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Taking Notes: Subpoenas and Just Compensation

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When the government enforces a subpoena duces tecum for the production of physical evidence, why isn't it taking the target's property within the meaning of the Constitution's just compensation requirement? Professor Lawson and Mr. Seidman argue that enforcement of such subpoenas are indeed takings, but that the Constitution's just compensation requirement can be satisfied in most instances through implicit in-kind compensation. There may be exceptional circumstances, however, where the prospect of implicit compensation from a general scheme of forced production of evidence is insufficient to compensate the target for its losses, in which case direct compensation may be constitutionally required.

INTRODUCTION

Few cases from the October 1997 Supreme Court term received as much public attention as *Swidler & Berlin v United States*,¹ which held that the attorney-client privilege survives the death of the client in federal criminal proceedings.² If one focuses solely on the issue actually decided in the case, that degree of attention is surprising. The issue had not generated a split among the federal circuits, and there were relatively few decisions—federal or state—squarely on point. The Court's holding was thus unlikely to have a major impact on American law; the paucity of

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¹ 524 US 399, 118 S Ct 2081 (1998). The case was the subject of (uniformly favorable) editorial commentary in virtually every major newspaper in the country, and even received a cover story in *The American Lawyer*. See Roger Parloff, *Can We Talk?*, *Am Lawyer* 5 (June 1998).

² *Swidler*, 118 S Ct at 2088.

prior case law demonstrates that the question of the survivability of the attorney-client privilege in criminal cases was not crying out for quick resolution by the Supreme Court.³ Indeed, an observer unfamiliar with *Swidler*'s background might well wonder why a Court that has been dramatically cutting back on its docket even took the time to decide such a minor case.⁴

In another respect, however, the attention lavished on *Swidler* is easily understood. The client in *Swidler* was Vince Foster, a former Deputy White House Counsel who (according to the official version of events) committed suicide on July 20, 1993. The materials at issue in the case were notes from Foster's attorney, James Hamilton, reflecting a conversation that occurred just nine days before Foster's death. The notes were being sought by Whitewater special prosecutor Kenneth Starr in connection with the ongoing investigation of President Clinton.⁵ When the names in the caption are filled in, the public's—and the Court's—attention to the case makes a great deal of sense.

It is normally an ambition, or at least a pretense, of our legal system that the content of the law does not depend on the identity of the parties. From that standpoint, the Court's mere decision to hear the case—a decision that it surely would not have made but for the identity of the parties—may seem somewhat troubling. There is, however, an issue lurking in the background of *Swidler* for which the identity of the parties is highly relevant, in a proper legal sense. That issue was not raised or addressed in the course of the litigation—it instead lay dormant in the facts, and stayed dormant as a result of the Court's decision upholding Hamilton's assertion of privilege. Our aim in this Article is to uncover that dormant issue, which has ramifications that are significantly more important and far-ranging than the question of the survivability of the attorney-client privilege in criminal cases.

The primary issue embedded in the facts of *Swidler* does not concern privileges; it concerns property rights. What is the market value of the exclusive publication rights of notes from Vince Foster's last conversation with his lawyer? Whether your answer has six or seven digits (and it surely will have at least six), the

³ The survivability of the privilege arises primarily in will contests in which the testator's statements can bear on his or her intentions, and it is undisputed that the privilege generally does not apply in those circumstances. See generally Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5502 (West 1986 & Supp 1998).

⁴ The opinion in *Swidler* does not explain why the Court thought that the case merited plenary review.

⁵ *Swidler*, 118 S Ct at 2083.

sum is certainly considerable. Those notes are therefore a very valuable asset for whoever has ownership of them.⁶

Suppose that the Court had ruled against the claim of privilege, and the notes were obtained by the special prosecutor. What would the notes then be worth? It is impossible to judge exactly what effect such compelled production would have on the notes' value, but surely the effect would be substantial. There might still be some value in the first publication rights, but once the notes were in the hands of the special prosecutor, the market would be well aware that their contents would almost certainly become public in the near future, through either a leak or ultimate disclosure during ensuing criminal or impeachment proceedings. A transfer of possession of the notes, or even of a copy of the notes, to the special prosecutor would thus destroy a good portion of the notes' market value.

The question lying behind the facts of *Swidler* is thus: Would a ruling against Hamilton's assertion of privilege and in favor of enforcement of the special prosecutor's subpoena have amounted to an unconstitutional "taking" of property without just compensation? The more general question is when, if ever, enforcement of a subpoena duces tecum calling for the production of physical evidence constitutes a taking of property that requires paying just compensation.

Such questions have excited little interest among modern courts and commentators for three principal reasons. First, any federal constitutional claims are widely thought to be foreclosed by the Supreme Court's 1973 decision in *Hurtado v United States*.⁷ *Hurtado* involved a statute setting a (minimal) compensation level for detained federal witnesses. In response to a challenge from some detainees claiming that the compensation levels were so low that they amounted to an unconstitutional taking of their time and persons, the Court held quite sweepingly that government orders that seize the time and labor of persons, such as the draft, jury duty, or forced appearances in court, are categorically not takings.⁸ Lower courts have consistently taken this language to apply as well to subpoenas duces tecum that require the production of physical evidence rather than the production of

⁶ If the attorney who took the notes has ownership, there may be ethical questions about the attorney's ability to make the notes publicly available. We ignore those questions here, which have no bearing on the more commonplace disclosure of documents that do not raise legal or ethical issues of confidentiality, in order to illuminate the issues raised by government control of the timing of disclosure.

⁷ 410 US 578 (1973).

⁸ *Id.* at 589.

one's person,⁹ and state courts faced with somewhat analogous state and federal constitutional questions have generally followed *Hurtado's* lead.¹⁰ Second, these rulings seem to conform to powerful intuitions: It can't be the case, can it, that the government must provide market-rate compensation for every service that it exacts from citizens, including the duty to provide evidence in court proceedings? There is no historical precedent for such a sweeping compensation scheme, and it would have enormous policy (and economic) consequences. Third, several federal statutes expressly provide for compensation to certain nonparties forced to produce documents.¹¹ One of those statutes pertains specifically to entities that are largely in the business of holding records and will face substantial, repeated compliance costs in the normal course of affairs.¹² The most likely plaintiffs for a constitutional challenge to uncompensated production of documents thus appear to have been "bought off" in advance, which both makes lawsuits less likely and reinforces the idea that compensation is a matter of political judgment (or, if one prefers, political power) rather than constitutional command.

We think that the relationship between subpoenas and the Constitution's just compensation requirement deserves more careful study. *Hurtado* does not address, and certainly does not control, claims for compensation based on forced production of physical evidence, and the lower court decisions that have sought to extend *Hurtado's* reasoning into this realm are ill-considered. The intuition against a general compensation obligation turns out to be correct in the normal case, but the justifications for this intuition have been entirely misunderstood. When properly formulated, they leave room for exceptional cases, including the hypothetical claim implicit in *Swidler*, in which compensation is due. Finally, the selective federal statutes providing for compensation

⁹ See, for example, *In re Grand Jury No 76-3 (MLA) Subpoena Duces Tecum*, 555 F2d 1306, 1309 (5th Cir 1977); *United States v Friedman*, 532 F2d 928, 935 (3d Cir 1976); *In re Grand Jury Subpoena Duces Tecum*, 436 F Supp 46, 51 (D Md 1977); *United States v Covington Trust & Banking Co*, 431 F Supp 352, 354-55 (E D Ky 1977). See also *In re Grand Jury Proceedings*, 707 F Supp 1207, 1219 (D Hawaii 1989).

¹⁰ State courts uniformly hold that compensation is not required for damage to property that is held as evidence by the state. See, for example, *Soucy v State*, 127 NH 451, 506 A2d 238, 293 (1985); *Emery v State*, 297 Or 755, 688 P2d 72, 79 (1984). The courts are split as a matter of state law on the question whether compensation is required when police damage an innocent party's property in the course of chasing or arresting suspects. See Annotation, *Right to Compensation for Real Property Damaged by Law Enforcement Personnel in Course of Apprehending Suspect*, 23 ALR5th 834 (1994).

¹¹ See text accompanying notes 92-98.

¹² Right to Financial Privacy Act, 12 USC §§ 3401, 3415 (1994). See also discussion of the statute at text accompanying notes 92-96.

for forced document production turn out to be a reasonable fit with this calibrated constitutional compensation requirement that accepts but limits the general intuition.

This inquiry brings to the fore a valuable, oft-overlooked lesson about takings law: one must carefully distinguish the question whether there is a taking of private property for public use from the very different question whether just compensation has been provided. The required production of physical evidence is clearly a taking of private property for public use, but in the usual run of cases, the just compensation requirement is satisfied by what Richard Epstein has aptly termed “implicit in-kind compensation”:¹³ the costs of the forced production of property are offset by the equal opportunity to make forced use of others’ property for evidence in appropriate cases. Where, however, one can argue that the burden imposed in a particular case exceeds any plausible *ex ante* expectation of benefits from a system of mutual forced production, the law ought to be open to claims for just compensation.

I. INTERPRETING THE TAKINGS CLAUSE

The so-called takings clause of the Fifth Amendment states, “[N]or shall private property be taken for public use, without just compensation.”¹⁴ We do not aim here to present a comprehensive theory of this clause or its numerous state counterparts. We do, however, wish to emphasize four preliminary points about the structure, language, and proper interpretation of the takings clause.

First, the language of the takings clause discloses three distinct reasons why a claim under that clause can fail: the item taken may not constitute “private property” in a constitutional sense; the item may constitute private property but may not have been “taken” in the constitutional sense; or the item may have been “taken,” but “just compensation” in the constitutional sense may have already been provided. It does not matter to a losing litigant which of these grounds is the basis for his or her loss, but it can make a great deal of difference for the correct analysis of future cases.¹⁵

¹³ Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 195-215 (Harvard 1985) (developing the framework for implicit in-kind compensation). For more on implicit in-kind compensation, see Section IV.

¹⁴ US Const, Amend V.

¹⁵ For an example of confusion between elements of a just compensation claim, one need look no further than *Suitum v Tahoe Regional Planning Agency*, 520 US 725 (1997). The Tahoe Regional Planning Agency refused to permit Suitum to develop her land, but

Second, the qualifying phrase "in a constitutional sense" is critical with respect to each key term in the takings clause. As is generally the case with constitutional terms, the original meaning of the takings clause¹⁶ must be sought through careful historical analysis of what a fully informed eighteenth-century audience would have believed rather than from economic logic or unreflective reliance on plain language; the seemingly transparent meaning of the language may well conceal a deeper, more technical meaning.

Third, and more importantly, the language of the takings clause is not necessarily the first place (or even the second place) that one should look to determine the constitutional limits, if any, on the federal government's power to appropriate private property.¹⁷ Where the federal government is concerned, the first constitutional inquiry is always: Where in the Constitution is the government granted the enumerated power to act, and does that enumeration contain an internal limitation on the scope of the granted power? The Constitution does not grant the federal government any express power of eminent domain (or any other power to appropriate property other than through specified modes of taxation). If the power to appropriate property exists at all,¹⁸ it must stem from the sweeping clause of Article I, Section 8,

provided transferable development rights ("TDRs") that could be used to develop other land held by Suitum or sold to third parties. The majority, along with the Ninth Circuit below, somehow got snookered into accepting the provision of TDRs as relevant to the question whether a taking had occurred rather than as relevant to the question whether just compensation had been provided. As Justice Scalia pointed out in a concurring opinion, *id.* at 748, the sale of a TDR is a three-way transaction: the initial recipient of the TDR receives cash from the purchaser, and the purchaser receives from the government a waiver from otherwise applicable land use restrictions. Thus, TDRs are essentially cash payments, with the money coming from a third party (to whom the TDR is sold) rather than from the government directly. Had the government directly provided cash to Suitum, nobody (one hopes) would treat that payment as relevant to the question whether a taking had occurred.

¹⁶ Our approach in this Article is explicitly and self-consciously originalist. See text accompanying notes 22-29. Of course, we cannot in this brief Article define precisely what we mean by "original meaning" or justify our chosen interpretative approach. Such an enterprise would require a rather lengthy book, which one of us is currently planning. For some preliminary thoughts, see Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 Georgetown L.J. 1823 (1997).

¹⁷ We are limiting our analysis to federal action. As is true of all of the provisions of the Bill of Rights, the takings clause, on its own terms, applies only to federal action, not to action by state governments. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 242, 250 (1833), which limited the takings clause to federal actions, was rightly decided. It is entirely possible that the privileges or immunities clause of the Fourteenth Amendment imposes some restrictions on the power of state governments to appropriate property, but the contours of those restrictions must be determined by a careful study of the Fourteenth Amendment rather than by examination of the Bill of Rights or the original constitutional text.

¹⁸ The existence of a federal power of eminent domain was a matter of some contro-

which grants to Congress the power to enact all laws “which shall be necessary and proper for carrying into Execution” other enumerated federal powers.¹⁹ The terms of the grant define the scope of the power. Specifically, any appropriation of property by the federal government must be “necessary and proper” for the execution of other granted federal powers. As one of us, in conjunction with Patricia B. Granger, has explained elsewhere at length,²⁰ the requirement that executory laws be “proper” places important substantive limits on the exercise of Congress’ authority under the sweeping clause. Without any reference at all to the takings clause, which did not even become operative until 1791, any federal appropriation of property must conform to a “proper” understanding of the relationship between the federal government, the people, and the state governments. The takings clause thus reflects, rather than creates, whatever obligation of just compensation already exists for federal appropriations of property. As with most of the Bill of Rights, the takings clause is a refinement (and partial extension) of principles that were already embodied in the Constitution of 1789.²¹ In order to understand the takings clause, one must first understand the principles of federal property appropriation that governed for the two years prior to the Fifth Amendment’s ratification—and that would have continued to govern had the Bill of Rights never been ratified.

All of this leads to our fourth and final point: identifying the principles of federal property appropriation that are reflected in the takings clause turns out to be (at least for originalists) one of the most difficult interpretative tasks in all of constitutional law, because none of the standard tools of interpretation gives much guidance. The plain language of the original Constitution, which would normally be one’s first resort, is not especially helpful: the sweeping clause requires any appropriation of property to be “proper,” but that term simply incorporates background assump-

versy in the founding era. See Gary Lawson and Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L J 267, 270 n 8 (1993). The Supreme Court did not specifically confirm a federal power of eminent domain until 1876, see *Kohl v United States*, 91 US 367, 371-74 (1875), and by that time the Court had largely abandoned the original understanding of a limited federal government. See Lawson and Granger, 43 Duke L J at 270 n 9.

¹⁹ US Const, Art I, § 8, cl 18. Today, this clause is commonly called the “necessary and proper clause,” but the founding generation knew it as “the sweeping clause.” See Lawson and Granger, 43 Duke L J at 270 n 10 (cited in note 18).

²⁰ See Lawson and Granger, 43 Duke L J at 291-326 (cited in note 18).

²¹ We have elsewhere explained a similar point in connection with the right to petition. See Gary Lawson and Guy Seidman, *Downsizing the Right to Petition*, 93 Nw U L Rev 739 (1999).

tions about federal power that are not precisely elaborated in the constitutional text.

So how would an originalist flesh out those background assumptions about federal power that the sweeping clause incorporates? Obviously, a complete answer to this question would require a fully developed theory of originalist constitutional interpretation, but enough can be said here to establish our general point about the difficulty of the interpretative task in this context.

One possible move is to interpret the takings power to reflect some underlying theory about the proper scope of government. It is, after all, a constitution that we are interpreting, and the Constitution is designed to serve concrete ends. In practice, however, this move proves less useful than one might like. It is safe to say that the federal government was not granted an unlimited power to seize property without compensation; such a power would not fit in well with the obvious distrust of the national government that is reflected in the whole design of the Constitution. Indeed, the Constitution of 1789 severely constrains the national government's power to tax.²² Thus, a limitless takings power would be utterly incongruous. Beyond that general conclusion, however, it is hard to draw much specific guidance from constitutional structure. The Constitution, like most any political document, is the product of a wide range of forces that are unlikely candidates for a single organizing principle. There is no a priori reason to suppose that the contours of the federal takings power reflect, or even resemble, the most attractive or coherent underlying theory of eminent domain. The attractiveness or coherence of the correct account of the federal takings power must be a conclusion rather than a premise.

Another potential source for giving meaning to vague constitutional terms is tradition: What were the preexisting understandings about the power of government to appropriate property

²² The primary taxing power specified in Article I, Section 8, clause 1 of the Constitution ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises") is subject to three important limitations: direct taxes must be apportioned among the states, US Const, Art I, § 2, cl 3; taxes may be levied only "to pay the Debts and provide for the common Defence and general Welfare of the United States," US Const, Art I, § 8, cl 1; and all such taxes "shall be uniform throughout the United States," *id.* None of these limitations, of course, has survived the onslaught of modern government. See US Const, Amend XVI (removing the apportionment requirement for direct taxes); *United States v Ptasynski*, 462 US 74, 84-85 (1983) (upholding as constitutionally "uniform" a tax that singles out Alaskan oil for special treatment); *Buckley v Valeo*, 424 US 1, 90-91 (1976) (treating the general welfare clause as a grant of spending power rather than as a limitation on the taxing power).

in the period before ratification of the Constitution? Those understandings, however, are distinctly unhelpful in the context of the federal takings problem. As Professor Treanor has effectively documented, the states and colonies in the preconstitutional era enjoyed considerable power to appropriate property with no obligation of compensation.²³ But that tradition is of little value for understanding the scope of federal power under the Constitution. The state governments stood in a very different position from the federal government in 1789. It would not be at all surprising for people in 1789 to entrust wide powers to their preexisting state governments while denying similar powers to the newly-created federal government. Indeed, there was considerable doubt in the founding era whether the federal government had even been granted an independent power of eminent domain or instead had to ask the states to employ their (undoubted) powers to acquire property and then convey it to the federal government.²⁴ It would therefore be a fundamental mistake to attribute to the federal government the same powers of property appropriation that were enjoyed by the colonies and the states. Moreover, the tradition of broad power to appropriate property without compensation was undergoing something of a transformation in the founding era. The Revolutionary War brought about a substantial measure of uncompensated takings and other actions that adversely affected property owners and clearly heightened suspicion of government in general and national government in particular.²⁵ It is at least questionable whether the preconstitutional tradition survived these developments intact in 1789.²⁶ The combination of these two factors—the difficulty of reasoning directly from state power to federal power and the possible changes in perspective in 1789 from even a few years earlier—makes it difficult to place much stock in preconstitutional tradition as a tool for interpreting the federal takings power.

What about statements concerning the scope of the federal takings power from key persons involved in the drafting and ratification of the Constitution and Bill of Rights? The short answer is that the historical record contains virtually no founding-era commentary on the scope of the federal government's power (if

²³ See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum L Rev 782, 785-91 (1995).

²⁴ See note 18.

²⁵ See Treanor, 95 Colum L Rev at 790, 831-32 (cited in note 23).

²⁶ The tradition had certainly dissipated by 1868, which may be relevant for identifying the constitutional principles that apply to actions by state governments. See note 17.

any) to appropriate property.²⁷ Another possible source of information would be early judicial decisions construing the federal government's takings power. Again, such evidence simply does not exist, and one should not expect it to exist. The doctrine of sovereign immunity prevented direct judicial actions against the government for compensation or injunctions.²⁸ In principle, a founding-era citizen could raise takings issues to strip away a potential defense in a tort action against a government official or to seek invalidation of a statute that the government affirmatively invoked in a judicial action.²⁹ However, this is a limited range of vehicles for seeking judicial resolution of takings claims, especially in an era of limited federal activity where the occasions to raise such claims were far fewer than today. In any event, we know of no early decisions that cast any significant light on the scope of the federal takings power.

Thus, all of the standard sources for fleshing out constitutional meaning turn up blank when we try to apply them to the federal takings power. So how do we approach the problem of determining the power's original meaning? There is little one can do except to reason from paradigms. We can try to identify certain actions for which compensation was clearly required and others for which it was not and analogize as best we can. The result may be messy and unstructured, but the Constitution does not always cooperate by providing clear rules of decision for all problems.

²⁷ See Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 Okla L Rev 417, 420 (1994) (noting the paucity of the historical record on the takings clause). Professor Treanor argues that the historical record at least supports the proposition that compensation was understood to be required only for physical appropriations of property and not for regulations that affected the property's value. See Treanor, 95 Colum L Rev 782 (cited in note 23). We do not necessarily disagree with the ultimate conclusion (although that is a topic for another essay), though we doubt whether the sparse statements in the historical record contribute much to the argument. In any case, the physical/regulatory debate has little relevance to the specific problem that we address here: as we explain below, subpoenas duces tecum involve direct physical appropriations of property by the government.

²⁸ See Treanor, 95 Colum L Rev at 794 n 69 (cited in note 23).

²⁹ Suppose, for example, that Congress enacted a statute purporting to authorize the uncompensated seizure of your land for construction of a post office. After the government employees dutifully tear down your house, you bring a common law tort action—presumably for trespass and conversion—against the offending officials. If they defend their action on the ground that it is authorized by statute (and is therefore something other than a case of garden-variety thuggery), you can “strip away” that defense and leave the officials answerable in tort by showing that the statute is unconstitutional and should be given no effect because Congress does not have the power to authorize an uncompensated taking of your land and house. In an era in which there was effectively no official immunity, see *Little v Barreme*, 6 US (2 Cranch) 170 (1804), it is hard to see what defense the officials could offer other than the purported authorization of the statute.

II. TAKING NOTES

Suppose that the government issues a subpoena duces tecum calling for the production of physical evidence—for example, a document, as in *Swidler*. As a matter of first principles, this looks like an easy case for compensation. The document is clearly an item of “private property” as that term would have been understood in the late eighteenth century, and its destruction by a private party (other than the owner) would have given rise to an action for conversion in every jurisdiction.³⁰ Furthermore, the government’s act of assuming physical possession of the item appears to be a paradigm case of a taking. There are a great many questions on the fringes of takings law concerning when (if ever) government action that does not physically appropriate property rises to the level of a taking, but the one bedrock principle that secures universal agreement is that physical appropriation, whether of land or of chattels, is the core definition of a taking. It is not any less a taking for being temporary.³¹ Even if the government merely takes possession of the document in order to produce a copy and then gives it back, the government’s temporary possession is still a taking—the length of the deprivation goes to the measure of damages, not to the threshold question whether a taking has occurred.

Thus, enforcement of a subpoena duces tecum calling for the production of physical evidence seems obviously to constitute a taking of private property. If just compensation is not provided, enforcement of the subpoena appears to be blatantly unconstitutional.

III. ENTER THE COURTS

If the takings issue is this easy, why do the courts not routinely order compensation for the forced production of physical evidence? A good place to begin searching for an answer is *Hurtado*,³² which has formed the basis for virtually all modern judi-

³⁰ See Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 BU L Rev 277, 301 (1988) (“There is no question that the takings clause protects against uncompensated takings of tangible real property and tangible personal property.”). One perhaps could make a nonfrivolous argument that the term “property” in the Constitution refers only to real estate and not to personal property, but the evidence for this is very thin. See Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW U L Rev 591, 608-09 (1998).

³¹ See *First English Evangelical Lutheran Church v County of Los Angeles*, 482 US 304, 321-22 (1987) (finding a compensable taking when a Los Angeles ordinance restricted the use of a church’s property for a period of years).

³² 410 US 578 (1973).

cial rejections of takings claims for the forced production of evidence. The relevant law in effect at the time of *Hurtado* allowed the government to incarcerate material witnesses who were unable to post bond to secure their appearance at trial. The statute provided for a twenty dollar per day fee for witnesses (plus allowances for food and mileage), but also stated that witnesses detained for failure to post bond were entitled only to one dollar per day (plus subsistence) for their time of detention.³³ The government argued that, in the case of detainees, the higher twenty dollars per day fee applied only to days in which the detainee appeared in court; the detainee plaintiffs argued that the higher fee was required during their entire confinement whether or not court was in session.³⁴ The Court rejected both views, holding that the statute required payment of twenty dollars per day to detainees for each day during the trial that they were detained, whether or not the detainees appeared in court each day.³⁵ This led to a constitutional challenge: the detainees maintained that "when the Government incarcerates material witnesses, it has 'taken' their property, and that one dollar a day is not just compensation for this 'taking' under the Fifth Amendment."³⁶ The Court rejected this argument in sweeping terms:

But the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed. See *Monongahela Bridge Co. v. United States*, 216 U.S. 177, 193 (modification of bridge obstructing river); *United States v. Hobbs*, 450 F.2d 935 (Selective Service Act); *United States v. Dillon*, 346 F.2d 633, 635 (representation of indigents by court-appointed attorney); *Roodenko v. United States*, 147 F.2d 752, 754 (alternative service for conscientious objectors). . . . It is beyond dispute that there is in fact a public obligation to provide evidence, . . . and that this obligation persists no matter how financially burdensome it may be. The financial losses suffered during pretrial detention are an extension of the burdens borne by every witness who testifies. The detention of a material witness, in short, is simply not a "taking" under the Fifth Amendment, and the level of his compensation, therefore, does not, as such, present a constitutional question. "[I]t is clearly recognized that the giving of testimony and the attendance upon court or

³³ Id at 580-82 & nn 2-3 (discussing 28 USC § 1821).

³⁴ 410 US at 582.

³⁵ Id at 586.

³⁶ Id at 588.

grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." *Blair v. United States*, 250 U.S. 273, 281.³⁷

In support of its position, the Court invoked a famous passage from Dean Wigmore:

[I]t may be a sacrifice of time and labor, and thus of ease, of profits, of livelihood. This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-required favor. It is a duty not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit. He who will live by society must let society live by him, when it requires to.³⁸

Hurtado's reasoning has been extended to a number of other settings. Three appellate decisions warrant special mention.³⁹ In *United States v. Friedman*,⁴⁰ the IRS issued summonses to several banks seeking records pertaining to taxpayers under investigation. The banks argued, inter alia, that it violated the takings clause to require them to search for and produce these records at their own expense. The Third Circuit casually dismissed this argument in one brief paragraph on the strength of *Hurtado*.⁴¹

A more elaborate analysis for the same result was provided by the Oregon Supreme Court in *Emery v. State*.⁴² The plaintiffs' pickup truck was seized by the state as evidence in a murder investigation of one of the plaintiffs. The criminal charge was settled by a plea bargain, and the truck was returned to its owners. The police, however, had effectively dismantled the truck during the investigation and did not repair the truck before returning it.

³⁷ Id at 588-89 (certain citations and footnote omitted).

³⁸ 8 John Henry Wigmore, *Evidence* § 2192 at 72 (McNaughton Rev 1961), quoted in *Hurtado*, 410 US at 589 n 10.

³⁹ For other decisions, see note 9.

⁴⁰ 532 F2d 928 (3d Cir 1976).

⁴¹ Id at 935 ("Any fifth amendment . . . taking contention would seem to be foreclosed by the Supreme Court's decision in [*Hurtado*].").

⁴² 297 Or 755, 688 P2d 72 (1984). For a critical analysis of *Emery*, albeit from a nonoriginalist perspective, see Spencer M. Punnett II, Note, *The "Takings" Clause and the Duty to Provide Evidence: An Alternative Analysis of Emery v. State*, 80 Nw U L Rev 1094 (1986).

The necessary repairs (which included restoring the roof) were estimated at more than two thousand dollars.⁴³ The plaintiffs claimed, *inter alia*, that the state "took" their property without just compensation by returning it in damaged condition. The Oregon court invoked four sets of authorities in holding that no taking had occurred. First, noting that the takings clause of its state constitution was substantively identical to the takings clause of the Fifth Amendment, the court extensively cited *Hurtado*.⁴⁴ Second, the court relied on an 1886 Oregon case holding that the state could require the attendance of certain witnesses in criminal cases without any fees.⁴⁵ Third, the court quoted at length from Dean Wigmore's evidence treatise, which had also been invoked in *Hurtado*.⁴⁶ And fourth, the court noted that a number of federal courts had cited *Hurtado* with approval in contexts involving the production of evidence.⁴⁷ The court then concluded:

We agree with the United States Supreme Court's reasons and analysis in *Hurtado v. United States*, *supra*, and adopt the same as our own in construing Article I, section 18, of the Oregon Constitution. We also agree with Wigmore that every citizen must make available to the State chattels within his or her control for purposes of evidence without expectation of reimbursement. We can see no reason to make a distinction between the giving of oral testimony and the furnishing of physical evidence. The damage suffered by the plaintiffs' pickup truck while it was in the custody of the defendants simply was not "taking" within the meaning of our constitution.⁴⁸

The New Hampshire Supreme Court addressed a different aspect of the appropriation problem in *Soucy v State*.⁴⁹ The plaintiffs' building was damaged by fire. At the state's behest, the superior court ordered the building sealed so that it could serve as evidence in an arson investigation. The plaintiffs subsequently moved to vacate that order to allow them to sell or renovate the building, but the court refused. When the investigation ended and the order was finally removed, the plaintiffs sued for damages for

⁴³ The stipulated facts are set forth in *Emery*, 688 P2d at 74.

⁴⁴ *Id.* at 77-78.

⁴⁵ *Id.* at 78-79 (discussing *Daly v Multnomah County*, 14 Or 20, 12 P 11 (1886)).

⁴⁶ 688 P2d at 79 (discussing 8 Wigmore, *Evidence* § 2192 at 72 (cited in note 38)).

⁴⁷ 688 P2d at 79.

⁴⁸ *Id.* at 79-80 (footnote omitted).

⁴⁹ 127 NH 451, 506 A2d 288 (1985).

a temporary taking.⁵⁰ The state supreme court, in an opinion by Justice Souter, rejected the claim under both state and federal law. The federal takings claim was brusquely dismissed on the authority of *Hurtado* and the cases following it. The court acknowledged that *Hurtado* dealt only with the detention of witnesses, but argued that “its principle is not so limited,” and noted that “several of the lower federal courts have applied the rule in *Hurtado* to hold that the government can require the owner of potential evidence to bear the financial burden of its deprivation or of its production for trial.”⁵¹

The state takings claim, which the court noted was “one of first impression and apparently one seldom raised elsewhere,”⁵² was resolved on similar grounds. The court invoked Dean Wigmore, the *Hurtado* line of cases, and *Emery* to conclude that “[h]istorically, then, the financial burden of providing evidence at the direction of a trial court has not been regarded as a compensable taking.”⁵³ That left only what the court described as a question of “constitutional policy”.⁵⁴ whether “to adhere to the rule of no compensation for restrictions on the use of property with evidentiary value.”⁵⁵ Balancing the burdens on citizens against the potential costs to the government, the court elected to “follow the unbroken historical practice in holding that a temporary restriction on the use of private property held as evidence in criminal cases is not a compensable taking of property.”⁵⁶

One important wrinkle in *Soucy* bears mention. The court’s balancing of public and private interests took place in the context of “facts generally prevailing”⁵⁷ and the “characteristic”⁵⁸ burdens and benefits of competing rules. In this “normal case”⁵⁹ involving evidence, the state possesses property for only a limited time and the burdens on the owner are typically minimal. But what if the burdens on the citizen are large and the state’s need for the evidence is dubious? The court’s response was

that the owner does have recourse, but that the remedy is an appeal to this court rather than an award of money damages. To classify the abnormal case as a taking subject to compen-

⁵⁰ 506 A2d at 289.

⁵¹ Id at 294.

⁵² Id at 289.

⁵³ Id at 291.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id at 293.

⁵⁷ Id at 292.

⁵⁸ Id.

⁵⁹ Id at 293.

sation would, we fear, defeat the general rule, for every disputed restriction would lead to an action for inverse condemnation. The property owner's remedy lies, rather, in this court's authority to entertain a request for prospective review of such an order in any apparently egregious case.⁶⁰

Thus, each of the courts in *Friedman*, *Emery*, and *Soucy* agreed that *Hurtado*'s rule extended to compulsions to produce physical evidence. We do not opine here on whether *Hurtado* was correctly decided on its facts. It is clear, however, that even if one thinks that it was correctly decided, that has no bearing on the question whether enforcement of a subpoena duces tecum is a taking requiring just compensation. *Hurtado* involved a government claim on personal services—specifically, service as a material witness in a criminal trial. The cases relied on by *Hurtado* similarly involved government appropriation of personal services, such as the draft or the representation of indigents.⁶¹ These cases provide powerful historical evidence that such exactions of personal time and labor have not traditionally been regarded as the sort of governmental actions that give rise to the need for just compensation.⁶² That the conclusion may be morally problematic says nothing about whether such a view accurately reflects the Constitution's original meaning. The Federalists, after all, were hardly model libertarians. But even granting that exaction of (certain historically established) personal services is not within the compass of the takings clause says nothing about whether exactions of real and personal property are also somehow exempt from compensation requirements whenever law enforcement or judicial process interests are at stake.

The court in *Emery*, echoed by the court in *Soucy*, found no basis for drawing a distinction between the compelled production of personal services and personal property, but that is because the judges were looking in the wrong place. An economist would certainly see no difference between requiring production of your own person and production of your own documents, but economists are not necessarily reliable constitutional interpreters. The

⁶⁰ Id.

⁶¹ See text accompanying note 37. The one exception is *Monongahela Bridge Co v United States*, 216 US 177 (1910), which involved the forced alteration of a bridge that was obstructing navigable waters under the jurisdiction of the United States. The relevance of *Monongahela* to any issue even remotely connected to *Hurtado* escapes us.

⁶² For a marshalling of this historical evidence, see *Butler v Perry*, 240 US 328 (1916) (holding that forced labor for road maintenance violates neither the Thirteenth nor the Fourteenth Amendments because of the long English and American tradition of such requirements).

simple fact is that a distinction between services and property, whatever its logical merit, has a distinguished historical pedigree. One of the dissenting judges in *Emery* presented that history at some length;⁶³ one example will serve to illustrate it. Traditionally, citizens were required to perform uncompensated road maintenance work, and courts consistently upheld such requirements (which strongly supports the narrow holding in *Hurtado*).⁶⁴ Alabama, however, went further by requiring that road workers provide horses, wagons, and feed as well. In *Toone v State*,⁶⁵ the Alabama Supreme Court accepted the state's power to compel uncompensated road work, but distinguished the requirement that citizens surrender their personal property as well:

The books have been examined in vain for an authority which will authorize the exaction from a citizen of the contribution of his property for public service, under the theory that it is his duty as a citizen to so contribute. The state may exact the performance of this personal obligation, or provide a reasonable commutation for same by way of an assessment; but it cannot confiscate his property by devoting it to public use. . . . It may be true, that the taking of the property under the act would be for only a few days; but this would nevertheless be a taking or a compulsion to produce under penalty for a default.⁶⁶

Put simply, the rule allowing the government to seize certain personal services without compensation, if correct, is a historically justified exception from the normal conceptual reach of the Constitution's just compensation requirement.⁶⁷ There is no similar ground for excepting exactions of property. Suppose, for example, that a firm has constructed a state-of-the-art laboratory for examining tissue and fiber samples. The government, or conceivably a criminal defendant, wants to make use of that laboratory in connection with a criminal trial. There is no question that the government can seize and use the laboratory, either tempo-

⁶³ See 688 P2d at 84-87 (Roberts dissenting).

⁶⁴ See, for example, *id* at 85.

⁶⁵ 178 Ala 70, 59 S 665 (1912).

⁶⁶ 59 S at 666.

⁶⁷ Whether one says that such exactions are not "takings," as the courts seem to prefer, or that such personal services are not "property" for purposes of the just compensation requirement is a matter of indifference. We suspect that an eighteenth-century audience would have been more inclined to say that opportunity costs of time and labor were not what it had in mind when it used the word "property" in the Constitution. See also *Butler v Perry*, 240 US at 333 (suggesting that, at least in some contexts, labor is not "property" for purposes of the Fourteenth Amendment).

rarily or permanently, under the power of eminent domain. But the logic of *Emery*, *Soucy*, and *Friedman* suggests that the government may also do so free of charge, even though that is precisely the kind of result that the Constitution's just compensation requirement forbids. The importance of the governmental interest involved is relevant for whether the public use requirement for a taking is satisfied, but it is not relevant for determining whether just compensation is due.⁶⁸ Enforcement of a subpoena duces tecum, or any other government process for the forced production of evidence, is no different from the seizure of a laboratory.

IV. THE STRUCTURE OF JUST COMPENSATION

Must the government therefore provide just compensation whenever it enforces a subpoena duces tecum for the production of evidence? The answer is yes, but this does not mean that the government must always pay money to the target of the subpoena. How can that be? How can you be entitled to just compensation but receive no money?

Just compensation can take several forms. The most obvious form, of course, is a check from the government for the fair market value of the property seized. Another possible form, however, is what Richard Epstein has termed "implicit in-kind compensation":⁶⁹ the same government action that imposes costs on the individual may also confer implicit (and possibly long-term) benefits on that individual that equal or exceed the costs imposed.⁷⁰ The idea was most famously expressed by Justice Holmes in *Pennsylvania Coal Co v Mahon*,⁷¹ when he remarked that some government programs, such as general land use regulations, do not require cash compensation to affected property owners because they produce an "average reciprocity of advantage."⁷² This is an obscure but powerful concept that has been seriously under-analyzed.⁷³

⁶⁸ Perhaps one could object that the government can always build its own laboratory but cannot obtain certain evidence at all without a subpoena. But one can easily imagine a legal system that functions without any compelled production of evidence. Compulsion reduces the costs to the litigants of procuring evidence, just as seizing a laboratory would reduce the government's costs.

⁶⁹ Epstein, *Takings* at 195 (cited in note 13).

⁷⁰ For Professor Epstein's extensive analysis of the concept of implicit in-kind compensation, see *id.* at 195-215.

⁷¹ 260 US 393 (1922).

⁷² *Id.* at 415. For an earlier expression of the same concept, see Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S Cal L Rev 561, 581-82 n 108 (1984).

⁷³ Relatively few scholars have provided sustained treatments of implicit in-kind com-

The enforcement of a subpoena duces tecum affords an excellent illustration of the possible application of implicit in-kind compensation. Government enforcement of a subpoena against you clearly constitutes a taking of private property. The subpoena, however, is issued as part of a general scheme that permits both plaintiffs and defendants to compel the production of evidence in their favor. Before any subpoena is issued to you, you have both an expected loss from this scheme (the discounted value of your expected compliance costs in all future suits) and an expected benefit (the discounted value of your expected gain from the ability to compel production in all future suits). In a normal case involving a subpoena, the relevant question for purposes of just compensation is whether, *ex ante*, the expected gains can be expected to equal or exceed the expected losses. Thus, when a subpoena is actually issued, the government can plausibly argue that just compensation is provided by the future availability to you of compulsory process, at least when your compliance costs in the particular case are not beyond the norm. If this argument is sound, the government provides the constitutionally necessary just compensation for enforcement of subpoenas by making the process available to you in the future.

There are very serious conceptual and empirical limits to this kind of argument. Empirically, the success of such an argument depends critically on the assumption that the availability to you of the relevant process offers net expected benefits that roughly approximate the level required by the Constitution's just compensation requirement. If we are talking about a government scheme that does not offer sufficient potential net benefits to the individual, then no case for implicit in-kind compensation can be made. This can present difficult, and even insuperable, empirical prob-

pensation. Frank Michelman was among the first to latch onto the concept, but his treatment was relatively cursory. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv L Rev 1165, 1225 (1967). Professor Epstein gave the concept its fullest development in his landmark 1985 book. See Epstein, *Takings* at 195-215 (cited in note 13). Useful elaborations and critiques of Professor Epstein's explication of implicit in-kind compensation are found in Lillian R. BeVier, *Give and Take: Public Use as Due Compensation in Pruneyard*, 64 U Chi L Rev 71 (1997); Glynn S. Lunney, Jr., *Responsibility, Causation, and the Harm-Benefit Line in Takings Jurisprudence*, 6 Fordham Envir L J 433, 478-82 (1995) (outlining the substantive rationales provided by courts for allowing government to prohibit a harmful use of property without compensation); Note, *Condemnation, Implicit Benefits, and Collective Losses: Achieving Just Compensation Through "Community"*, 107 Harv L Rev 696 (1994) (arguing that takings law does in fact account for nonmarket value losses—including the loss of collective interests—by presuming them to be fully offset by the implicit benefit that each property owner receives from a taking); Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 Nw U L Rev 1561, 1571-73 (1986) (reviewing Epstein, *Takings* (cited in note 13)).

lems in particular cases. How do we know, for example, whether or not a scheme of compulsory production of evidence produces overall net benefits to any given person? The answer is that we don't, but the law often has to make educated guesses; "close enough for government work" may well be a maxim of constitutional magnitude.

The problem is complicated by the difficulty of determining precisely which costs of complying with a subpoena "count" for constitutional purposes. A large chunk of the costs of complying with a subpoena *duces tecum* are ordinarily the costs of the time and labor needed for compliance. These costs seem to be similar to the costs of making a personal appearance pursuant to a subpoena, and it is clear that those latter costs are not constitutionally compensable. On the other hand, compliance costs may be more like the costs of providing horses and feed for road work than the requirement of personal service. On this analogy, the costs of complying with a subpoena *duces tecum* may be compensable even when the costs of complying with a personal subpoena are not. If compliance costs generally fall on the "services" side of the goods/services distinction and are therefore excluded entirely from the calculation, or if those costs fall within a normally modest range, we are prepared to indulge the assumption that the availability of a scheme of compulsory production of evidence generally produces enough expected net benefits to any given individual to count as just compensation for the enforcement of the occasional subpoena directed to that person. More to the point, we are prepared to indulge the assumption (subject to correction from more empirically sophisticated quarters) that an informed eighteenth-century audience would have been prepared to indulge such an assumption.

There are also two major conceptual issues raised by arguments about implicit in-kind compensation. First, how does one identify the relevant government action for purposes of measuring costs and benefits? Suppose, for example, that the government claims that implicit in-kind compensation for enforcement of a subpoena is provided by the availability of an organized legal system. The existence of such a system, the argument runs, surely provides substantial net benefits over a state of nature, so there is no right to complain about particular operations of that system. The Supreme Court has appeared to endorse this kind of argument on several occasions,⁷⁴ and it has a modest measure of

⁷⁴ See *Keystone Bituminous Coal Association v DeBenedictis*, 480 US 470, 491 (1987) (finding that—based on Justice Holmes' "reciprocity of advantage theory"—while a state

academic support.⁷⁵ It is, however, thoroughly implausible as an interpretation of the Constitution's just compensation requirement. Even if one grants that government in general represents an advance over the state of nature,⁷⁶ the argument in its widest form proves far too much.⁷⁷ It would obviate the need for cash compensation even for the formal condemnation of land as long as the government could argue that the subject is left with more than he or she would have in a state of nature. Whatever the merits of this argument as a matter of political theory, it is ridiculous as an interpretation of the Constitution. A theory of just compensation that provides anything less than market-value cash or cash-equivalent payments for formal condemnations of land is like a theory of free speech that permits prior restraints on political communications. If the government is to rely on implicit in-kind compensation to satisfy its constitutional obligations, the compensation must stem from the particular government action that takes the subject's property rather than from the government's general operations.

That still leaves, of course, the question how to determine what counts as the "particular" governmental action in question.⁷⁸ In the case of a subpoena duces tecum issued to a property owner, for example, is the relevant government benefit the owner's reciprocal ability to employ a subpoena duces tecum in the specific kind of action in which the subpoena at hand was issued, the owner's ability to employ a subpoena duces tecum in any action, or the owner's ability to employ an entire system of forced production of evidence? It seems artificial to slice off one narrow piece of the system of forced production and view it in isolation, especially when the piece's contours may be determined largely by the shape of the whole. But any more systemic approach,

statute prohibiting certain types of coal mining amounted to restraint on property use, it was not a taking); *Andrus v Allard*, 444 US 51, 67 (1979). Compare *Carmichael v Southern Coal & Coke Co*, 301 US 495, 522-23 (1937) (making a similar argument with respect to taxation).

⁷⁵ See, for example, Paul Burrows, *Getting a Stranglehold with the Eminent Domain Clause*, 9 Intl Rev L & Econ 129, 144 (1989) (suggesting such an argument without explicitly endorsing it).

⁷⁶ One of us is prepared to challenge this assumption quite widely and to argue that life without government would be (with apologies to Hobbes) plural, rich, pleasant, refined, and long. See generally Murray N. Rothbard, *For a New Liberty* (MacMillan 1978); Linda Tannehill, Morris Tannehill and Jarrett Wollstein, *Society without Government* (Arno 1972). But that claim is incidental to our constitutional argument.

⁷⁷ See Richard A. Epstein, *The Ubiquity of the Benefit Principle*, 67 S Cal L Rev 1369, 1408-09 (1994); Lunney, 6 Fordham Envir L J at 481-82 (cited in note 73).

⁷⁸ Tom Merrill has offered some especially insightful comments on this problem, which raise some of the same concerns noted here. See Merrill, 80 Nw U L Rev at 1572-73 (cited in note 73).

taken to its logical extreme, would lead us back to the claim that one must view all governmental action as part of a unified scheme of organized government.

In the end, one cannot resolve such problems of classification by deduction. Nor can one resolve them, as does Professor Epstein, by economic and political theory,⁷⁹ unless one accepts the proposition that the Constitution's just compensation principle constitutionalizes a coherent economic or political theory. We think instead that the Constitution's just compensation principle constitutionalizes the principle of just compensation that would generally have been understood by an informed public in the late eighteenth century. The answer to the problem of classification thus must be found by examining the historically grounded scheme of just compensation contained in the Constitution. Unfortunately, we know of no direct (or, for that matter, indirect) evidence on the precise question of how to characterize the relevant government program for purposes of determining the adequacy of implicit in-kind compensation, other than the relatively uninteresting fact that one cannot treat the existence of organized government as the relevant constitutional baseline. If, as the line goes, it takes a theory to beat a theory, Professor Epstein may have the last laugh after all.

Fortunately, the problem of classification may be largely irrelevant to the issues that we address here (though it may be very important in other contexts). Is it likely, for example, that the calculations of benefits and losses for any individual will differ greatly between a system of subpoenas duces tecum and a more general system of forced production of evidence? If not, then it probably does not matter which of the many plausible ways of characterizing the relevant government program one chooses. And most of the characterizations that would make a difference, such as lumping a system of subpoenas duces tecum with, for example, a national scheme of ballistic missile defenses, would be plainly implausible, for the same reasons that it would be out of bounds to play the government-versus-the-state-of-nature card. Perhaps the best we can do at this point is to posit a threshold requirement of *germaneness*: for purposes of implicit in-kind compensation, the government may only "lump" together programs that are directly germane to the program that effects the relevant taking of property. Germaneness is, of course, a slippery

⁷⁹ See Epstein, *Takings* at 202-15 (cited in note 13). Professor Epstein's ultimate conclusion is that one must "follow the linkages [between programs] only as far as the legislature makes them explicit, which typically will be program by program or statute by statute." *Id.* at 210.

concept that is likely to cause problems wherever it appears.⁸⁰ But not all constitutional problems lend themselves to bright-line solutions. Nor, however, does the existence of hard cases preclude the existence of easy ones. It is clear, for instance, that the government cannot "compensate" for the appropriation of trade secrets by invoking the "benefit" of permission to do business in the jurisdiction.⁸¹

Germaneness, however, is not the only threshold inquiry relevant to implicit in-kind compensation. A second conceptual problem is determining whether the government is even allowed to raise implicit in-kind compensation as a possible defense to a *prima facie* takings claim. For example, if the government physically occupies land, it normally may not avoid payment, or even reduce the amount of the required payment below the property's fair market value, by arguing that the property owner implicitly benefits from a general scheme of forced exchanges of property.⁸² Why should it be any different if the government physically occupies personal property under subpoena rather than real property under condemnation?⁸³ Indeed, the implicit in-kind compensation argument typically arises in the context of use regulations rather than outright occupations of property. Because the affirmative case for treating any use regulation as a taking depends on functional, consequentialist arguments about the effects of such activity, there is justification for allowing the government to invoke the alleged positive effects of the activity on the property owner.

⁸⁰ For example, a major question under the appointments clause, US Const, Art II, § 2, cl 2, is whether a new appointment is necessary when Congress changes or expands the duties of an existing appointee. The (correct) answer provided by the Court is that a new appointment is not necessary when the new duties are "germane" to the officer's pre-existing duties. *Weiss v United States*, 510 US 163, 173-76 (1994); *id* at 196 (Scalia concurring). But because the Court does not provide an independent account of what it means to be "germane," this amounts to saying that "Congress cannot vest new duties in an officer without providing for a new appointment if the new duties are sufficiently important to require a new appointment," Gary Lawson, *Federal Administrative Law* 132 (West 1998), which is probably as precise a formulation of germaneness as we will ever reach.

⁸¹ See *Philip Morris, Inc v Harshbarger*, 159 F3d 670, 674-78 (1st Cir 1998) (affirming a preliminary injunction against a Massachusetts statute that would disclose to the public the specific formulas for various tobacco blends and rejecting the claim that the right to do business in the state is adequate compensation for any losses).

⁸² See Note, 107 Harv L Rev at 701-02 (cited in note 73). The government may be able to reduce the amount that it must pay if it can be shown that the property owner specially benefits from the specific project for which the property is taken. See *id* at 702-03.

⁸³ One cannot say that the subpoena takes place pursuant to a general scheme while acts of condemnation are individual and unique. In the case of a subpoena, the challenge is to a *specific* subpoena that happens to be issued pursuant to a general system of forced production of evidence. In the case of the taking of real property, the challenge is to a *specific* occupation that happens to occur pursuant to a general system of forced exchanges of property.

But physical appropriations are clearly compensable takings regardless of their consequences or effects.⁸⁴ Whether or not there is a sound economic case for including implicit in-kind compensation as part of the damage calculation for physical occupations, there is no historical case for doing so with respect to land. So why is it even permissible to consider implicit in-kind compensation in connection with subpoenas, which involve the direct occupation of personal property?

There can be no abstract, theoretically elegant answer, because the contours of the Constitution's just compensation principle cannot be determined by abstract, theoretically elegant reasoning. Rather, the contours of that doctrine are determined by a series of historically grounded, decidedly inelegant observations about paradigm cases. Because we have little or no direct historical evidence concerning the late eighteenth-century understanding of these paradigm cases,⁸⁵ we have to make do with very "soft" arguments. The best that we can do at this point is as follows: There is little to be said for the view that every subpoena duces tecum must be accompanied by a direct cash payment. If such a view had any historical support, we would see some evidence of it, notwithstanding the difficulties of raising takings claims in the founding era. One could, for instance, raise such claims as part of a motion to quash any time a subpoena was received without assurance of payment for the temporary loss of the property (or for the permanent loss if the property was damaged or destroyed). Moreover, if compensation is required for every subpoena duces tecum, it must be required as well for every seizure of property pursuant to a search warrant (or a lawful search without a warrant). Seizures in such cases are takings of property just as surely as is the appropriation of property through a subpoena.⁸⁶ But a requirement of cash compensation in every such case is simply too far from established practice to be plausible. The absence of a need for compensation in the usual case of subpoenas, search

⁸⁴ A good analogy here is the law of trespass and nuisance. In the case of trespass—an injury to possessory rights—an injunction ordinarily issues as a matter of course without any showing of absolute or relative harm. In the case of nuisance—an injury to use and enjoyment rights—one ordinarily gets an injunction only by showing a balance of harm over benefits. See Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J Legal Stud 13, 13 (1985).

⁸⁵ This is a particular problem in the case of subpoenas. The founding generation could not imagine modern litigation and the discovery machinery that accompanies it. The notion that a subpoena could ever be burdensome enough to raise takings issues probably would have been laughable in the eighteenth century.

⁸⁶ We are grateful to the participants at a workshop at the Rutgers-Camden School of Law, and in particular to Jay Feinman, for bringing this point to our attention.

warrants, and other seizures associated with the operation of the legal system appears to be one of the paradigm points from which reasoning about the scope of the federal takings power must proceed.

That paradigm point, however, can be explained in either of two ways, which have very different implications for the permissibility of arguments concerning implicit in-kind compensation. First, the absence of compensation in the normal case might result from an ironclad rule that appropriations of property associated with the operation of the legal system are categorically outside the scope of any just compensation requirement, just as are requirements of certain kinds of personal services such as jury duty or the duty to appear as a witness. This rule would be consistent with (though would not necessarily entail) the view that arguments about implicit in-kind compensation do not apply to actual physical takings. Second, it might result from a scheme in which enforcement of subpoenas are *prima facie* takings, but in which the availability of implicit in-kind compensation renders explicit compensation unnecessary in all but the most extreme cases. The damages from a temporary loss of possession of personal property under a subpoena are normally very small, especially if one eliminates from consideration the opportunity costs of the time and labor required for compliance, which is likely to be the largest element of damages in most cases. It is therefore both easy and sensible to presume that the damages attributable solely to the temporary loss of possession of the property are small enough in the normal case to be mostly offset by general benefits from the availability of subpoenas. Similarly, the state's ability to seize evidence as part of an investigation presumably confers general benefits if it materially contributes to the ability to keep the peace and reduce crime. Unless the property-deprivation losses from a particular seizure are out of proportion to any plausible attribution of benefits from the general scheme, there is no need for explicit cash compensation in this context either.

Which view—a categorical exclusion from compensation requirements or a presumptive exclusion based on the availability of implicit in-kind compensation in normal, but not necessarily in extraordinary, cases—better reflects the proper view of federal power? Elegance would suggest a firm line between physical takings (no implicit in-kind compensation) and other takings (implicit in-kind compensation permitted), but elegance is not a

strong selection criterion in this context.⁸⁷ Granting that implicit in-kind compensation is not available for takings of real property, one still might say that it is available for takings of personal property in general or, even more narrowly, that it is available for takings of personal property in connection with the operation of the legal system. The latter view has the disadvantage of appearing to be ad hoc, but the advantage of providing a quite sensible body of outcomes.

As a matter of interpretation, we don't see much basis for preferring either view. As a matter of adjudication, this means that the second view, which treats subpoenas as takings but permits implicit in-kind compensation in normal cases, must prevail. This conclusion stems from two propositions. First, the key to understanding the scope of the federal takings power lies in the proper interpretation of the sweeping clause rather than in the proper interpretation of the takings clause.⁸⁸ The power to appropriate property, whether through eminent domain, the enforcement of subpoenas, or the execution of warrants or warrantless seizures, stems from the sweeping clause. The basic constitutional limitations on that power also stem from the sweeping clause, via the requirement that executory laws be "necessary and proper" for carrying into execution federal powers. Because it is always incumbent upon the federal government to demonstrate that it has the affirmative power to act in any particular case, the government always bears the initial burden of justification in any instance of property appropriation to show that the appropriation is a "necessary and proper" means for implementing other enumerated federal powers. Second, in any case of interpretative indeterminacy, the correct adjudicative response is to rule against the party that bears the burden of proof.⁸⁹ If the government cannot sustain its initial burden of demonstrating that an appropriation without compensation is constitutionally authorized, the government should lose. Interpretative indeterminacy leads to a determinate adjudicative outcome.⁹⁰ In a case in which a "no

⁸⁷ Moreover, it is not clear, as an original matter, that there is any such thing as a compensable taking that is not a direct physical occupation. See note 27.

⁸⁸ See text accompanying notes 17-21.

⁸⁹ One of us has defended this claim, and other related claims concerning the application of standards of proof and burdens of proof to propositions of law, at length elsewhere. See Gary Lawson and Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L Rev 1267, 1296-97 (1996); Gary Lawson, *Legal Indeterminacy: Its Cause & Cure*, 19 Harv J L & Pub Pol 411, 423-28 (1996); Gary Lawson, *Proving Ownership*, 11 Soc Phil & Pol 139 (Summer 1994). See generally Gary Lawson, *Proving the Law*, 86 Nw U L Rev 859 (1992).

⁹⁰ By the same token, if the scope of the federal takings power was determined by the

compensable taking” rule or a “taking with implicit in-kind compensation” rule would yield different outcomes, the government must lose unless it can affirmatively show that the “no compensable taking” rule is correct. And by hypothesis, no such showing can be made.

In any event, the availability of implicit in-kind compensation does not end the constitutional inquiry. An argument for the adequacy of implicit in-kind compensation only works, as we noted above, when compliance costs in a particular case are not outside the norm. If compliance with a particular subpoena imposes burdens so large that they are clearly out of proportion to any benefits that the target can reasonably expect to obtain from the scheme of compulsory production of evidence (taking the broadest plausible characterization of the relevant program), a claim of implicit in-kind compensation rings very hollow. Arguments from implicit in-kind compensation are, of necessity, *presumptive* arguments. When a taking results from application of a general scheme that can realistically be expected to produce net benefits for most people, there arises a presumption that the scheme’s general availability provides the constitutionally necessary just compensation. But like most presumptions, it is rebuttable.⁹¹

There are at least three circumstances in which implicit in-kind compensation is potentially inadequate to compensate the target of a subpoena. The first is where the target can realistically expect significant asymmetries in the application of the scheme. For example, if you are a bank, it may well be that you can expect to be on the receiving end of a subpoena (either from the IRS or from any of the numerous banking regulatory agencies) far more often than you will be on the issuing end. In that

Fifth Amendment rather than by the sweeping clause, the government would win in the case of interpretative indeterminacy, because the property owner would bear the affirmative burden of proving an asserted limit on federal power.

⁹¹ Is it necessary that implicit in-kind compensation work as a presumption? Could one say in some circumstances that arguments from implicit in-kind compensation are admissible but that one should reason categorically from normal cases to conclude that compensation is always adequate? (This is essentially how Justice Souter reasoned in *Soucy*.) The problem with the argument is that it fails to distinguish the problem of liability from the problem of damages. One can certainly argue that compensation is never due for a subpoena, but that is precisely the position that the government cannot meet its burden of establishing. Once we enter the world of compensation—of damages—it becomes a purely *factual* inquiry whether compensation is provided in any specific case. Arguments about implicit in-kind compensation concern the kinds of currency the government may use to satisfy its compensation (damages) obligations, but they cannot permit the adequacy of compensation in the general case to prevent a valid claim in the extraordinary case.

case, the clear expectation is that you will be a net loser from the scheme. Even if one can argue that search and production costs are ordinarily not compensable at all, by analogy to the rule that compelled personal service is not compensable, the personal service rule itself surely has limits. All of the recognized instances of compelled service, such as the draft, jury duty, witness duty, road maintenance duty, or mandatory pro bono requirements, are temporary. If the government permanently conscripted someone into one of these duties, we are confident that the analysis would be very different. Similarly, if someone is, in essence, a permanent subpoena target, costs that would normally not be compensable may well assume constitutional significance. And if search and production costs are analogous to requirements that you provide horses and feed for road work, then repeat targets have a good claim that the ordinary presumption of implicit in-kind compensation is overcome.

Indeed, a number of federal statutes that provide for compensation to entities that must comply with government subpoenas are consistent with this constitutional understanding.⁹² One such statute specifically concerns subpoenas issued to financial institutions. The federal Right to Financial Privacy Act defines a financial institution as

any office of a bank, savings bank, card issuer as defined in section 1602(n) of title 15, industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution.⁹³

For these entities, the statute provides, with some exceptions, that

a Government authority shall pay to the financial institution assembling or providing financial records pertaining to a customer and in accordance with procedures established by this chapter a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required or requested to be produced.⁹⁴

⁹² For a thorough analysis of these statutes that does not consider the constitutional issues discussed in this Article, see Norman Gross, *Government Compensation for the Costs of Producing Subpoenaed Documents: A Proposal for Legislative Reform*, 16 Mich J L Ref 603 (1983).

⁹³ 12 USC § 3401(1).

⁹⁴ 12 USC § 3415.

The statute looks like a piece of special interest pleading, and that may well have been its actual origin. But it serves an important constitutional purpose. Financial institutions, as defined by the statute, are entities that are especially likely to be on the receiving end of subpoenas seeking evidence on their customers. Without provision for compensation for the costs of compliance with these numerous subpoenas, these institutions would have a very strong case that the normal presumption of implicit in-kind compensation that accompanies a reciprocal scheme of forced evidentiary production does not apply to their circumstances.⁹⁵ Of course, the statute may well be over- or under-inclusive, and it therefore does not foreclose constitutional arguments made by entities outside of its scope who may also be systematically disadvantaged by the scheme of forced production,⁹⁶ but it is a reasonable first stab at the problem.

A second compensation statute is more general in its coverage. The Internal Revenue Code provides that payment shall be made, pursuant to regulations, for

(1) fees and mileage to persons who are summoned to appear before the Secretary [of the Treasury], and

(2) reimbursement for such costs that are reasonably necessary which have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required to be produced by summons.⁹⁷

The statute does not apply when subpoenas are issued to targets of investigation or their agents.⁹⁸ The greatest beneficiaries of the statute are therefore third party custodians of financial documents, such as banks or credit card companies, who are likely to be on the receiving end of an inordinate number of IRS summonses seeking information on clients or customers, but the statute by its terms provides compensation for noninstitutional targets as well. The universal coverage in this case may or may not be a constitutional necessity; the answer depends on (1) whether search costs are generally compensable in the first instance and (2) the ever-intractable problem of characterizing the relevant government program. If one lumps the IRS's summons

⁹⁵ Even with the statute, there may still be questions about whether the statutory (or regulatory) level of compensation is just compensation in the constitutional sense.

⁹⁶ Many entities that are not "financial institutions," such as brokerage firms, travel agents, and common carriers, may also be frequent targets of government subpoenas. See Gross, 16 Mich J L Ref at 607 n 20, 611 n 40 (cited in note 92).

⁹⁷ 26 USC § 7610(a) (1994).

⁹⁸ 26 USC § 7610(b)(1)-(2) (1994).

power into a general category of "compulsory process devices," so that its effects can be offset for just compensation purposes by the availability of subpoena mechanisms in private lawsuits or criminal proceedings, then most individuals and entities probably do not have a constitutional right to reimbursement for their costs. But if the system of IRS summonses is considered in isolation, it is virtually certain that everyone other than the IRS loses from the availability of forced production of evidence in IRS proceedings. If the narrow characterization is the correct one, it may well be that universal reimbursement is a constitutional requirement. Are other enforcement mechanisms sufficiently "germane" to the IRS summons procedure to warrant lumping them together for just compensation purposes? The answer is probably yes, because forced production is a universal feature of the legal system. There is nothing unique about the IRS's summons power, and there is nothing unique about the government as a litigant (other than its potential role as a repeat player that can generate an asymmetry requiring compensation).

The second circumstance where implicit in-kind compensation may be inadequate is where compliance costs are unusually high because the scope of the demand is unusually large or complex. This is a harder case than the repeat-player scenario, and it may well be that the no-compensation-for-compliance rule, if applicable, continues to govern. After all, you cannot escape your duty to provide evidence even if you reasonably fear for your life (because, for instance, you fear reprisals from a criminal defendant or his/her associates).⁹⁹ But if the government is going to impose life-threatening costs on a citizen, it surely has the obligation to take some steps to minimize those costs. Similarly, there may be an obligation at least to defray the costs of complying with an especially burdensome document request, though we are admittedly uncertain about the right answer here.

The third circumstance, which seems relevant to the facts in *Swidler*, is where the act of production itself has costs beyond ordinary compliance costs. In the normal circumstance, the only significant cost of a subpoena is the time and expense needed to comply with it. In some cases, however, there is a substantial cost

⁹⁹ See, for example, *Piemonte v United States*, 367 US 556, 559 n 2 (1961) (stating in dicta that witness's fear for his life would not be a valid legal excuse for refusing to testify); *United States v Damiano*, 579 F2d 1001, 1003-04 (6th Cir 1978) (holding that "fear for the safety of one's self or others is not a ground for refusing to testify"). We do not use the draft as an example of forced service with potentially disastrous consequences because we are skeptical, as an original matter, of the federal government's power to employ a draft.

associated with the mere fact of disclosure. Most obviously, if the material demanded is a trade secret, the value of the secret is eroded by the forced production. Protective orders and other devices to limit access to the information can mitigate these effects, but they cannot erase them.¹⁰⁰ Forced production of Hamilton's notes in *Swidler* would have presented a dramatic example of this kind of cost. The value of the notes lies largely in their exclusive distribution rights. The value of those rights would be seriously affected if the notes were in the hands of a court or a prosecutor, even with the most plausible assurances of security. In that circumstance, there may well be no likelihood that the future availability of compulsory process will compensate for the loss in value of the property caused by the act of production.

Thus, Justice Souter in *Soucy* asked the right questions but got the wrong answers.¹⁰¹ He was correct to conduct his analysis based on normal cases, leaving it to parties to argue that their case is abnormal. But he was wrong to think that abnormal cases cannot present takings issues. Enforcement of a subpoena duces tecum is necessarily a taking of property, and the only question is the appropriate level and kind of compensation. Implicit in-kind compensation may well be presumptively adequate in these circumstances, but where the presumption is rebutted, the case for additional compensation is complete.

The remaining question concerns the strength of the operative presumption: What kind and level of costs are enough to trigger an obligation to provide express compensation? We cannot begin to provide an answer; this appears to be precisely the kind of issue that is ripe for resolution through case-by-case evolution (though we are confident, and hopeful, that a clever economist will soon come to the rescue). But reflection on extreme cases, such as the facts of *Swidler*, demonstrate that it is not enough to wave the magic wands of *Hurtado* and *Wigmore* and make the problem go away.

CONCLUSION

We do not pretend to have final answers to all—or even most—of the questions raised here. But we think that the questions need to be raised more frequently and more pointedly than the law and the academy have thus far been prepared to raise

¹⁰⁰ For an interesting treatment of the problem of forced production of trade secrets, see John C. Janka, Comment, *Federal Disclosure Statutes and the Fifth Amendment: The New Status of Trade Secrets*, 54 U Chi L Rev 334 (1987).

¹⁰¹ See the discussion of *Soucy* at text accompanying notes 49-60.

them. In addressing those questions, one will need to think carefully, as the law thus far has not, about the scope and limits of the principle of implicit in-kind compensation. It will not be an easy undertaking, but that is no excuse for avoiding the effort.