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TAKINGS, TORTS, AND SPECIAL INTERESTS

*Saul Levmore**

ONE of the most frustrating areas of law is that occupied by the question of compensation for private parties who are burdened by their government's actions. From a positive perspective, as most lawyers and readers of law reviews know, there is a gray area in which it is difficult to predict whether compensation will be constitutionally required.¹ And even where takings law is predictable, it is chaotic in the sense that it is difficult to articulate principles that describe or rationalize the various predictable segments in a consistent manner.

From a normative perspective,² takings law remains difficult. The desirability of requiring compensation from a government that takes

* Class of 1962 Professor, University of Virginia School of Law. I am grateful for suggestions received from Richard Fallon, Howell Jackson, Harold Krent, Lance Liebman, Julie Roin, Roberta Romano, and William Stuntz, and from workshop participants at Harvard, Toronto, and Vanderbilt University law schools.

¹ A typical modern reaction to this question is that "it is difficult to imagine a body of case law in greater doctrinal and conceptual disarray." Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I—A Critique of Current Takings Clause Doctrine*, 77 Cal. L. Rev. 1299, 1304 (1989). A similar reaction is to say that "[f]ew 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." Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 149 (1971). I think it is fair to say that commentators and courts are more likely to describe takings law as coherent if the focus is limited to one part of the law, such as regulatory burdens or zoning decisions. Once the inquiry is expanded, the claims of chaos grow louder.

Nevertheless, large parts of takings law may be predictable in the sense that experienced observers will know whether a particular governmental intervention is or is not likely to cause courts to require that the government compensate burdened parties. The familiar clues as to when compensation will be required are permanent physical occupations, serious interference with investment-backed expectations, and total destruction of the economic value of property. See Frank I. Michelman, *Takings*, 1987, 88 Colum. L. Rev. 1600, 1622 (1988). However, such clues do not help us predict why, for example, property taxes are not compensable takings, or why governments can draft doctors and lawyers into military service without matching their preconscription earnings, even though this interferes with "investment-backed expectations." Yet experienced observers know that such interventions will never be held to be compensable takings.

² There are, of course, coherent normative theories of the takings clause. One could imagine an argument, built on notions of Pareto optimality, that private parties ought to be compensated for any forced move away from the status quo. For a theory that comes close to this possibility, see Richard A. Epstein, *Takings: Private Property and the Power of Eminent*

one citizen's property when it could have taken another's, or that takes so much or so often that private investors hesitate to improve properties for fear that much will be lost to the government, is uncontroversial. But when the government simply burdens some citizens, as it might through restrictive zoning, various tax schemes, import restrictions, or environmental controls, the desirability of compensation is disputed. Some of the normative disagreement reflects different perceptions of the relative capacity of market forces or private law suits to bring about similar or better results than does government intervention; some can be traced to different conceptions of majoritarian power in our constitutional arrangement; and some can be traced to the difficulty of advancing positions that offer defensible boundaries between compensated and uncompensated burdens. In any event, general theories purporting to explain why some governmental interventions are (or ought to be) compensable, whereas others are not (or should not be), have not been entirely successful. I aim in this Article to take a fresh approach to this area and to show how takings law is often intertwined with other law. I try to offer a theory that is predictively useful and normatively defensible.³

An important element of my strategy is to start in a strange place. Part I suggests that the distinction between tort and property claims in private law parallels the distinction between uncompensable and compensable takings. Responsibilities that private parties can impose on each other through the tort system, and thus without compensation, can similarly be imposed by the government without compensation. I begin the argument by considering the difficulty of explaining or maintaining the distinction between torts and property in private law, and I develop a claim as to why the distinction carries over to interventions by the government.

The discussion in Part II returns to an approach that I began elsewhere,⁴ and combines Part I's view, that takings law mirrors private law, with the idea that takings law protects parties that are least

Domain (1985). In contrast, one could imagine an argument, paying little attention to initial endowments but much concerned with the game of politics, that no political decision should ever require compensation for losers. But such normative theories are not reflected in takings law as we know it (in the United States or elsewhere).

³ The interaction between the positive and normative components of this theory is first developed in passing and is then explicitly described at the end of the Article.

⁴ Saul Levmore, *Just Compensation and Just Politics*, 22 *Conn. L. Rev.* 285 (1990).

secure in the political process. Part III rationalizes these themes with the doctrine of sovereign immunity and with the familiar idea that compensation is certain for many physical invasions by the government. Part IV returns to the relationship between takings law and the political process by focusing not only on those who are burdened but also on those who benefit from interventions by the government. I suggest that compensation may depend on the presence of a particular kind of special interest group. Finally, the discussion in Part V completes the positive theory of takings law advanced in this Article and then explores the fact that regulations designed to curtail economic growth are unlikely to yield compensation for the burdened parties. I try to show that although this result sometimes seems at odds with the themes advanced in this Article, at least one plausible view of this aspect of takings law is consistent with these themes.

I. THE SYMMETRY OF THE TORTS-PROPERTY AND REGULATION-TAKINGS DISTINCTIONS

I develop two arguments in this Part. First, that the government must pay for what it wants in very much the same way that private parties must pay for their interventions with respect to existing property rights, and that this symmetry, or similarity between the rules of public and private interventions, is the cornerstone of a general, descriptive theory of takings law. And, second, that there is a good reason for this symmetry. As we will see, these arguments build on a difference between tort and property rules. A critical and perhaps surprising question is whether this difference can be justified or otherwise sustained. I believe it can, and I offer some explanations of the difference between tort and property rules. In the end, however, the argument for understanding takings law relies on the strength of the idea that there is a torts-property distinction—and not the question of whether there ought to be such a distinction.

A. Identifying the Symmetry

The symmetry between private and public interventions is easy to recognize. If *A* wants to build on or otherwise exploit *B*'s property, *A* must generally buy the property or pay *B* for the right to be enriched from it. In this case, *B* is often referred to as enjoying a "property right." In contrast, when *A* enlists the help of a court in shutting down a source of pollution on *B*'s property, or in controlling the

amount of such pollution by charging *B* for the damage inflicted on neighbors, *A* need not (and certainly the court need not) compensate *B* for any lost pre-intervention value of the tortious activity. A successful plaintiff simply need not compensate for a tortfeasor's precautions. We might think of the torts-property distinction in this familiar (and nearly circular) way; the law simply treats *A*'s wish to use *B*'s backyard in order to install a party tent or solar panels and *A*'s attempt to stop *B*'s pollution in very different ways. We are accustomed to thinking of *B* as possessing a property right that *A* must purchase in the first example, and of *B* as infringing on *A*'s property right (protected by a liability rule) in the second example.

Public interventions can be divided into the same two categories. If the government takes land from *B* and builds on it, then the government must compensate *B*. But if the government restricts *B*'s activity, or even closes down *B*'s factory through safety or environmental controls, then it need not pay *B* for the pre-intervention, "pre-takings," value of the property. Similarly, the government can regulate in an injunctive way, without triggering compensation for the taking of private property, just as a private party, albeit less frequently, can obtain injunctive relief in extreme situations or in those that present the administrative problems of continuing liability and damages. There is thus a *symmetry* between private and public interventions. The axis which divides torts and property, or defines property rights, in private law is reflected in the line between compensable takings and uncompensable government interventions.⁵

The symmetry is not perfect. *A* may be unable to collect damages from, or shut down, *B*'s nonnegligent factory (unless a strict liability rule is in effect), but the government can often use its police power to close down (even) a nonnegligent factory that violates some safety or environmental norm announced by the government. And a private party will normally need to wait for a real injury before intervening against *B*'s factory, but the government can normally intervene even

⁵ While I use the word symmetry in its provocative, scientific sense, see Martin Gardner, *The New Ambidextrous Universe: Symmetry and Asymmetry from Mirror Reflections to Superstrings* (3d rev. ed. 1990), the text goes on to disclaim the presence of precise symmetry between takings and regulation on the one hand, and property rights and torts on the other. I do mean, however, that just as looking at the right side of a face generally gives terrific clues as to what to expect on the left side, looking at the divide between property and torts in private law gives excellent insight as to where we ought to expect the line between compensable takings and regulations to fall.

before the factory does any harm. The symmetry would be more perfect if the government were required to justify its interventions by showing that *B*'s factory was operated negligently and caused actual damage. But inasmuch as we often favor government interventions precisely where proof (and especially proof of negligence) is difficult or expensive to produce, it is not surprising that we do not ask the government to prove wrongdoing before it intervenes. An alternative means of enhancing the symmetry between public and private interventions would be to arm private plaintiffs with a rule of strict liability, but there are, of course, a variety of reasons why we might prefer less strict liability rather than more.⁶

But without rearguing the rules of tort liability, the point is that there is a rough but striking symmetry between uncompensable and compensable public and private interventions. No matter how certain we are that a proposal by *A* to use *B*'s land will cause the land to be used more efficiently, *A* will need to pay *B*. And similarly, the government will need to pay when it takes *B*'s land in order to build a highway through it, no matter how certain we are that this highway represents a higher valued use of the property. And if *A* suffers 10,000 in damages because *B* does not spend 200 to lessen the pollution that emanates from *B*'s property, *A* can bring a tort suit and *B* will have to pay 10,000 in damages (and stop polluting), but *A* will not have to pay *B* 200 as compensation for the pre-intervention value that *B* loses. Similarly, if the government intervenes to stop *B*'s pollution, *B* will receive no compensation.

This symmetry suggests that one way to understand takings law, or the requirement that compensation *sometimes* be paid for government interventions, is to understand first the distinction between torts and property. Put differently, if we understood why private property consists of the bundle of rights (and remedies) that is associated with it, then we might have some insight into the question of why the government must compensate when it interferes with some combinations of

⁶ It is interesting that the most impassioned academic proponent of strict liability rules also believes that a great many forms of regulation (and taxation) ought to be compensable takings. Epstein, *supra* note 2. Both positions reflect the idea that a party should pay for what it "imposes" (Coase aside). But there is also a tension between these positions because strict liability for private actions generates more perfect symmetry (and, as we will see, less incentive for inefficient allocation between the public and private sectors) only if the government need *not* pay when it intervenes.

these rights but not others. If the regulation-takings distinction reflects the torts-property distinction, then the former might be understood by dissecting the latter.

Unfortunately, it is easier to point to this distinction between torts and property than it is to explain it. When *B*'s failure to spend 200 causes 10,000 in pollution damages for *A*, it is easy to explain the willingness of courts to intervene against *B*, by requiring *B* to pay damages or to modify his or her behavior, if only because there are transaction costs that sometimes prevent bargains between *A* and *B*. But it is more difficult to understand why neither *A* nor the government is required to pay 200 as compensation for the pre-intervention value that *B* loses.

One explanation of why we find a compensation requirement in property and not in torts starts with the idea, rooted in judicial language and everyday intuitions, that torts involve behavior that most reasonable people would regard as offensive and that spills over to harm an innocent party. Thus, courts will help *A* stop a neighbor's noisemaking, because loud noise is generally regarded as intrusive or offensive, but courts will not intervene to give *A* the right to cut down trees in a neighboring yard which cast shadows on *A*'s own solar panels because growing trees is not generally regarded as intrusive or offensive behavior. The more general suggestion that comes from this example is that moral intuitions can often explain or describe both the torts-property distinction and the regulation-takings boundary. For example, the requirement in takings law that compensation be paid to a farmer whose crops are taken to feed troops might reflect the intuition that it is unfair for individual citizens to bear much more than their proportional share of a social burden.⁷

A very different explanation of the torts-property distinction arises out of a conviction that although our legal system generally prefers private exchanges to bureaucratic or judicial interventions, interven-

⁷ Somewhat similarly, that the government need not pay inducted troops wages that correspond to their peacetime earnings might be said to reflect a moral intuition that because many citizens are called into the armed forces the burden of lower wages is widely shared. A similar explanation regards compelled military service, payments of taxes, and jury duty as uncompensable takings because they are all reciprocal civic obligations. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 Cal. L. Rev. 53, 131-40 (1990). Under this view, it would seem (contrary to takings law) that the government ought to be able to claim that it is the civic obligation of farmers to provide free food to troops.

tions may be necessary in the face of "holdout" power. Private marketplace bargains may not work in tort cases. If *B*'s polluting activity interferes with *A*'s neighboring use, and *A* is forced to rely on a private market transaction to influence *B*, then *B* will often enjoy a kind of monopoly power and be able to hold out for a private payment from *A* that is greater than the actual value to *B* of polluting. In comparison, private marketplace bargains are more reliable where normal property transactions are concerned, because if *B* tries to hold out, *A* will normally be able to go elsewhere to acquire the necessary land. The law may therefore be quite prepared to intervene in tort cases (where there would otherwise often be holdout problems), but it is generally inclined to leave property transactions to private bargains. Certainly, the law could deal with holdout problems through tort liability but still require that *A* compensate *B* for the value of precautions. The effect of tort law would be to force a bargain at an externally determined price (rather than at a price of zero). The fact that the law does not follow this strategy, however theoretically neat it may be, may indicate that the law seeks to avoid the unnecessary administrative costs such compensation would require.

Still, if holdout problems are indeed the source of the torts-property distinction, then we might wonder why the law does not simply await evidence of holdouts, allow uncompensated intervention when there is such a holdout problem, and require private bargains (and compensation) in all other cases. There are, after all, tort cases that do not involve any substantial holdouts, and private property transactions that do. The answer, I think, is that it is easier to distinguish torts from property than it is to confirm the presence of a holdout problem. If the legal rule were that uncompensated interventions were allowed only in the face of holdouts, private parties and governments that coveted their neighbors' property would often come running to court, insisting that a seller has holdout power and that there should be a judicially sponsored taking with no requirement of compensation.⁸

⁸ On the other hand, when there are obvious holdout problems in "property" we might expect (and we occasionally find) legal intervention of the kind normally found in torts. This is probably the best way to understand the doctrine of easement by necessity, which permits one property owner to use another's land when this use is found "necessary" to the enjoyment of the first owner's land, as it might when a landlocked owner has no other means of access to his property. See Stewart E. Sterk, *Neighbors in American Land Law*, 87 *Colum. L. Rev.* 55, 69-76 (1987) (exploring doctrine of easement by necessity as solving holdout problem created by bilateral monopoly situation). It is more difficult to explain why easements of necessity may

Without offering an exhaustive exploration of the torts-property distinction,⁹ I am suggesting that we proceed under the assumption that this distinction in private law can be understood either as the product of widely held notions about the kinds of behavior that are regarded as offensive deviations from the status quo (and are labeled as torts) or as a convenient rule of thumb meant both to encourage private bargains and, at the same time, to defeat holdouts. But, as we will see, the arguments below do not much depend on either of these explanations. What matters instead is that we accept the proposition that there is an identifiable distinction between torts and property so that courts are able to distinguish between tort cases, where *A* complains of *B*'s pollution, and property cases, where *A* wants to use *B*'s backyard. I suggest both that this distinction carries over to direct government interactions, in the form of a corresponding line between regulations and takings, and that this migration, or symmetry, is appropriate.

B. Predicting Based on the Symmetry Theme

The implication of this symmetry for predicting takings law is that one should evaluate situations in which a citizen is burdened by a government's action by asking first whether a private party with the same aims and strategy as the government could have succeeded in tort or would have needed to purchase property. The predictive rule for takings law that emerges from this theory is that compensation

be available without just compensation, but it bears noting that there will generally be no comparable marketplace exchanges against which to measure the forced exchange.

In any event, the discussion in the text incorporates the familiar idea that one reason the government can take private property (by paying compensation), and private parties can not normally take property except through consensual bargains, is that the government would otherwise often face holdout problems. Several property owners in the path of a proposed highway, for example, might hold out for large payments (above their true reservation prices), raising the cost of the property to a level where the government would be unable to justify the project. Put differently, another source of asymmetry is that public but not private property transfers may be involuntary, but this asymmetry seems both explicable and sensible.

⁹ Another explanation for a disinclination to make torts as compensable as property interventions builds on the idea that taken property is easier to value than are untaken precautions. In tort cases, courts can often ascertain quickly whether precaution costs exceeded benefits, with no need to undertake precise valuations. My intuition is, however, that this sort of administrative difference between torts and property is unlikely to explain the absence of compensable torts decisions. For a similar argument, see Saul Levmore, *Probabilistic Recoveries, Restitution, and Recurring Wrongs*, 19 J. Legal Stud. 691, 711-12 (1990) (assessing administrative difference between tort and restitution remedies).

will not be required when a government's intervention is easily seen as a substitute for a private tort suit, but that compensation will be required when the intervention is readily seen as a substitute for a private purchase. When neither is the case, so that the intervention is a close substitute neither for a private tort suit nor for a private purchase, this symmetry analysis has no applicability. A complete predictive theory of takings law will need to include other considerations in order to address such situations.

Thus, when the government tears down a private home in order to build a government office building, we might predict that compensation will be required because a private party that sought to develop a property in this manner would surely need to purchase the right to do so, and could hardly get a court to intervene in a way that would eliminate the need to pay the homeowner.¹⁰ But when the government's environmental regulations cause a factory to shut down, we would expect there to be no compensation requirement, much as in a private tort suit the victorious plaintiff need not compensate the loser for precaution costs or for any decrease in value of the defendant's property.¹¹

¹⁰ Thus, the easiest takings case to explain may involve not the government's seizure of land in order to build a road or a dam (the classic holdout-based example), but rather a taking in order to build a building or some other project that a private party might undertake. See Laurence H. Tribe, *American Constitutional Law* 588-93 (2d ed. 1988); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation"* Law, 80 Harv. L. Rev. 1165, 1189-90 (1967).

¹¹ I recognize that some readers may find the text's examples too easy. To the extent that the torts-property distinction is *not* predictable, my suggestion is that the unpredictability of takings law is an interesting corollary. I regard the symmetry argument as a means of explaining and predicting a good deal of takings law. But for the reader who is inclined to insist that private law is itself quite unpredictable, I offer the symmetry idea as a way of understanding why takings law is similarly chaotic.

It should be noted that although tort suits tend to be more retrospective than regulatory interventions, see *supra* text preceding note 6, there remains a good deal of similarity between these two tools, even when tort suits involve *ex post* claims for damages rather than claims for injunctive relief in the face of a threatening hazard. See, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590, 595-96 (1962) (upholding local ordinance prohibiting drilling below water table in the interest of safety even though it resulted in shutdown of business); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (upholding restrictive zoning in a residential area that resulted in shutdown of brickyard). The obvious analogy between regulatory interventions and tort suits is implicitly recognized in many of the decisions that point to the idea that all property is held under the implied obligation that the owner's use not be injurious to the community. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-92 (1987) (citing *Mugler v. Kansas*, 123 U.S. 623, 665 (1887)). The discussion in Part II suggests that cases such as *Mugler*, which involved the closing of a brewery as a result of state legislation forbidding the

C. Justifying the Symmetry

However much the compensation rules associated with public interventions can be predicted by referring to close private counterparts, there is the obvious question of *why* takings law should track results in hypothetically parallel, private maneuvers. The answer, I think, is that this carryover, or symmetry, is necessary because without it private parties would expend great (wasted) effort to get governments to do their takings for them.¹² If in private, but not public, interventions the law required that losers be compensated, there would be great incentive to shift maneuvers from the private to the public sector. Similarly, if there were no symmetry, and public, but not private, interventions triggered a compensation requirement, governments would often decline to regulate tortious behavior, however awful or inefficient, because by leaving such regulatory tasks to private suits—even when the government was itself the best enforcer or provider of public goods—the government could avoid the expense of the compensation requirement. It is thus positively understandable and normatively desirable for similar interventions to be similarly compensable (or not compensable) whether done in private (by bargain or lawsuit) or by the government (with regulation, lawsuit, bargain, or condemnation). If this symmetry were not present, the allocation of tasks between the private and public sectors would be distorted in an unfortunate way.¹³ It is this allocation problem that

manufacture and sale of intoxicating beverages, might be more easily understood as not generating compensation because the burdened parties were probably a potent political interest group.

¹² It is possible that this problem is at the root of the “public use” distinction in takings law. But inasmuch as this idea, that the government can take for some ends and not others, has not survived real cases and clever governments, I do not dwell on it. For more on this point, see Epstein, *supra* note 2, at 161-81 (arguing that the public use requirement limits the power of the government to take private property).

¹³ This argument about allocation suggests that special attention ought to be paid to takings cases where plaintiffs might instead have been sued in tort. Perhaps the most famous of such cases is *Miller v. Schoene*, 276 U.S. 272, 279-281 (1928) (holding compensation not required where state statute permitted 10 or more apple orchard owners to enlist the help of the state (rather than requiring them to sue in tort) in destroying red cedar groves to prevent the harm done to apple trees by a fungus, cedar rust, which harmlessly resides on cedar trees). For a penetrating discussion of the case, see James M. Buchanan, *Politics, Property, and the Law: An Alternative Interpretation of Miller et al. v. Schoene*, 15 J. L. & Econ. 439 (1972). Among other things, Professor Buchanan points to the asymmetry of constitutional rules; in particular, he notes that we would not expect the Court to allow a legislature to require investment on the part of cedar tree owners (without compensation) if the biology were

drives the symmetry idea. It is when government interventions could be substitutes for private actions that we need to ask whether these private suits would likely have been (free) tort suits or (costly) purchases of property rights.

In short, whatever the reason for the torts-property distinction in private law, under which compensation is bargained for or otherwise enjoyed by transferors of land and other property but not by those who are made to give up some use or entitlement that is found tortious to others, this distinction repeats itself in the public sphere, so that the government pays for takings but not for regulating tortious behavior. And the useful result of this symmetry is that the government has no extra incentive either to push to the private sector those tasks for which the government is well-suited, or to take on tasks that are best done privately.¹⁴

reversed and cedar rust proved beneficial to apple orchards. *Id.* at 450 n.16. The analogous asymmetry in private law is clear in the different treatment of omissions and commissions. See Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 *Va. L. Rev.* 879 (1986). Buchanan also discusses the use of legislative intervention as a substitute for private bargaining (in the face of high transaction costs). Buchanan, *supra*, at 445. In this there is perhaps a hint of the related substitutability of a tort suit (and ultimately of the need for symmetrical rules in order to prevent misallocations between the private and public sectors).

In more obvious tort situations, the allocational aspect of the symmetry idea is more apparent. Thus, if I accumulate large quantities of explosives in my yard, we could imagine my neighbor proceeding in tort, or the government (encouraged, perhaps, by my neighbor) removing the danger through its police, zoning, or other powers. It would be strange (and perhaps risky) either if my neighbor had to compensate me and the government did not, or if the government owed just compensation and my neighbor could proceed freely in tort.

This last example suggests that the idea that valuation difficulties explain the torts-property distinction may have been discarded too quickly. When the government faces holdouts and takes property as part of a road-building project, for instance, the requirement that it pay compensation might be understood as reflecting the idea that land sales and property assessments are sufficiently common events that valuation can not be too expensive to accomplish. In contrast, when the government shuts down an unsafe factory or removes explosives from my yard, untaken precautions or idiosyncratic pleasures would need to be valued if such interventions were held compensable, and it is arguable that we do not normally undertake such valuations and that they would be administratively costly. I do not pursue this theme because my sense is that it explains, at best, only a small part of the various puzzles associated with takings (and torts). We do, after all, often value untaken precautions in adjudicating claims of negligence, and there are so many examples of takings claims that fail even though the plaintiff's losses are simple to value.

¹⁴ A related point is that there is a risk that political decisionmaking will be pushed "away from the legislature and administrative agencies and into the courts" if courts can alter property rights in a way that is exempt from the compensation requirement. Barton H. Thompson, Jr., *Judicial Takings*, 76 *Va. L. Rev.* 1449, 1507 (1990). To the extent that the

As noted earlier, there are, of course, government interventions that have no close private counterparts. A comprehensive zoning scheme, for example, is not the sort of thing that a private party normally designs or purchases, and it is arguable that takings law could compensate or not compensate losers with little fear of misallocating authority between the public and private spheres. Thus, a recognition of the symmetry between the torts-property and regulation-takings distinctions adds little to understanding these cases.¹⁵ I turn now to a second theme that contributes to a more general theory of takings law.

II. SINGLING OUT

I have suggested elsewhere that when the government threatens to intervene in a way that will burden many citizens, these citizens need to look to the political process rather than to takings law for any relief, but that when the government singles out a private party, in the

judicial intervention at issue is in fact a close substitute for something that would be compensable if done legislatively (or in traditional, private transactions), I quite agree that parallel rules (as between judicial and legislative interventions) are desirable. On the other hand, the areas explored by Professor Thompson often involve circumstances where interest groups battle in the political arena and then pass legislation or, it is feared, encourage the courts to intervene in order to avoid the requirement of compensation. I argue in Part II that in many of these situations, because there is no "singling out" of politically unprotected minorities, a clever legislature could in fact accomplish its aims (without appealing to the courts) in a way that avoided the compensation requirement. To the extent that this is so, there is of course no allocation problem between the branches. See *infra* note 28 for further comment on this problem of misallocation between legislatures and courts.

It should also be noted that there are other allocation problems between the public and private sectors that are not limited by symmetrically drawn doctrines. For example, procedural due process requirements may encourage activities to move from the public to the private arenas. Similarly, protections against government-sponsored searches and seizures may cause some activities to be carried out by private parties rather than by officials of the state. In short, my claim is that takings law avoids one such allocation problem, but I do not claim that other areas of law avoid similar problems.

¹⁵ An optimistic alternative would be to say that where the activity is never engaged in by a private party, there is no risk of a private party (inefficiently) pressuring the government to take over a task in order to escape private payments. And with no such reallocation risk, compensation (and the valuation tasks associated with a compensation requirement) need not be required. One problem with this approach is that it ignores the role of interest groups. Private parties might still be tempted to get the government to do something inefficient precisely because there is no need to pay for the government intervention. In Parts II and III, I consider some analytic tools applicable to interest group problems.

Note that a zoning scheme might also be drafted in a way that burdened a small number of people. In such a case the symmetry theme might again be a useful tool of analysis.

sense that the government's aims could have been achieved in many ways but the means chosen placed losses on an individual or on persons who are not part of an existing or easily organized political coalition, then we can expect to find a compensable taking.¹⁶ Thus, most taxes and rent control schemes are not compensable takings because they are the products of political exchanges; taxpayers and landlords are left to protect themselves in the political arena. In contrast, individuals who are subjected to "spot zoning" are often politically unprotected, because they are burdened in a way that makes it unlikely that they can find political allies, and takings law will often protect them from majoritarian exploitation.¹⁷ There is, in other words, a kind of process theory or equal protection element in takings law. I should stress that although this is a positive theory, in the

¹⁶ Levmore, *supra* note 4, at 305-19.

¹⁷ Takings law also protects individuals from zoning regulations if the zoning ordinance was passed for an illegal or anticompetitive purpose, or if the individual owner had been induced to rely on government actions or statements prior to a rezoning, or perhaps if the zoning ordinance caused an extraordinary decrease in the value of the land. See, e.g., *Wheeler v. City of Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. 1981) (finding taking where referendum banning new apartment buildings followed grant of permit), cert. denied, 456 U.S. 973 (1982); *Herman Glick Realty Co. v. St. Louis County*, 545 S.W.2d 320, 325 (Mo. Ct. App. 1976) (finding taking where zoning permit denied because municipality believed there was no need for more enterprises). But see *Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919) (finding no taking for regulation requiring the removal of oil tanks despite earlier reliance and placement of tanks at a certain location at the city's own request); Daniel A. Farber, *Economic Analysis and Just Compensation*, __ Int'l Rev. L. & Econ. __ (forthcoming) (noting that although decisions often stress the importance of a large drop in value, there has been no finding of a compensable taking by the United States Supreme Court on this precise ground for more than half a century).

But my point is that apart from these specific factors, a successful takings claim might hinge on the more general claim that a property was unfairly "singled out." See, e.g., *Charnofree Corp. v. City of Miami Beach*, 76 So. 2d 665, 669-70 (Fla. 1954) (finding taking where large hotel was prohibited from building stores in its interior lobby notwithstanding that several other nearby large hotels had stores in their lobbies); *McIlhinney v. Zoning Hearing Board*, 455 A.2d 1284, 1286-87 (Pa. Commw. Ct. 1983) (finding zoning decision resulting in "residentially zoned land in a sea of commercial zoning" arbitrary where ordinance made land adjacent to truck stop and interstate highway residential); *Thompson v. City of Palestine*, 510 S.W.2d 579, 582-83 (Tex. 1974) (finding city's attempt to rezone as commercial a single vacant lot at an intersection to be "arbitrary spot zoning"); see also *Trustees Under Will of Poineroy v. Town of Westlake*, 357 So. 2d 1299, 1304 (La. Ct. App.) (finding taking where neighbors succeeded in keeping adjacent tract from being rezoned light industrial for aesthetic purposes), cert. denied, 359 So. 2d 205 (La. 1978); *Huttig v. City of Richmond Heights*, 372 S.W.2d 833, 842-43 (Mo. 1963) (finding taking where land along commercial district zoned residential because of fears that rezoning would devalue expensive homes located behind the property).

sense that it usefully describes a good deal of takings law, I also think it normatively defensible.¹⁸

This theme is not entirely unrelated to the symmetry associated with the torts-property distinction. When the government intervenes against a tortious individual, some observers might insist that the government has not singled out this party because the government's legitimate aim could not usually have been accomplished in alternative ways (with the burdens falling on other parties). But because the symmetry and singling out ideas have different origins (the latter comes from thinking about the dividing line between markets and politics, and the role takings law can play in protecting parties who could not easily invest in political influence, whereas the former comes from the torts-property distinction in private law and the need to carry over this distinction in public law so as to prevent a misallocation of responsibilities between the private and public sectors) and because the two themes do not as a positive matter entirely overlap, I prefer to regard them as two tools that address different cases but that happen to reinforce one another in some settings. Generally speaking, I think of the singling out idea as explaining the absence of a compensation requirement in most large-scale cases where there are many losers. In smaller-scale cases, where singling out is a concern because the political market is unlikely to work well, the symmetry theme then describes the dividing line between compensable (private

¹⁸ The variety of distributional, economic, and moral arguments *in favor* of compensation for government interventions are, I think, familiar. Distributional arguments *against* compensation (for a large set of regulatory burdens, for example) rest on the idea that a strict compensation requirement further empowers citizens who happened to enjoy larger initial endowments. Efficiency arguments against compensation turn on the point that generous and regular compensation will encourage overinvestment in private capital, much as earthquake insurance may encourage overbuilding along faults. Indeed, there is the danger that investors who can predict regulation will exacerbate a social problem in order to be compensated for "lost profits" when the regulation comes into effect. Unless the government is an efficient provider of the kind of insurance against takings that citizens would want, the argument for compensation turns on the likelihood that an unconstrained government will make non-welfare maximizing choices, or simply that a majority will exploit the minority. See Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Cal. L. Rev. 569 (1984) (describing takings law as insurance); William A. Fischel & Perry Shapiro, *A Constitutional Choice Model of Compensation for Takings*, 9 Int'l. Rev. L. & Econ. 115 (1989) (explaining takings law as contractarian protection against exploitative majorities); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 509 (1986). Put in these terms, my argument is that where there is singling out there is a significant risk that exploitation has occurred, and thus compensation should be required.

property-purchase-like) and noncompensable (private tort-suit-like) interventions.

For example, a rent control statute that benefited one set of tenants at the expense of one landlord would likely be a compensable intervention both because it singled out the landlord and because at this scale there is an obvious private substitute—tenants can pay their landlord market prices. Rent control laws applicable only to a very few mobile home parks do resemble private purchases and do burden but a small number of citizens, and it is striking that such controls have been found to be compensable interventions.¹⁹

In contrast, most rent control schemes, taxes, and regulatory plans that burden entire industries (such as legislation mandating automobile safety equipment or banning the sale of alcohol) are not compensable takings. These schemes burden (potentially) well-organized coalitions. The alternative means of explaining the noncompensability of taxes is to emphasize the moral responsibility of all citizens to pay their fair share of the government's obligations.²⁰ But this explanation avoids the parallel question of the appropriate size and scope of government. There is surely no moral consensus as to whether the government, by raising income or property taxes, should build more highways, buy more aircraft carriers, pay out more agricultural subsidies, or do none of these things.²¹

¹⁹ See Levmore, *supra* note 4, at 311-12 nn.57-60 for some discussion of these cases.

²⁰ See Peterson, *supra* note 7, at 131-40 (discussing taxes as a "morally justified" civic obligation and therefore not compensable). Professor Peterson's theory is that there is a compensable taking when the government intentionally forces someone to give up property and is not seeking to prevent or penalize behavior that the public regards as wrongful. One problem with this approach concerns situations where the government enacts price controls aimed at a single industry. My own positive view of such controls is that we should not expect compensability because there is no singling out. See Levmore, *supra* note 4, at 313 n.61 (arguing that price controls aimed at an industry are different from those aimed at one or two firms within an industry). Arguably, the Peterson approach either miscalculates these cases (as Peterson recognizes) because no compensation is required but the firms have not engaged in any wrongful behavior, or requires some reformulation to account for the noncompensation rule. Peterson's approach also fails to deal with sovereign immunity: the public surely regards negligent behavior by government employees as wrongful, yet under the doctrine of sovereign immunity (which is itself not regarded as a compensable taking), tortious acts by government officials may be noncompensable.

²¹ On the other hand, I do not argue that comprehensive zoning or tax schemes, with no compensation for the losers, are necessarily desirable. It is possible that a requirement of compensation would lead to better schemes and to less (undesirable) rent-seeking. But it is at least *plausible* that politics works well, and it is certainly *implausible* that singling out is a good idea. A compensation rule linked to singling out is therefore justifiable.

In sum, my positive claim about takings law contains two primary elements.²² Compensation for a governmental intervention will be required when a politically unprotected loser is singled out and when there is a close substitute in the form of a private purchase. Inasmuch as it is my plan to explain takings law, broadly defined to include tort interventions, taxes, regulations, and virtually all interactions between governments and private citizens, it will be no surprise that I plan to add to these elements. But as we will see, these two themes need but a little help to form a remarkably successful predictive theory. Multivariable positive theories are, of course, easy to criticize—especially when their evolutionary origins are mysterious. Nevertheless, I present a positive theory because I think it is useful to offer a competing predictive theory in this famous minefield of positive legal theories. But my real emphasis is on the idea that we can gain a good deal in both predictive and jurisprudential terms by approaching takings law not from the starting point of physical invasions (a starting point that has produced chaos and unpredictability over the last hundred years, and in at least that number of law review articles) but instead with the fundamental question of why interventions against tortfeasors are not compensable takings. Armed with the symmetry of the torts-property (or regulation-takings) distinction, with the notion that the takings clause may have evolved as a means of protecting individual citizens or unprotected minorities from adverse political decisions, and with several other themes, takings law begins to appear rich rather than chaotic.

²² The normative image of the argument set forth in the present Article builds on several different ideas. The first is the point stressed in Part I, that there is a normative reason for the regulation-takings line to be drawn in much the same way that the torts-property line is drawn in private law. The second normative line of reasoning offers a division of the landscape that reflects the concerns of the economic and distributional arguments noted earlier. The suggestion is that where there is singling out there is more reason to fear inefficient and inequitable intervention. There is a hint of this idea in a very different approach that describes judicial activism as sensitive to the perceived imbalance of power between regulators and the regulated. Gregory S. Alexander, *Takings, Narratives, and Power*, 88 *Colum. L. Rev.* 1752, 1753 (1988). A different normative argument is explored in Part IV. It should be noted that I do not insist that politics leads to efficient results. Rather, in the absence of a convincing argument concerning what majorities ought to be able to do, I argue that it is defensible to draw the line at singling out.

III. SOVEREIGN IMMUNITY AND PHYSICAL INVASIONS

A. *Takings Law and Sovereign Immunity*

The symmetry and singling out ideas facilitate an explanation of why numerous residents burdened by noise from a nearby government-sponsored airport have little chance of recovering in takings law, whereas a lone farmer who bears a similar economic burden is more likely to recover.²³ The symmetry idea also exposes the relationship between takings law and sovereign immunity, and raises the interesting question of whether the plaintiffs disturbed by a neighboring airport would be more successful if they proceeded in tort rather than in takings law. Doctrinally speaking, plaintiffs prefer to bring takings claims because: (1) successful tort claims would need to be repeated inasmuch as damages will be awarded (at best) only for claims that fit within the period prescribed by the statute of limitations; (2) in the case where there are many offended neighbors, a nuisance claim (seeking, perhaps, to shut down the airport) would likely

²³ Generally speaking, landowners are most successful when they can show specific physical damage and are sometimes successful when repeated low overflights significantly diminish economic value. See, e.g., *A.J. Hodges Indus., Inc. v. United States*, 355 F.2d 592 (Ct. Cl. 1966) (recovery for economic damage from low overflights); *Bemiett v. United States*, 266 F. Supp. 627 (W.D. Okla. 1965) (no taking where overflights may have been a nuisance but did not cause any specific property damage). But alongside this explicit rule there is also the sense that compensation is unlikely when there is no singling out. See, e.g., *Bieneman v. City of Chicago*, 864 F.2d 463, 465 (7th Cir. 1988) (unsuccessful attempt to bring class action claim against O'Hare airport on behalf of all citizens of Northern Illinois), cert. denied, 490 U.S. 1080 (1989); *Moore v. United States*, 185 F. Supp. 399, 400 (N.D. Tex. 1960) (no compensation for noise emanating from an Air Force base because there must be a "sharing in the common burden of incidental damages") (quoting *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1913)); *Nestle v. City of Santa Monica*, 496 P.2d 480 (Cal. 1972) (appeal from unsuccessful suit by over 700 local citizens complaining of noise from Santa Monica Airport). A corollary to this proposition is that similarly injured citizens in a densely populated area have better access to the political arena than does a single, isolated property owner. See *Batten v. United States*, 306 F.2d 580, 585 (10th Cir. 1962) (giving no compensation to owners of 10 homes seeking relief from jet noise from Air Force Base, with an implicit message to go to the legislature), cert. denied, 371 U.S. 955 (1963).

Finally, for a case with singling out and compensation, see *Branning v. United States*, 654 F.2d 88 (Ct. Cl. 1981), where a landowner on a South Carolina island successfully brought a takings claim for airport noise. The case can be said to involve singling out either because alternative military jet training sites were probably available or because the government could at the outset have assembled a larger piece of land for its airbase. More generally, the need for successful claimants to show repeated, rather than occasional, offensive flights may well reflect sensitivity to singled out owners. After all, a lone supersonic overflight, however intrusive, does not compare to repeated hourly flights by more common aircraft in demonstrating the degree to which a property was selected to be in the path of the government's maneuvers.

fail because of the doctrinal distinction between a private and public nuisance (which is itself consistent with the singling out idea);²⁴ and (3) whether numerous or singled out, plaintiffs would face a powerful sovereign immunity defense because the government can say that its offending actions were *discretionary*, involving the direction of takeoff and landing patterns and so forth.²⁵

The existence of a sovereign immunity defense, however, raises the question of why it is not a compensable taking when the government *commits* a tort (and enjoys sovereign immunity). It is one thing to say that the government can intervene against a tortfeasor, because private plaintiffs can do the same, but now the question concerns the government's ability to intervene, or cast burdens, as a tortfeasor. The doctrine of sovereign immunity seems quite at odds with the symmetry notion developed in Part I (and with other theories of takings law as well) because the doctrine allows the government to escape liability where private tortfeasors would have to pay. A related puzzle is that as the doctrine (or defensive use) of sovereign immunity has narrowed, a line has been drawn between discretionary actions, where the immunity prevents plaintiffs from recovering from a negligent government, and nondiscretionary behavior, such as negligent driving by government employees, where sovereign immunity is waived.²⁶

In fact, these developments reaffirm the importance of the symmetry of the torts-property (and regulation-takings) distinction. In the early days of our republic, the government had more limited ambition

²⁴ One reason that is often given for this distinction in nuisance law is that numerous burdened parties can appeal to the legislature for relief. The notion is that a legislator will find it more worthwhile to press for government intervention when tortious behavior affects many constituents. Similarly, I have suggested that takings law protects only singled out parties because more numerous potential losers can battle in the political arena. On the distinction between public and private nuisance, see Richard A. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. Legal Stud. 49, 98-102 (1979). For some suggestive cases, see *supra* note 23.

²⁵ See *Schwartz v. United States*, 38 F.R.D. 164 (D.N.D. 1965) (rejecting nuisance claim regarding sonic boom because it was a discretionary decision).

²⁶ The suggestion in the text hardly pretends to do more than take a stab at a small part of the mysteries that can be associated with the doctrine of sovereign immunity. The symmetry idea also suggests that sovereign immunity is related to ideas about delegation, because there is always the possibility that the government can "contract out" its powers. For further discussion of this aspect of the delegation issue, see Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. Rev. 871 (1991); Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 Ind. L.J. 145 (1977-78).

and a smaller budget, so that a rule of sovereign immunity (making public torts free) would have been unlikely to stimulate the transfer of many activities from the private to the public sector. Moreover, if a government-owned wagon negligently collided with one owned by a private party, then as now there would be little fear of singling out, or ugly majoritarianism, because wagons chance upon one another. In modern times, in contrast, it is plain that the government has substantial entrepreneurial power so that there is a need for rules preventing misallocation between the private and public sectors. An optimist might say that tort immunity has been waived in the modern era not simply because as the government grew it committed many torts, and an outraged citizenry demanded accountability, deterrence, and compensation, but also because, to the extent that things could be done recklessly in one sector but not the other, there arose the danger of misallocation between the sectors. As the government engaged in more activities, this danger of misallocation increased. A larger evolutionary point also bears mention: as tort law itself has expanded, there has been a symmetrical growth in the scope and quantity of (uncompensated) regulatory interventions by the government.

Insofar as sovereign immunity for discretionary acts is concerned, it is plain that in a large subset of cases there is, almost by definition, no private-sector counterpart to governmental interventions, and therefore no need for symmetrical liability. If the government injures private parties because of a negligently managed war or because it is reckless in not banning the importation of a food or the sale of a drug, tort immunity is available. Inasmuch as there are no close private equivalents, there is little danger of misallocation between the public and private sectors with respect to warmaking or embargo declarations. In contrast, if there is a negligently caused injury at a construction site owned and managed by the government, liability follows because it is conceivable that without such liability the government would be more inclined to develop internal construction capabilities and less inclined to put construction projects out to bid in the private market.

If the boundary between discretionary and nondiscretionary acts in the law of sovereign immunity were defined by asking whether the government's actions were proprietary, or of the sort that private enterprises engaged in, we would have a virtual articulation of the symmetry theme. But inasmuch as this boundary has been rejected,

so that the government sometimes enjoys immunity when it competes rather directly with the private sector and in other instances is liable in tort when it does not compete, the symmetry idea can be said only to influence (but hardly to predict) this area of law.²⁷

B. *Physical Invasions*

I turn now to a reexamination of the taking by the government of many pieces of land in order to build a road or other large project. As a doctrinal matter, it seems quite plain that compensation is required. But under the theory developed here, we might expect that the acquisitions could amount to uncompensable takings because there is no singling out. The taking of one piece of land is, after all, quite different from the taking of many. Put differently, there is a sense in which the taking of many pieces of land is no different from the collection of a broadly based tax, the regulation of a profession or industry, or the institution of a military draft. And indeed, if our law were to evolve all over again, I think it possible that with different legal arguments in the right place and time these traditional appropriations would *not* amount to compensable takings.²⁸ But we have a long history of classifying "physical invasions" (as opposed to taxation and other physical appropriations) as compensable takings, and although this

²⁷ The governmental-proprietary distinction was most recently rejected in *Berkovitz v. United States*, 486 U.S. 531, 538-39 (1988). For a discussion of the discretionary function exception, see Krent, *supra* note 26.

The discussion in the text avoids the question of whether there ought to be sovereign immunity where there is no public-private misallocation problem but there is reasonable reliance. For example, when the government undertakes to provide large-scale meteorological services, it is arguable that liability for negligence would do more harm than good by deterring the government from providing the service at all, but an absence of liability raises the difficult question of how to encourage the correct amount of reliance on such governmental services. See, e.g., *Brown v. United States*, 599 F. Supp. 877 (D. Mass. 1984) (finding liability for negligent maintenance of weather buoy), *rev'd*, 790 F.2d 199 (1st Cir. 1986) (finding no liability), *cert. denied*, 479 U.S. 1058 (1987).

²⁸ As we will see in Part IV, one possible explanation of these cases is that there is often a nonmajoritarian political coalition that *benefits* from these takings (for example, when the government builds a highway spur on the land it takes). But I do not stress this feature, however historically important it may be, because it is plain that if the government takes many pieces of land in order to build a military base, compensation will be required, even though there is neither singling out nor special interest, or nonmajoritarian, beneficiaries. For a very different approach that reaches the same conclusion, that large-scale physical takings might not be or might not have been compensable, see Peterson, *supra* note 7, at 137-38. And for a discussion of the ways in which this issue encapsulates the tension between liberal and republican views of constitutional rights, see Frank I. Michelman, *Tutelary Jurisprudence and*

doctrine has now lost much of its predictive utility, as claims regarding airplanes and open-space zoning demonstrate,²⁹ it remains true that where the government physically invades land,³⁰ or uses land in a way that drives its value to the old owner down to zero,³¹ compensation will be required even though there is no singling out.³² The same is true when a wartime government appropriates the fruit of many farmers' harvests.³³

Constitutional Property, in *Liberty, Property, and the Future of Constitutional Development* 127 (Ellen Frankel Paul & Howard Dickman eds., 1990).

Legislatures can avoid paying compensation under the takings clause, even for physical invasions, by encouraging courts to alter common law property rights. One familiar example is that legislatures have responded to public pressure to expand public access to beaches by declining to legislate such access but urging the judiciary to provide such access and authorizing public lawsuits. In turn, the courts have favored public access and denied compensation, see Thompson, *supra* note 14, at 1450, even though they were clearly rethinking common law property rights. It is thus (barely) arguable that legislatures have been allowed to avoid paying compensation—and have been allowed to push or misallocate interventions from one branch to another—only and precisely where the singling out idea suggests that legislatures might not have been required to compensate at all.

²⁹ In the case of overflights, the older cases sought to establish a bright-line rule that there was an invasion if flights passed through a "box" of property above and including an owner's land. The current focus seems to be less on the location of the offending aircraft and more on the damage done to the property below. Compare *Batten v. United States*, 306 F.2d 580, 585 (10th Cir. 1962) (no taking because flights not directly over property), cert. denied, 371 U.S. 955 (1963) and *Lacey v. United States*, 595 F.2d 614, 618 (Ct. Cl. 1979) (jets flying at 450 feet was a taking of aviation easement) and *Aaron v. United States*, 311 F.2d 798, 801 (Ct. Cl. 1963) (allowing recovery only for flights below 500 feet) with *Branning v. United States*, 654 F.2d 88 (Ct. Cl. 1981) (reduction in value of property below is a compensable taking).

As for open-space zoning regulation that allows a property owner to do little more than leave the zoned property in its "natural" state, see Jon A. Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking*, 57 Minn. L. Rev. 1 (1972).

³⁰ This is true even where there is no reduction in value. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (finding a permanent physical invasion a taking even where there was probably no reduction in value).

³¹ There are mixed signals regarding the question of compensation for actions that reduce the value of property down to zero. Compare *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 n.36 (1978) (suggesting that there would have been a taking if the terminal had ceased to be economically viable) with Farber, *supra* note 17 (showing that no recent United States Supreme Court cases find compensation because of a gross reduction in value).

³² Alternatively, we might say that physical takings usually involve singling out, so that the law, as a substitute for identifying singling out, has developed a rule of thumb that physical takings are always compensable. The noncompensability of the military draft could then be explained as reflecting the fact that in the context of human services physical takings are not highly correlated with singling out.

³³ In such cases it might be simplest to explain that a precommitment to compensate comes not because of a physical invasion but because it is in the majority's interest in order to ensure supply.

An extreme case to consider is that of land reform or large-scale nationalization of private enterprise (or, in earlier eras, the emancipation of serfs and slaves), where there is a majoritarian redistribution of vast quantities of property. The singling out idea suggests that such large-scale changes could escape the compensation requirement; the physical taking of such traditional property, however, suggests that compensation will be required. Predicting such a case seems more a matter of politics than of anything else. For example, the Civil War seems to have weakened the “legal” arguments for compensating slaveowners. It is noteworthy that steep property taxes could (slowly but surely) do the same thing as any land reform program, with no risk that these taxes would be held either to require compensation or to be otherwise illegal. As is frequently the case, a determined and long-lived majority can do virtually anything it likes.

A very different approach to the special character of physical takings is to emphasize that when land, farm products, or other property is completely taken, the costs of measuring the taking are relatively low. Compensation may be most available where it is administratively most feasible. If zoning schemes were compensable, courts would need to establish both pre- and post-zoning values, so that the noncompensability of most zoning schemes—and of non-physical takings in general—could be linked to the administrative costs that compensation would generate. One counterexample to this link between compensation for physical invasions and administrability is that the government must pay for “taking” an easement, even though the valuation of such a property right is often complicated. It is possible that compensation in this context should be understood as necessary to prevent the government from escaping the reach of virtually all takings law by cleverly taking a series of easements or other rights that were in the aggregate sufficient for the government’s purposes, when it would be more natural or efficient to take a few entire parcels. There is probably some merit to this line of argument, but I think it more useful to focus on singling out and on the torts-property distinction than on the difference between physical and other takings, between losses that are difficult and easy to value, or between complete and incomplete takings.

IV. IDENTIFIABLE SPECIAL INTERESTS

If we shift our focus from the losers in politics, who are singled out, to the winners who profit from government interventions, we come to recognize the familiar problem of republican theory—coalitions consisting of even less than a majority of the citizenry can capture the legislature, or other decisionmaking entities, and impose great costs on other citizens. Recognizing this problem of “external costs” facilitates imagining that a political and legal system might wish to place hurdles in the way of such an organized coalition, at least when it represents something less than a true majority.³⁴

One solution to this problem is the normative suggestion of “windfalls for wipeouts,” that those who benefit from government interventions should be made to pay those who are burdened.³⁵ In theory, such a requirement would perfectly encourage desirable projects and discourage inefficient or corrupt interventions. One reason why we see little of this internalization technique in practice³⁶ is that it is often difficult to identify the winners. Mass transit systems might be financed by charging those who live near train stations or whose property values increase when new rail lines are announced, but many projects are not so easily translated into monetary gains. At the same time, it is surely the case that some of the interventions encouraged by nonmajoritarian coalitions, or “special interests,” produce greater benefits than costs (however much the benefits accrue to members of the coalition in question). There is, therefore, an argument against a rigid requirement that either winners or the state compensate losers, because in the face of unidentifiable winners, good interventions will

³⁴ On the problem of external costs and the inefficiency of interest group legislation, see James M. Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962); Saul Levmore, *Bicameralism: When are Two Decisions Better than One?*, *Int'l Rev. L & Econ.* __ (forthcoming); Frank I. Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 *Creighton L. Rev.* 487 (1979).

³⁵ See *Windfalls for Wipeouts: Land Value Capture and Compensation* (Donald G. Hagman & Dean J. Mischynski eds., 1978).

³⁶ The decline of special assessments is one example of the disinclination to use internalization techniques. See Stephen Diamond, *The Death and Transfiguration of Benefit Taxation: Special Assessments in Nineteenth Century America*, 12 *J. Legal Stud.* 201 (1983); Levmore, *supra* note 4, at 294.

It is noteworthy that some of the early cases dealing with the constitutionality of special assessments may be best explained with the idea of singling out. See, e.g., *Norwood v. Baker*, 172 U.S. 269 (1898) (decision favoring taxpayer where exaction exceeded benefits to property owner and assessment fell on but one property owner).

sometimes be passed over. Given these concerns, a reasonable compromise position might be one in which special interest legislation required payments from winners to losers only when it was relatively easy to identify the winners, and only to the extent necessary to compensate the losers. The point of requiring identifiable beneficiaries is that the legislature could charge the winners for the costs imposed on the losers (instead of declining to intervene in order to save the cost of compensatory payments by the government). The point of limiting the scheme to situations where a nonmajoritarian special interest benefits is that it is possible that the administrative cost of windfalls for wipeouts is worth bearing only when the problem of external costs is greatest. Under such a rule, the compensation requirement would serve as a shield for those who are singled out and as a tool to constrain (nonmajoritarian) special interests.

The predictive quality of this suggestion, that identifying those who gain from an intervention is a useful step in determining whether compensation will be required, is more interesting than it is powerful. Consider, for example, two classics, *Penn Central Transportation Co. v. New York City*³⁷ and *Griggs v. Allegheny County*.³⁸ In *Penn Central*, a property owner's ability to develop a commercial property was constrained because of the declaration of landmark status for the property. In *Griggs*, a few nearby residents suffered losses from the expansion of a commercial airport. There is something intriguing about the fact that compensation was not required in *Penn Central*, where those who really value historic preservation are surely a special interest group (as defined above) but are difficult to identify (and would be especially difficult to identify if the government tried to charge them for the costs of compensating the loser in that intervention), but that the Court found a compensable taking in *Griggs*, where the airport expansion also probably benefited only a minority of citizens—who could have been identified and taxed through airport fees.

A predictive theory can not possibly claim that there is compensation whenever the winners are identifiable because there are, of course, many cases where there is surely no compensation requirement and yet intervention simply benefits the fisc, so that all taxpayers are the easily identified winners. Military aircraft noise, for example,

³⁷ 438 U.S. 104 (1978).

³⁸ 369 U.S. 84 (1962).

is not normally a compensable intervention even though such noise might be less burdensome if aircraft followed more circuitous routes or were equipped with expensive mufflers; taxpayers gain when these precautions are not taken, but there is no payment to the losers from these identifiable winners. What is, instead, positively successful and normatively defensible is the idea that there will sometimes be compensation when an intervention generates identifiable nonmajoritarian, or special interest, beneficiaries. At the same time, the logic of the symmetry of the torts-property (and regulation-takings) distinction leads us to expect that compensation will not be required for an intervention resembling, or closely substituting for, a private tort suit.³⁹

Somewhat similarly, the singling out theme needs to be coordinated with the inquiry into the number and identifiability of beneficiaries. When the government has singled out a loser in startling fashion, we should probably expect that feature of the case to dominate any observation about the political characteristics of the beneficiaries. And, in contrast, when a governmental intervention distributes burdens very broadly, we might expect coalition politics to govern, so that there will be no (redundant) compensation. Thus, if the government raises income taxes in order to increase price supports for an agricultural commodity, there are identifiable nonmajoritarian beneficiaries, but the losers are so numerous that there is absolutely no singling out. If compensation were required (as it is not), we might say that the rule encouraged the majority to consider the external costs imposed by a well-organized minority. But it is easy to rationalize the absence of a compensation requirement in these circumstances; compensation is administratively costly, and it may be less costly for the majority to learn to protect itself in the political process. As a positive matter, it is when a nonmajoritarian, identifiable interest group benefits at the expense of another small group that we should expect compensation. I could describe *Penn Central* as a situation where there is a touch of singling out, because despite the fact that hundreds of properties were given landmark status, there were necessarily case-by-case decisions

³⁹ Put differently, if the interest group could normally sue in tort, the logic of the symmetry argument suggests that there should be neither an incentive for such complainants to lobby the government nor a reason for the government to decline to regulate when it is the best regulator.

as to which properties to include.⁴⁰ Alternatively, the case can be said to involve an intervention resembling a private purchase. Under either view, the government's victory (no compensation was required) might seem surprising—unless it is linked to the fact that some compensation was paid in the form of transferable development rights.⁴¹ But the most striking thing about the case is the fact that the beneficiaries are not identifiable. We might therefore say that *Penn Central* stands only for the idea that where there is but a hint of singling out, or a vague resemblance to a private purchase, and where some compensation has already been paid, the law will not require fuller compensation so long as the beneficiaries are not identifiable. The normative version of the argument is that if compensation were required in such cases, the majority would be unwilling to vote for the intervention because it would need to pay when it had no great interest in the matter (of historic preservation), and it would have no way of taxing those who gained most from the intervention. It is precisely because some such (special interest) interventions are efficient and desirable that compensation is therefore not required. In *Griggs*, by way of comparison, there were only a few burdened parties, so that compensation could be seen as a response to singling out. But, again, the combination of several losers and the ease of identifying, and collecting from, the winners makes the result still easier to explain.

There are, of course, some more straightforward cases. If the government shuts down a polluting factory, there will be no compensation even though the intervention may benefit an identifiable nonmajoritarian interest group.⁴² And if the government takes a

⁴⁰ 438 U.S. 104, 132 (1978) (noting designation of more than 400 landmarks and 31 historic districts).

⁴¹ See John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 Yale L.J. 75 (1973); *Penn Cent. Transp. Co. v. New York City*, 366 N.E.2d 1271, 1277-78, (N.Y. 1977) (underscoring use of development rights), *aff'd*, 438 U.S. 104 (1978). In *Penn Central*, the court also reasons that the railroad benefited from the fact that the city's subway system connected travelers to the railroad. Such "offsetting benefits" arguments are noted in Part V, although it would seem that (even if the court was correct as to the direction of the net benefit) an offsetting benefit from *another*, earlier government intervention does not generate a present license to take. Still, it is noteworthy that the decision thus doubly suggests the windfalls for wipeouts idea. Not only is it difficult to extract gains from those who enjoy historic preservation, but also the Penn Central Company itself had been the previous beneficiary of windfalls that would have been hard to extract.

⁴² Again, this is one way to think of *Miller v. Schoene*, 276 U.S. 272, 279-821 (1928), previously discussed *supra* note 13. Note that in cases involving cedar rust (*Miller*), pollution,

piece of land in order to build a shelter or a monument, compensation will be required even though the beneficiaries are nonmajoritarian and regardless of whether or not they are ultimately identifiable.⁴³ The symmetry and singling out ideas command these results.

A better way to explore the three themes suggested thus far, symmetry, singling out, and identifiability of beneficiaries, is to experiment with some difficult hypothetical interventions. Imagine, for example, that the government planned to deal with the problem of homelessness by requiring all homeowners and landlords whose residential properties are worth more than \$60,000 per inhabitant to take in and care for one homeless person for a period of three years. Drafted and litigated properly (with perhaps some promise of compensation for any torts or crimes committed against the property owners), I think that this could be done in a way that did not amount to a compensable taking. There is, by design of course, a physical invasion and an invasion of privacy (a subject that may require its own drafting strategy). But, there is not much of a misallocation concern (because there is no close private substitute for the intervention), and the burdens fall very broadly, so that there is no singling out. Moreover, the (nonmajoritarian) homeless are a contemporary exam-

or other activities that might be found tortious, there is no singling out because the government has not chosen to burden one party when it might just as well have burdened others. See *supra* text accompanying note 16.

⁴³ When the government takes land, not only is there singling out (as there often is in physical takings), but also there is a close resemblance to a private purchase. Similarly, although rent control is not normally a compensable taking, it may be compensable where there are nonmajoritarian identifiable beneficiaries and singling out. See *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1282 (9th Cir. 1987). And in *State v. Herwig*, 117 N.W.2d 335 (Wis. 1962), a statute forbidding a landowner to shoot wildfowl on his own property was held unconstitutional where the government had designated that owner's land as a no-hunting area in order to induce migratory birds to land in the area and to be available to other hunters. There was evidence that the plan increased the number of available birds and that the birds did some foraging at the expense of the owner of this designated safety zone. In short, there was singling out in the selection of the safety zone. It is also plain, I think, that the state could have funded the cost of compensation from the beneficiaries of this intervention, through the collection of additional licensing fees from hunters.

A harder case to explain involves a rancher who was forced, without compensation, to modify or remove his fence in order to enable antelope to move through the property to their preferred winter range. *United States ex rel. Bergen v. Lawrence*, 848 F.2d 1502 (10th Cir.), cert. denied, 488 U.S. 980 (1988). Here we might say either that there was no singling out (it is not as if there were many ranchers who could have been imposed upon with the government choosing one to bear the brunt of the solution) or that the beneficiaries are those who love wildlife and are unidentifiable.

ple of a group that can be numerous but still not sufficiently or potentially organized to constitute a special interest group of the kind under discussion. There is, after all, no need for the majority to fear that such a set of citizens will capture the legislature and impose grave external costs. Put differently, a statute of this kind is not one we are likely to experience under majoritarian rule.

In contrast, imagine a statute that called on the same property owners to take in members of the United Automobile Workers, or even unemployed members of that union, who desired free housing. I think that such a statute might be struck down (or held to require compensation). An important difference between the two schemes is that, in this second hypothetical, the beneficiaries are now an identifiable, nonmajoritarian coalition who could capture the legislature and impose external costs. If *all* homeowners were required to bear the burden, there would still be no compensation under this analysis; but the more the losers are few and the beneficiaries are identifiable, the greater the chance that the statute will be struck down or that compensation will be required.

V. OFFSETTING BENEFITS AND GAINS FROM GROWTH

A. *Offsetting Benefits*

I have suggested thus far that we should expect the line between compensable and noncompensable governmental interventions to resemble its counterpart in private law. At the same time, we should think of takings law as sensitive to the identity and political power of the losers, and occasionally the winners, associated with an intervention. Powerful as these themes may prove to be, however, there will remain cases that are best understood with different tools. Consider, for example, those situations in which a plaintiff claims compensation for a loss, but where the very intervention that caused the loss generated an offsetting benefit. Under virtually *any* theory of takings law we would not expect compensation in these circumstances.⁴⁴ For example, a regulation requiring a factory owner or common carrier to obtain liability insurance will not be a compensable taking if only

⁴⁴ See Epstein, *supra* note 2, at 195-210 (discussing implicit in-kind compensation).

because the “loser” receives insurance coverage in return for the premiums that the government requires to be paid.⁴⁵

A less obvious corollary is that if the same external factors (such as congestion) that have generated the pressure for government intervention have also increased the value of a property burdened by the intervention, then we should not expect compensation. This situation could also be described as one in which the average property owner would have agreed *ex ante* to the combination of congestion-plus-uncompensated-regulation (rather than to no congestion at all).⁴⁶ I have in mind the many cases in which factories, stables, quarries, and other enterprises near residential areas are regulated out of business.⁴⁷ One could explain the noncompensability of such regulation as reflecting the fact that even though there are only a few losers in many of these cases, there is a close private substitute in the form of a nuisance suit. But there is a neater way to explain these cases. In many of these disputes, the political stimulus for such regulation is related to the fact that many citizens have moved into the area, so that the risks from, and the distaste for, these businesses are greater than

⁴⁵ See, e.g., *Noble State Bank v. Haskell*, 219 U.S. 104, amended, 219 U.S. 575 (1911).

The regulated party may of course be risk neutral, or even risk seeking, so that the insurance is not welcome, but perhaps because this raises the administrative costs of valuation or because there is at least substantial compensation in the form of the insurance coverage, the law seems inclined to be rough about the matter and to say there is no compensable taking. Note that I do not point to the example of mandatory liability insurance for a large group of citizens, such as all automobile drivers, because there is no singling out and no close private substitute (for the *requirement* that there be insurance coverage) and thus we should not expect compensation. Put differently, the government could just tax this group (and there would be no compensable taking). At the same time, landlords who lose through a rent control scheme obviously do not enjoy offsetting benefits, or “average reciprocity of advantage,” but again there is no compensation because there is no singling out.

⁴⁶ Note that when the benefits come not from the given statutory scheme but rather from the external pressure of increased population and the like, there is then no longer the familiar argument that takings law forces the government to internalize costs and benefits (because under this view the government can do almost as it pleases once congestion sets in and property values increase).

⁴⁷ See, e.g., *Goldblatt v. Hempstead* 369 U.S. 590 (1962) (holding regulation of pit excavation not a compensable taking where town had expanded around the water-filled pit and 18 acres held by pit owner remained to be developed); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (allowing elimination of brickyard originally established in isolated area when at the time of regulation a substantial residential community had developed); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (eliminating livery stables in area that had become more congested); *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878) (permitting development of once-marshy area).

before.⁴⁸ Unfortunately, the takings cases in this area do not mention the likelihood that as the area around plaintiff's business became more populated land prices surely increased. Nonetheless, it is surely the case that the very same forces that have generated regulation often also provide some implicit compensation. When the owner of the business that is regulated out of existence sells the underlying property, this "compensation" can often be collected.⁴⁹

⁴⁸ There is the possibility (but, as it turns out, not a great probability) that where an owner's losses are the result of recent, "specific" reliance on governmental actions or promises, compensation will be available. See *supra* note 27. There are many reasons to think that in such cases we ought to expect compensation (or a striking down of the governmental scheme) regardless of our positive and normative theories of takings law in general (and even if the move to regulate stems from increased congestion). This reliance idea has been discussed elsewhere and can be understood simply by noting the gross inefficiencies and injustices that can be done by a government that need not abide by its recent and specific promises. See Tribe, *supra* note 10, at 601-02; Levmore, *supra* note 4, at 317 n.74. But to put this notion in terms of the present discussion, we might not be surprised if large numbers of citizens do not gain compensation through litigation when they have relied to their detriment (because they can appeal to the legislature before or after the burdensome intervention) but then lone losers are compensated where there has been serious reliance even if there is no close substitute in the form of a private tort claim. See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (striking down public-access ruling by Army Corps of Engineers where the ruling affected a single corporation and where the government earlier had encouraged the corporation to invest); *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483 (1988) (awarding compensation to a single dump-site operator who was shut down after relying on recent government permit), cert. denied, 490 U.S. 1020 (1989).

Although this kind of reliance argument is not terribly useful on its own, it is interesting to see a relationship with the symmetry idea introduced in Part I; an argument can be made that a reliance claim against the government should succeed when a similar claim would have succeeded against a private party who induced reliance.

⁴⁹ A perfect (but usually unnoticed) example of this phenomenon in the private context can be found in the famous torts case where a feedlot became a nuisance to another party's residential development. *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972). The development was part of the expansion of Phoenix to include areas that had once been remote from suburban life. The court granted a permanent injunction against the feedlot, but required the developer to indemnify the feedlot owner for a reasonable amount of the cost of moving or shutting down. *Id.* at 708. The ease is often understood as amounting to a purchased injunction, but the low explicit payment that was required makes this explanation unpersuasive. The hidden point is that the land on which the feedlot was located must surely have risen in value for the very same reason that the developer was able to induce residents to buy in this location. Indeed, the residents who "caused" the issuance of the injunction might be said to have caused the increase in the land's value. Thus, the loser received compensation when he sold his property and did not really need to be directly reimbursed by the developer or the government. It was therefore appropriate to limit compensation to relocation or shutdown costs.

B. Political Coalitions and Dynamic Regulation

The predictive power of the theory advanced in this Article relies to a degree on an ability to identify situations in which the burdens of a government intervention fall on an individual or on an otherwise unprotected political minority. There are cases, however, in which this apparently straightforward distinction is less obvious than first appears. Consider, for example, *Kinzli v. City of Santa Cruz*,⁵⁰ where an owner of a large, undeveloped tract of land, surrounded by other property owners who over time had sold their land to developers, suddenly confronted a majoritarian decision to create a "greenbelt" and ban any future urban development on the property. This intervention greatly reduced the value of the property owned by the Kinzli family. Put differently, the ban on development precluded their opportunity to profit from the increased congestion. The potential for singling out in such a setting is quite plain: voters in an undeveloped region permit some commercial or residential development, and as newcomers arrive there is soon the risk that the newcomers will want to free ride on the open space which remains, by banning the very kind of development that permitted the new majority's arrival in the first place.

In situations such as *Kinzli*, the regulation closely resembles a private purchase and involves significant singling out. In contrast, in some communities anti-growth sentiment threatens the owners of many undeveloped sites. For example, regulations may effectively require greatly increased lot sizes so that construction is essentially banned on a percentage of undeveloped lots. In such a situation, we might explain a (likely) decision denying the right to compensation as following from the fact that with so many losers there is no great danger of misallocation between the private and public sectors because there is no close resemblance to a private purchase, and there is no blatant singling out of a politically powerless minority. But what explains the result in *Kinzli*, and cases of its kind, where compensation is unavailable, other than the possibility either that the theory developed here is unhelpful or that with better lawyering or judging such cases would have come out in plaintiffs' favor? There are, I think, two ways of thinking about such difficult cases. The first draws our attention to the problem of *future* burdens and windfalls;

⁵⁰ 620 F. Supp. 609 (N.D. Cal. 1985), rev'd on other grounds, 818 F.2d 1449, amended, 830 F.2d 968 (9th Cir. 1987), cert. denied, 484 U.S. 1043 (1988).

the second brings us to the thin line between potent coalitions and unprotected individuals.

Imagine first, contrary to the actual decision, that a court decides that the Kinzlis are entitled to constitutional protection. The government could then be expected either to abandon its anti-development regulatory plan, proceed to appropriate (and pay for) the property, or pay the assessed value of what was taken. Imagine for the sake of exposition that this third, and perhaps most likely, alternative materializes and that the government must pay seventy percent of the property's pre-taking value (because the regulation barred urban development but not all uses of the land). Imagine further, that after a few years the government undoes its regulatory controls, perhaps because the Kinzlis sell to a developer who is better able to maneuver in the political arena or because the majority is unwilling to tax itself in order to complete the greenbelt idea, so that the property rises greatly in value. It is most unlikely that the government could now get a refund from the Kinzlis or from their successor. In some sense this disinclination to retrieve money that has passed under the bridge creates a general imperfection in takings law.⁵¹ We might therefore expect courts to be especially reluctant to order compensation when there is some substantial possibility of change (in a way that favors the property owner) in the future. I think *Kinzli* and many other anti-development situations fit this description. It is interesting to note that in *Kinzli* the zoning change was enacted for a ten-year period, and the court may have taken this sunset provision to mean that there was some real possibility of development being permitted after that time. In most other cases the disinclination to compensate when development rules change can be explained not only by the possibility of a reshuffling of priorities and political power in the future, but also by the fact that there is little singling out (because many building sites are affected) and not much of a close substitute to a private purchase or tort suit (because of the larger scale of the regulation).

The second way to think about these cases is to look for the possibility of windfalls in the past instead of the future. Imagine that the Kinzli family understood all along that their land could be restric-

⁵¹ For example, if the government is forced to compensate an offended property owner because of 20 military flights that pass over a property on a daily basis, the government can be required to pay more if the aircraft fly lower or become more numerous, but the property owner will surely not get a refund if the flights unexpectedly cease.

tively zoned or regulated without compensation. In that case, their view of the steady arrival of new residents to their jurisdiction might have been to welcome such migration because property values would rise. After all, there is only a chance that they would eventually be on the losing end of a regulatory intervention. Indeed, as development occurs we might think of the Kinzlis as speculating by *declining* to be among the early developers. As this undeveloped land becomes a rarer commodity, its value rises—even as the chance of an intervention preventing its development increases. It is even tempting to say that from an *ex ante* perspective the Kinzlis have not been injured; they simply gambled (and lost) on the likely path of development and politics. But this temptation must be ignored because the same could be said of most takings. When, for instance, a government takes *A*'s land in order to build a new school in a recently congested area, we *could* say that *ex ante* *A* would have been willing to take the gamble of congestion-plus-uncompensated-takings. That is, as a matter of wealth maximization, *A* might favor in-migration, and she just happened to lose in the sense that her land, rather than another citizen's, was selected as the site for a school rather than left alone by the government and allowed to appreciate in value in *A*'s hands. Yet takings law clearly requires compensation when *A*'s land is taken in this manner.

As a positive matter, the correct *ex ante* perspective is apparently to see that *A* much prefers congestion *plus* the constitutional guarantee of compensation over a scheme which offers gains from congestion discounted by the possibility of an intervention with no compensation for the appreciated, post-congestion value of the land.⁵² Once the matter is put this way, the *ex ante* perspective explains the absence of compensation for the Kinzlis only if it is plausible that they prefer a no-compensation rule because such a rule would *itself* encourage enough migration so as to make property values rise more than enough to compensate for the chance of an uncompensated taking. And inasmuch as we have little experience with people moving from one jurisdiction to another because of the promise that a majority will be able to secure property and otherwise intervene in the public interest without paying compensation to the old owners of property, it

⁵² See sources cited *supra* note 18 (takings law as insurance scheme).

seems rather far-fetched to explain *Kinzli* or other pieces of takings law precisely in this fashion.

There is, however, a silver lining to the cloud of the ex ante perspective. Once we think of the Kinzlis' attitude toward increased population, we can think of their dispute with the government as pitting the forces favoring growth against those that can loosely be regarded as anti-growth. I will not suggest that there is never singling out in the regulation of development, but by and large the controversies over development in suburbs and vacation communities, and near historic or scenic sites, stir up somewhat predictable patterns of proponents and opponents of growth. I suspect that the Kinzlis had some allies, and that an array of merchants and various subsets of consumers, property owners, and potential owners or tenants also opposed the government's anti-growth interventions. And to the extent that *Kinzli* (and contemporary regulations in Nantucket, Aspen, or hundreds of other locations) involves intervention by politically victorious interests over the wishes of other potent, but pro-growth, political coalitions, it is plain that there is both no singling out and no close private (purchase) substitute because such regulation is but a piece of a large-scale, anti-growth movement that private parties can rarely imitate.

Even if the preceding characterization goes too far, because a community's dispute about a single development project leaves some singling out in the air and somewhat resembles a private purchase, the predictive aim of this Article is accomplished. In *Kinzli* there is, after all, only weak singling out, and one suspects that if the sole loser had been a small farmer who tended only a few acres, compensation might have been required, whether the citizens who most favored anti-growth regulation had been either a majority or an unidentifiable and nonmajoritarian coalition. In most cases, where there are a fair number of losers, we should surely not be surprised when those who are burdened by the government's intervention receive no compensation.

CONCLUSION

The three major arguments developed in this Article reflect different combinations of positive and normative theorizing. The predictive notion that singled out property owners gain compensation (at least when there is a close counterpart in the form of a private

purchase) is the most appealing kind of positive claim, because it is both normatively attractive and easy to see how judges might be socialized or otherwise inclined to decide cases in a way that fits such a theory. There remains the (familiar) question of why judges do not more explicitly "reveal" the relevance of singling out, but observers who are willing to concede that in law, as in literature, art, and perhaps all human endeavors, there is more to judicial decisions than what is written in opinions or consciously intended, will be inclined, I suspect, to like best this aspect of the takings theory presented here. It is a positive theory that is normatively attractive and developmentally explicable.

The other arguments present more difficult cases regarding the interaction between positive and normative theories. The idea that the dividing line in takings law mirrors that between torts and property in private law is a strong example of the elegant and mystifying nature of many positive legal theories. It seems like a good thing to draw similar lines between torts and property, on the one hand, and between regulation and takings on the other. And this normative appeal adds, I think, to the predictive quality of the symmetry theme. At the same time, however, it is hard to see how the law could possibly have evolved in a manner that brought it to such a happy state of affairs. And there are plainly many areas of law where rules have the (often undesirable) effect of encouraging the reallocation of activities from the public to the private sectors. It is tempting to say that the same intuitions that brought about the expansion of tort law caused an increase in uncompensated regulatory interventions, but this connection may not rise quite to the level of an evolutionary explanation. Again, my own views are that, in law as in science, predictability is at least one fair test of a theory, and that, in law as elsewhere, there is no need to constrain our understanding by what lawmakers consciously acknowledge. Still, the question of how it could be that judicial decisions in one area of law subconsciously or accidentally (and conveniently) mirror those in another almost certainly shakes even the positive aspect of this theory.

Finally, there is the idea that takings law is more likely to provide for compensation when the beneficiaries of an intervention are identifiable and nonmajoritarian. I did not need to make much use of this third theme, but it is usefully contrasted to the other ideas put forward here. It is arguable that a legal system should balance the costs

of majoritarianism, the need for public goods, and the difficulty of identifying and charging beneficiaries, with a rule that provides for compensation only where those who profit at the expense of others constitute an identifiable nonmajoritarian special interest. But there are surely arguments in favor of rules that encourage the extraction of windfalls from majorities, and there are contrary arguments in favor of putting fewer rather than more financial hurdles in the way of intervening governments. In short, this prong of the theory combines predictive power with normative plausibility (rather than real bite), but again there is no evolutionary story. Judges do not focus on the identity of the real winners in these takings decisions, and there is a sense in which we might expect that if their attention were directed at this positive interpretation of past decisions, judges might actually decline to follow this pattern in the future. In contrast, judges might be expected and encouraged to welcome the ideas of singling out and of the symmetry of the torts-property and regulation-takings distinctions.

In the end, then, I think that the themes advanced in this Article can be understood as forming a positive theory which explains or rationalizes nearly all of takings law. At the very least, it is useful to understand that some of the difficult questions in takings law reflect (perhaps necessarily) similar difficulties in drawing the line between tort and property rules. But for those who do not like mysterious positive theories, or who do not find the torts-property divide easy to draw or predict, I am satisfied to make the argument that as a normative matter takings law ought to reflect a concern for those who are singled out to bear the burdens of government intervention, and it ought to provide for just compensation in a manner that does not lead to misallocations between the private and public spheres. I can report that a good deal of takings law already follows these recommendations, and my inclination is to suggest that the future should bring more of the same, with perhaps more explicit focus on these elegant qualities of the law and less insistence by courts and commentators that here, in takings law, chaos reigns.