules that promise either compensation or simply the ability to bargain with one’s investment in the political arena. It is true, I suppose, that in theory a group’s political power is either formidable or not, regardless of whether it is threatened with losses through governmental actions. But it seems likely that an interest group will work harder to save itself from $X in losses than to gain $X in windfalls, perhaps because it fights more for what it has than for what it wishes it had or because other citizens share a taste for the preservation of the status quo or for some reason related to the general question of why there is an “offer-asking” differential. In any event, a democratic government that could take without paying compensation would almost surely affect individual investment projects more than it would projects

\[ 56. \text{This differential, or the fact that endowments influence one's ability to pay for things, is discussed critically in M. Kelman, A Guide to Critical Legal Studies 141-50 (1987); Kelman, supra note 43; Kennedy, Cost-Benefit Analysis of Entitlement Problems: A Critique, 33 Stan. L. Rev. 387 (1981). Note that the argument in the text does not depend on the existence of a cognitive illusion or an offer-asking differential. See supra note 42 and accompanying text.}\]
that are under the watchful eye of a powerful interest group. To the extent that we have difficulty giving examples of this difference, I think it is because we are so accustomed to the notion that the government does not much harm the interests of powerful groups without either offering some compensation or, more to the point, giving something in return from other groups or with respect to other interests of the apparent losers. Finally, the internalization argument is most easily reformulated. Inasmuch as organized interest groups do protect themselves, do make their interests known, and do not give up things in return for nothing at all, majority coalitions or their agents are forced to internalize the costs they impose on these interests. Takings law thus forces the actual payment of compensation to unprotected individuals or groups that do not regularly participate in political bargains because it is with respect to these citizens that the government must be made to internalize costs that it might not otherwise take into account.

2. Rent Control, Zoning, and Nuisance Cases

Consider, as a first example, the imposition of rent control on landlords. If we did not know that such controls were regularly legislated and that landlords do not much like them—and it would be harmless or meaningless, at least from a landlord’s perspective, to have rent control if the foregone income were simply returned after just compensation was required—we would have been tempted to predict that a government that enacted rent control would be found to have taken property within the meaning of the fifth amendment (and certainly within the meaning of similar and often more emphatic provisions in state constitutions). Rent control presents us, after all, with a situation in which a majority may be ganging up on a minority (one does not expect to see democratically elected representatives voting retrospective rent increases, for example, in part because there would be more outraged voters than enriched voters), investment in apartment buildings may be inefficiently discouraged, and governments may think only of the savings to some citizens, while not internalizing the drop in

57. It is noteworthy that attacks on nonconfiscatory rent control statutes have not been successful even under state constitutional law. See, e.g., Fisher v. City of Berkeley, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984) (city may restrict landlords’ profit with rent control so long as landlords not deprived of reasonable rate of return), aff’d, 475 U.S. 260 (1986); Hutton Park Gardens v. Town Council, 68 N.J. 543, 350 A.2d 1 (1975) (municipal rent control statute constitutional so long as it permits landlord just and reasonable rate of return); Lopez v. Mirabel, 127 A.D.2d 771, 512 N.Y.S.2d 164 (1987) (valid exercise of police power).
property values (which signals, again, the disincentive effect of rent control on investment in rental property) suffered by others. But when the fifth amendment is understood as protecting minority interests that are not represented in political bargains, it is easy to “predict” that rent control schemes will not be regarded as takings because such statutes apply not to a landlord here and there but to a large set of landlords who can (and do) easily unite to bargain about this and other legislation affecting their mutual interests. Landlords may often lose this battle against existing tenants, but they may be able to join forces with other political interest groups and see to packages of legislation that do not include rent control, that contain only mild controls, or that provide offsetting benefits.

Another way to see this point is to note that, instead of rent control, the government might have enacted a tax on rents, much like there are hotel room taxes, or on rent increases, or on one of these bases but with a transition rule exempting rents paid by tenants on the premises at the time of the enactment. These taxes would mirror the effects of more familiar rent control statutes to different degrees, but surely no one would have expected these taxes to be struck down as surreptitious takings. A large tax on one and only one landlord, hard as it is to imagine, would no doubt be struck down one way or another—and it goes without saying that a single landlord is more helpless politically than are landlords in general. The tantalizing thing about this example is that rent control statutes aimed only at mobile home park owners are occasionally struck down. There is more to this

58. These tenants obviously outnumber their landlords. Note, however, that potential tenants may rationally prefer that there not be rent control legislation because present tenants are far more likely to vacate uncontrolled units. Thus, potential tenants who sense that they will enjoy significant consumer surplus (because they place a higher value on renting than is represented by the market price, which reflects marginal values) will prefer more vacancies to a small chance of obtaining a rent controlled unit.

59. It is noteworthy that rent control statutes generally do not apply to landlords who control only a very few units. And these landlords, who may devote little time to the one or two cottages or basement apartments they own, would plainly face relatively high costs in organizing into an effective political force. Still, because there can be little doubt but that rent control laws could apply to single-unit landlords, with no danger of judicial intervention, it is best to understand the exclusion of such units from rent control statutes as reflecting either populist, majoritarian politics or the fact that the additional administrative costs of including single rental units in a rent control scheme would be considerable.

60. On mobile home parks, see Hall v. City of Santa Barbara, 813 F.2d 198 (9th Cir. 1986) (emphasizing that rent control statute enabled park tenants, who owned the mobile homes, to sell their homes and locations and enjoy the capitalized value of the regulated rents); Gregory v. City of San Juan Capistrano, 142 Cal. App. 3d 72, 191 Cal. Rptr. 47 (1983) (statutory scheme grant-
difference in results than the single variable explored in this article, but it is noteworthy that there are often very few mobile home parks in a given jurisdiction so that the owner or owners of the mobile home park or parks may be just the sort of (true political) minority protected by takings law. Similarly, price or wage controls directed at one business, rather than at an entire industry (or at the economy as a whole), may well trigger judicial protection. On the other hand, controls that do not go so far as to deny a minimal market rate of return and that are applied to an entire industry or economy are just the sort of thing that is resolved in the political arena where most of the affected parties are represented.61

61. Controls that cause any business or industry to lose money are essentially treated as physical takings—and the rule of thumb is that there is constitutional protection, although temporary losses may be found acceptable. See infra text accompanying notes 76-77. The point in the text is that controls that cut into profits, but not so far as to deny permanently a "reasonable" rate of return, will be far more vulnerable if directed at a particular business, rather than at an industry or other easily organized political interest group. For a sample of judicial reaction to controls affecting entire (or large parts of) industries, see FCC v. Florida Power Corp., 480 U.S. 245 (1987) (regulations empowering the Commission to set rates that utilities may charge cable television systems for using utility poles not a taking because not confiscatory); Regional Rail Reorg. Act Cases, 419 U.S. 102 (1974) (comprehensive plan affecting nation's railroads would amount to a taking (only) to the extent that constitutional minimum rate of return is denied); Mapco Inc. v. Carter, 573 F.2d 1268 (Temp. Emer. Ct. App.) (rollback of domestic oil prices not unconstitutional because not confiscatory), cert. denied, 437 U.S. 904 (1978); Laycock v. Kenney, 270 F.2d 580 (9th Cir. 1959) (allowing caps on gold prices even if further mining and refining becomes unprofitable), cert. denied, 361 U.S. 933 (1960); Minden Beef Co. v. Cost of Living Council, 362 F. Supp. 298 (D. Neb. 1973) (no taking even though cap on beef prices causes producers to lose money). My claim is essentially that similar price controls aimed at one or two firms within these industries would have triggered judicial intervention.
The same distinction between governmentally imposed burdens on truly unprotected minorities and on groups that can work through the political process is fruitful in working through zoning cases. In many ways, zoning is the mirror image of special assessments. But in contrast to special assessments, which once seemed quite promising but which declined in popularity, zoning is a relatively new innovation that has spread to the point where it is as familiar to most citizens as are the most popular taxes. In any event, we would now expect that zoning done on a large scale would be free of constitutional restraints, but that zoning that narrowly singled out an individual, or a small group that did not otherwise have much in common for the purpose of political organization, would be the kind of burden that might either be regarded as a "regulatory taking," triggering compensation, or would, in some other way, be constrained by courts. And it is certainly the case that most zoning schemes are accepted as part and parcel of what good (or at least legitimate) governments do, and that zoning-like plans, such as one that restricts the number of apartment-to-condominium conversions in a city or one that allows prostitution in a given zone and thus burdens residents who live in adjacent areas, are held not to require compensation to those who are burdened by these governmental actions. In all these cases, the burdened interests are capable of effective participation in the political arena. In contrast, I think it fair to say that there is reason to think that the more a property was singled out in a zoning scheme, the more likely it would be that its owner could successfully object and obtain compensation.

62. The pivotal case was Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (zoning ordinance upheld despite 75% loss in property's value). The Court's recent decision in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), casts some fresh doubt on zoning schemes. See Epstein, supra note 4, at 43. Without wandering too far from my purpose in this essay, I can safely say that I do not think this will in fact be an area that is revisited by the Court.


64. L'Hote v. New Orleans, 177 U.S. 587 (1900).

65. For examples of zoning regulations struck down as going beyond the generous boundaries of Ambler Realty, 272 U.S. at 395 (zoning regulations valid unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"), see I E. YOKLEY, ZONING LAW AND PRACTICE 135-40 (4th ed. 1978). On the idea that a zoning scheme will be invalidated (or found to be a compensable taking) because a very few property owners are inordinately burdened or singled out, see Nollan, 483 U.S. at 835 n.4, which hints at this vulnerability of what has been called "reverse spot zoning." Recent cases that can be said to reflect this point include McIlhinney v. Zoning Hearing Bd., 72 Pa. Commw. 129, 455 A.2d 1284 (1983) (finding spot zoning of parcel near interstate highway arbitrary), and Thompson v. City of
The difficult line-drawing problem among regulatory takings, nuisances, and mere (non-nuisance and non-negligent) annoyances is also simplified and rationalized by a perspective that focuses on political coalitions. In *United States v. Causby*, overflights from a military base, which caused deaths among plaintiff's chickens, were analogized by the Court to actual, physical takings, and, in *Griggs v. Allegheny County*, intense noise from an airport was found to constitute the taking of an "air easement." But quite plainly, noise and other pollution from airports, highways, and other facilities do not normally entitle victims to compensation. It is, therefore, remarkable that both *Causby* and *Griggs* involved uniquely situated victims who would be unlikely to find close political allies. In contrast, of course, most noise problems emanating from airports and highways affect large numbers of people and are regular grist for the political process.

*Batten v. United States* may provide the (admittedly and inevitably sloppy) dividing line between minorities that are part of the political process and those that are "unprotected." In *Batten*, no compensation was allowed to ten homeowners who lived near an air base in a

Palestine, 510 S.W.2d 579 (Tex. 1974) (disallowing city's attempt to downzone one vacant lot located at intersection). Other recent cases that fit this pattern, but which can also be described as protecting the reliance interest of property owners, see infra note 74, include Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir. 1981) (dealing with law banning apartment construction, passed to block a particular real estate development that had received earlier zoning clearance), and Township of Plymouth v. County of Montgomery, 109 Pa. Commw. 200, 531 A.2d 49 (1987) (city granted permit for waste treatment plant; community opposition caused township council to rescind permit and rezone area to prevent operation of plant), appeal denied, 520 Pa. 622, 554 A.2d 513 (1988), cert. denied, 109 S. Ct. 1748 (1989).

67. 369 U.S. 84 (1962).
68. See, e.g., Citizen's Ass'n v. International Raceways, Inc., 833 F.2d 760, 762 (9th Cir. 1987) ("any diminution in value of private property [from city's granting permit for racing to defendant] is rationally related to the governmental interest in the raceway"); Nunally v. United States, 239 F.2d 521 (4th Cir. 1956) (finding government's use of nearby grounds for testing naval guns and flying aircraft not a taking of resident's property); Love v. Navarro, 262 F. Supp. 520 (C.D. Cal. 1967) (denying recovery to homeowner burdened by construction of nearby highway); see also Gandal, *Governmental Liability for Nonphysical Damage to Land*, 2 Urb. Law. 315 (1970) (advocating liability in many settings); Thompson, *An Externality from Governmentally Owned Property May Be a Nuisance or Even a Taking*, in *WINDFALLS FOR WIPEOUTS*, supra note 14, at 203.

State constitutions may offer the burdened property owner some hope of recovery because these constitutions address property that is "damaged" as well as "taken." A. NICHOLS' *THE LAW OF EMINENT DOMAIN* § 6.20 (3d ed. 1988); see supra note 13. One commentator has, however, found that state constitutions do not, in reality, provide a more useful tool to burdened property owners. Spater, *Noise and the Law*, 63 Mich. L. Rev. 1373, 1399-1404 (1965).

small town in homes they had acquired prior to the base's expansion, and who complained about noise and smoke after the air base was enlarged. The court distinguished the case from *Causby* by insisting that no direct overflights were involved in *Batten*, a hollow argument inasmuch as overflights at any altitude are on their own obviously not regarded as takings. I do not mean to imply that the ten homeowners could have weighed into the political process, found allies, and battled the Pentagon, while the single landowners in *Causby* and *Griggs* won because they could not. Rather, I note that the theory requires some awkwardly drawn line between "interest groups" and "unprotected minorities," because one can hardly claim that only singly burdened citizens get market compensation while others who are burdened get only whatever the political arena yields, and that the group in *Batten* may have had the ear of an elected representative or, more likely, may simply have fallen on the wrong side of the awkward line.

3. Other Cases Involving Unprotected Minorities

Inasmuch as I have attempted in this article to set forth only one piece of a positive theory of takings law, it is less productive to draw attention to other cases or areas of takings law that are explained by the unprotected minorities idea than it is to suggest areas in which this idea might explain the actual decisions—but in which one might predict an opposite result if the burdens imposed by government were differently distributed. I have chosen three cases out of many, with the sense that they give a fair picture of the larger landscape. In *Kaiser Aetna v. United States*, a single corporation, Kaiser Aetna, invested enormous sums in Hawaii to convert a shallow, land-locked pond into a navigable body of water connected to the Pacific Ocean by an eight-foot-deep channel. The resulting inlet, and the marina constructed within it, was the focal point of a residential community developed by Kaiser Aetna. The United States Army Corps of Engineers, which had

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70. *Id.* at 584 ("We are cited to no decisions holding that the United States is liable for noise, vibration, or smoke without a physical invasion. In *Causby, Griggs*, and a number of lower court decisions . . . there were regular flights over the property. Absent such physical invasion recovery has been uniformly denied."). State constitutional decisions have been more inclined to find "condemnation by nuisance" from alongside, rather than overhead, flights. *See W. STOEBUCK, NON-TRESPASSORY TAKINGS IN EMINENT DOMAIN* 158-61 (1977).

71. The positive theory needs to be tested by its performance in predicting cases and not by the performance of one part of the theory in predicting some cases drawn from every corner of takings law.

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initially approved the project, subsequently demanded that there be public access for other pleasure boat owners. The Court ruled against the government, striking down the public-access ruling and leaving the government empowered to open up the inlet only by condemning the property and paying compensation. If, instead, the government had made such a ruling about all marinas or all man-made inlets along a given coast, for instance, then it is likely, I think, that the Court would have allowed the regulation (pointing, perhaps, to the traditional power over navigable waters), requiring only that the marinas and other facilities built in these inlets not be regulated past the point where they continue to earn a "fair" rate of return.

In *A.A. Profiles, Inc. v. Fort Lauderdale,* 73 a developer obtained permits and began developing a wood chipping plant. Complaints from neighbors (and, arguably, some violations of local rules) caused the city to shut "Le Dump" down—but the court ruled that compensation was required. The case might best be understood as suggesting that the degree of an investor's reliance on earlier governmental permits or other actions should be a variable in any positive theory, but, because there are many cases in which similar reliance does not do the property owner much good, 74 it is more useful to focus on the fact that a single developer was involved. A similar burden imposed on many developers

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74. Such a reliance-based theory has been suggested in the context of *Kaiser Aetna.* See L. Tribe, *supra* note 2, at 601-02. But inasmuch as there are many cases in which investors' reliance interests are destroyed and compensation is not forthcoming, it is not economical to build a positive theory of takings law around the idea that it is reliance interests that are generally protected. Thus, when governments moved to rid highways and even towns of outdoor advertising signs—which had been constructed, no doubt, in reliance on the proposition that such media would continue to be unregulated—courts were divided as to whether compensation was constitutionally required. For litigation on this subject within one circuit, compare *Georgia Outdoor Advertising, Inc. v. City of Waynesville,* 690 F. Supp. 452 (W.D.N.C. 1988) (striking down statute that required removal of all "off-premises" signs within four years (while signs found to have average life of at least 27 years) and did not provide for compensation; plaintiff was committed to leases beyond the four-year period and engaged in no other business) with *Major Media v. City of Raleigh,* 621 F. Supp. 1446 (E.D.N.C. 1985) (court cites large number of cases in which very short amortization, or transition, periods are legislated and finds five and one-half year amortization period sufficient, where statute restricted previously approved billboards, but did not prohibit all billboards nor entirely destroy plaintiff's business), *aff'd,* 792 F.2d 1269 (4th Cir. 1986), cert. denied, 479 U.S. 1102 (1987). The relevance of a reliance interest is apparent because there is no reason to think (and certainly no case that suggests) that compensation would ever be available to an owner whose property did not contain a billboard, but which dropped in value because a government's beautification scheme meant that no advertising space could be sold in the future. *See, e.g., Georgia Outdoor Advertising,* 690 F. Supp. at 458 (suggesting that city could constitutionally "probably" prohibit construction of billboards in the future for aesthetic reasons).

It may be somewhat more useful to speculate that when a *particular* investor is specifically
or factories (all of whom had permits) would most likely not have extracted such a ruling from any court. Indeed, there are many such regulations that shut down large numbers of facilities in the name of a cleaner or safer environment, and it is regularly the case that no explicit compensation (through takings law) is available to owners who are burdened by these governmental actions.75

Finally, perhaps the most interesting of these cases is Ropico, Inc. v. City of New York,76 in which a bondholder objected to New York’s unilaterally declared moratorium on redeeming its bonds and reductions in the interest rates paid on these bonds. Note that there was not a complete “physical taking”77 because the bonds could be sold to more patient investors, or speculators. The value of these bonds had dropped, but not to zero, because, although time is obviously money, the city did not say that it would never abide by its original promises to the bondholders. The court declared that the city was permissibly using its emergency powers in a time of financial crisis, with no compensation required. The court may have believed that if the city were unable to reduce payments in the way it had announced then it would completely default—at which time bondholders would do even worse. Thus, it is not unlikely that the moratorium and interest rate reduction plan were in the bondholders’ interests—and it is especially noteworthy that the statutory moratorium mimicked a private bargain first struck with a group of large institutional bondholders.78 Still, it may be especially encouraged to rely on a government’s position, as the plaintiff was in Kaiser Aetna, then compensation may be more likely when the government’s position changes to the detriment of that investor. A pre-Kaiser counterexample, however, is Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1919) (city can require relocation of oil tanks for safety reasons even after it had earlier “requested” their placement in current location near railway). Even if this version of the reliance argument bears fruit, there will likely remain several explanations for judicial intervention in such cases so that it is probably unprofitable to look for plaintiffs who simply relied on the status quo.

75. The classic case is Miller v. Schoene, 276 U.S. 272 (1928), but because there is much more to be said about this case than is warranted in the present article it is more useful to note several others. See, e.g., Andrus v. Allard, 444 U.S. 51 (1979) (no taking where Congress forbids sale of artifacts made with eagle feathers, including artifacts made before passage of law); Reinman v. City of Little Rock, 237 U.S. 171 (1915) (no taking where further operation of livery stables prohibited within certain parts of city); Mugler v. Kansas, 123 U.S. 623 (1887) (“noxious use” and no taking where plaintiff forced to shut down brewery because statute forbids sale and manufacture of intoxicating beverages).


77. See supra note 3 and accompanying text; infra text accompanying note 79.

78. In Ropico, it is clear that no creditors were singled out. A set of large institutional investors had agreed that their notes would be subject to the moratorium proposed by the city and that they would adjust the terms of the $1.7 billion of city bonds that they held, so that the statute essentially required other investors, who, in the aggregate, had about the same amount at risk, to
noteworthy that there were many affected bondholders, including, no doubt, some fairly powerful and politically sophisticated individuals and corporations. I can not help but guess that if the city had dealt with the crisis not by stopping payment to bondholders but, for instance, by declaring a moratorium on payments arising out of only one large contract with one creditor, then somehow the court would have been less agreeable and would have come to the rescue of this “unprotected minority.”

B. Politics as Part of a Comprehensive Takings Theory

The reader familiar with any of a number of areas of takings law will know that there remains the need to explain why some burdens involving organized interest groups do amount to compensable takings, and why some that burden individuals do not yield compensation. The most important set of cases in which members of organized interest groups are compensated along with unprotected minorities are those in which the government takes title to real property. If, for example, a government should condemn all of the hotels in a city for the public purpose of converting them to apartments for low-income residents, the hotel owners will be compensated.9 The fact that these property owners are numerous or are already organized interferes not at all with the prediction that this will be held to be a taking and that compensation will be available if the government goes through with the plan. It is simply the case that actual physical invasions, or takings of title, occupy a solid core in which the cases are predictable enough with no theory at all. This is so even though it may seem odd at times that a government that takes one square foot of land out of a huge estate must pay compensation, while one that destroys three-quarters of the value of a piece of property with regulations or with a noisy highway nearby normally need pay nothing at all. This example of the availability of compensation even when politics could be substituted for markets (because some of these property owners, like the hotel owners in the

abide by similar rules. Ropico, 425 F. Supp. at 974-75. It is thus arguable that the injured creditors were essentially represented by the well-organized interest group so that the statute imitated the deal reached with organized unsophisticated interests.

previous example, are already organized and hardly qualify as unprotected minorities) does not undermine the search for unprotected minorities as part of a larger theory of takings law—any more than it is a problem for virtually any theory of takings law. Indeed, it is tempting to insist that the existence of this core, or safe harbor for property owners, supports the theory advanced here because physical takings (as opposed to regulatory or tax burdens) usually burden fewer people, who will have relatively more trouble organizing into a political force. Often the government takes property from just one or two property owners, while regulatory burdens almost always affect larger numbers. And even when there are many interests at stake, as when a proposed highway will run through hundreds of properties, the nonphysical burdens of such a project are likely to fall on thousands of properties (such as the homeowners who lose value because of noise from the new highway) whose owners can more easily organize than can the set of owners whose properties are physically taken. In short, it is possible that the rule of thumb, under which physical takings always yield compensation, is simply a convenient algorithm in the law, but it is at least arguable that it is a rule of thumb that is consistent with the view that takings law is sensitive to unprotected minorities.

Nor is it troubling that the reliable core of cases in which compensation is regularly required (even though the taking is from members of organized interest groups) includes cases in which the government does not quite physically take or invade but rather (strategically, in most instances) regulates to such a degree that the property owner is left with virtually nothing at all. \(^80\) One might simply say that joined to the core of physical takings are cases in which the government sought to elevate form over substance in order to avoid compensating those burdened by its actions. In any event, although it is arguable that the distinction between physical and regulatory takings supports the theoreti-

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\(^80\) See, e.g., Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938) (residential rezoning found to deny plaintiff reasonable return where, in fact, no residential development took place in eight subsequent years). For a catalogue and discussion of *Arverne Bay Construction* and other cases in which Justice Holmes's dictum that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); see W. STOEBUCK, supra note 70.

It goes without saying that such cases do not always yield compensation, but rather form part of the murky middle in need of a positive theory. See, e.g., Hadacheck v. Sebastian, 239 U.S. 394 (1915) (no compensation where new zoning scheme shuts down brickmaking operation located on rich clay deposits such that value of property drops from $800,000 to $60,000). There are many such cases, and I plan to include them in the more general positive theory of takings law promised presently in the text.
cal distinction between unprotected minorities and more organized interest groups, it matters little, for our present purpose, why it is that complete physical (or nearly so) takings always yield compensation, while the chaos is contained in that area of law we label regulatory takings. One might simply regard this as an historical accident or a convenient rule of thumb linked to one version of the plainest meaning of the language of the fifth amendment's takings clause. The real task of any positive theory in takings law is, in short, not to explain physical takings but to explain why some "less" invasive burdens rise to the level of takings and others do not.

There are other cases in which even singly burdened citizens are not compensated, and there are others in which compensation is available to members of organized groups. But, as I have warned, it is not possible in this article to take on all of takings law. I leave for another day the development of additional analytic tools that may yield a more complete positive theory of takings law. These other tools, or variables, are not related to the idea of the importance of political coalitions, and my goal in the present article has been to emphasize the interest and the utility of thinking about the separation of markets and politics.

CONCLUSION

I have tried in this article to explore the interaction between, and the separation of, markets and politics in the sense that the constitutional requirement of just compensation injects a marketplace notion into political decisionmaking. I have argued that the very reason why we may not find more extensive use of market mechanisms, such as explicit, or "special," bids, may suggest the starting ground of a new, more successful, and more attractive theory of takings law.

It would be overly theoretical, however, to give the impression that the inquiry into special bids and assessments was merely a necessary step on the way to a positive theory of takings law. I think that the pessimistic explanation of why we do not see special bids and other explicit market influences on the political process is at least as convincing as the optimistic one that I drew on so heavily in Part III. If pessimism is more appropriate, and if the exclusion of market mechanisms from politics is in substantial part the product of the self-interest of

81. See Loretto, 458 U.S. at 430 n.7 ("Early commentators viewed a physical occupation of real property as the quintessential deprivation of property."). There is, unfortunately, little written about early interpretations of the fifth amendment. See Sax, supra note 50, at 58 (contemporaneous commentary in short supply).
politicians, then it is especially important to explore the advantages and disadvantages of innovations like special bids, and it is worthwhile to think about ways in which such mechanisms could be introduced. And even if one's reaction is somewhere in between the two extremes, as it might be if the optimistic explanation—that politics is an efficient market—seemed strong enough to explain why special bids had not yet materialized, but not so strong as to mean that special bids would not be a worthwhile addition to the political arena, then it is appropriate to explore further the mechanics and implications of special bidding and to advertise its possibilities in order to bring about some experimentation.

In the end, I think it likely that political bargaining, or logrolling, plus special bids by interest groups (such as states that anticipate substantial positive spillovers from federal projects they covet) are likely to yield better results than logrolling alone. Moreover, there are likely to be desirable side effects from the special bidding process, such as the possibility that because states (and other interest groups) will need to think about the magnitude of their bids, politicians and citizens may become far more involved than they presently are in thinking about the advantages and disadvantages of government projects at every level. While this is not yet another article extolling the virtues of communitarianism or republicanism, it is surely the case that more explicit discussion about political bargains, interstate spillovers, and the means of raising revenue for projects and for special bids would be a good thing for our political life and for the quality of our self-government. However impressed I am that special bids have not evolved on their own, and however impossible it seems to experiment intentionally with such an intrusion of markets into politics, I can not help but believe that, if the seed of the idea of special bids is dropped here and there, it might flower into something that is both theoretically and practically interesting.