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### JUST ENOUGH

*Lee Anne Fennell\**

*Response to: Brian Angelo Lee, Just Undercompensation: The Idiosyncratic Premium in Eminent Domain, 113 Colum. L. Rev. 593 (2013).*

Does the constitutional measure of just compensation—fair market value—unfairly undercompensate those whose property is taken through eminent domain? The question is trickier than it appears, as Professor Brian Angelo Lee artfully demonstrates. First, there is the positive question of which elements, if any, are actually left out of the fair market value standard. Next, there is the normative question of whether failure to compensate for those elements should be regarded as unfair. A third question is how, or if, any such unfairness should be addressed. In this Response I hope to both underscore the value of the questions Lee asks and challenge some of his answers. One thing is clear: Lee has opened up understudied avenues of inquiry that will richly repay the attention of those interested in questions of property rights and government power.

This Response proceeds in two Parts. Part I takes up Lee's first question—the contents of fair market value. My analysis, like Lee's, focuses throughout on owner-occupied homes, which are traditionally assumed to be significant repositories of subjective value.<sup>1</sup> Part II considers whether fair market value is a sufficiently just measure of compensation—and if not, how we might make it so.

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1. See Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 *Colum. L. Rev.* 593, 613 n.71 (2013) (suggesting sentimental value is likely to be greater, on average, for residential owners than for business owners).

## I. UNPACKING FAIR MARKET VALUE

Lee usefully tries to pin down what, if anything, the fair market value (FMV) measure of compensation leaves uncompensated.<sup>2</sup> This is an important exercise. FMV is the constitutional standard for just compensation,<sup>3</sup> even though owners of condemned land often receive larger amounts.<sup>4</sup> And FMV is generally believed to undercompensate.<sup>5</sup> If this supposition is untrue, then it weakens many of the concerns associated with the use of eminent domain.<sup>6</sup>

Like other scholars, I have previously observed that the FMV measure of compensation leaves an increment of value uncompensated:

The uncompensated increment is made up of three distinct components: (1) the increment by which the property owner's subjective value exceeds fair market value; (2) the chance of reaping a surplus from trade (that is, of obtaining an amount larger than one's own true subjective valuation); and (3) the autonomy of choosing for oneself when to sell.<sup>7</sup>

Lee argues that appropriate amounts of both subjective value and the chance of gains from trade are included in FMV, leaving only interference with autonomy categorically uncompensated in a manner that would implicate fairness concerns.<sup>8</sup> This Part focuses only on the positive question of what does

2. See *id.* at 598–618.

3. See, e.g., *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979).

4. See, e.g., Yun-chien Chang, *An Empirical Study of Court-Adjudicated Takings Compensation in New York City: 1990–2003*, 8 *J. Empirical Legal Stud.* 384, 400 (2011) (comparing results of hedonic regression models with court-adjudicated compensation in New York City eminent domain cases and finding, “Overall, the claims, offers, and awards tend to be higher than the estimated fair market value.”); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 *Mich. L. Rev.* 101, 121–26 (2006) (detailing federal and state relocation assistance statutes that entitle condemnees to amounts significantly above fair market value); *id.* at 126–36 (discussing role of precondemnation bargaining in providing takees with above-market amounts of compensation).

5. See, e.g., Richard A. Posner, *Economic Analysis of Law* 74 (8th ed. 2011) (“[J]ust compensation in the legal sense is not full compensation in the economic sense.”).

6. The concerns associated with undercompensation in eminent domain sound in both fairness and efficiency. Fairness arguments center on the fear that condemnees will be forced to bear disproportionate burdens. Efficiency arguments focus on the fear that the government will take too much property (or the wrong property) if it is not required to fully compensate for what it takes. For an overview (and some counterarguments), see, e.g., Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 *Mich. St. L. Rev.* 957, 961–62 & nn.15–16 (2004) [hereinafter Fennell, *Taking*].

7. *Id.* at 958–59 (footnotes omitted). Other scholars have recognized these elements in various forms. See, e.g., Garnett, *supra* note 4, at 109–10 (discussing “dignitary harms” that connect to autonomy concerns); James E. Krier & Christopher Serkin, *Public Ruses*, 2004 *Mich. St. L. Rev.* 859, 866 (2004) (noting “consumer surplus” that residents may have in their properties); Thomas W. Merrill, *The Economics of Public Use*, 72 *Cornell L. Rev.* 61, 83 (1986) (observing owners may place “subjective premium[s]” on their properties above fair market value); Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 *U.C. Davis L. Rev.* 239, 260 (2007) (discussing how eminent domain deprives takees of opportunities to bargain for shares of surplus from economic development projects).

8. Lee does express some ambivalence about the treatment of high levels of sentimental value under the FMV standard, although he argues that ordinary or typical amounts of this element are included in the measure. See Lee, *supra* note 1, at 597, 633–34 & n.125, 648–49 (leaving open

and does not get included in FMV, leaving the normative questions to the next Part. Part I.A considers subjective value and Part I.B turns to the last two components of the “uncompensated increment.”<sup>9</sup>

#### A. *The Subjective Increment*

Lee contends that the FMV measure of compensation incorporates a “typical” amount of subjective value and omits only the subset of subjective value that is “idiosyncratically large.”<sup>10</sup> He is clearly right to observe that many of the things that are subjectively valued by a home’s current owner are things that most potential future owners would also subjectively value—such as a convenient location, a weatherproof roof, a beautiful view, a gorgeously landscaped lawn, and so on. We would expect such widely correlated components of value to get picked up in sales transactions over time, and hence to be built into FMV.<sup>11</sup> Even though a seller’s entire reservation price might be accurately called her “subjective valuation” of the property,<sup>12</sup> eminent domain scholars recognize (implicitly or explicitly) that the widely correlated portions of that valuation are not in fact excluded from FMV.<sup>13</sup> Instead, only a subjective “increment” or “premium” remains uncompensated by the FMV measure.<sup>14</sup>

The interesting empirical question, which Lee approaches conceptually, is whether some of the elements usually believed to be within the uncompensated

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possibility that fairness could require fixed-dollar-amount compensation for idiosyncratically large sentimental values).

9. My organization diverges slightly from Lee’s taxonomy, in that he includes the chance of gains from trade and autonomy as subcomponents of subjective value, rather than as separate elements. See *id.* at 607.

10. *Id.* at 611 (emphasis omitted).

11. As Lee explains, there is more than one method for deriving FMV. *Id.* at 616–18. However, the comparable sales method is widely used and often preferred by courts. *Id.* at 616.

12. A reservation price is the smallest amount an owner would accept to sell an item, or the largest amount a buyer would pay to purchase it. See, e.g., Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 *Geo. L.J.* 1789, 1792 (2000). A seller’s reservation price for a given property reflects the sum total of what the property is worth to her, and hence might be equated with her subjective valuation of the property, subject to two clarifications. First, her reservation price will tend to align with FMV even if she herself has no affection or use for the property, as long as she will have outside opportunities to sell at that price to other buyers. Second, as discussed in the text, only a subset of the things that she subjectively values about the property will fail to correlate with what the market as a whole values about the property.

13. Thus, the fact that an owner might subjectively feel aesthetic delight when observing her own granite countertops does not keep this element of value from being reflected in FMV as long as enough would-be buyers feel a similar sense of delight when exposed to granite countertops. By contrast, the happy feeling an owner gets when observing his buckling do-it-yourself countertops covered in an unpopular color of linoleum is unlikely to be (positively) correlated with anyone else’s feelings toward those countertops.

14. See Fennell, *Taking*, *supra* note 6, at 958 (referring to “increment by which the property owner’s subjective value exceeds fair market value”); Merrill, *supra* note 7, at 83 (using term “subjective premium” to capture difference between FMV and owner’s subjective valuation). It is of course tautologically true, as Lee notes, that compensation pegged to FMV will not compensate for an increment or premium that is defined to represent an amount in excess of FMV. Lee, *supra* note 1, at 600. Lee properly focuses attention on the contents of this increment or premium.

portion of subjective value are actually incorporated into FMV. For example, it is generally supposed that sentimental attachments to the home (happy memories and so forth) are not built into FMV because they are unique to the owner and not transferable to a buyer. Lee argues that a “typical” amount of even the most sentimental elements of the subjective increment will in fact get captured in FMV, on the theory that large numbers of sellers share the fact of these elements (if not their specific details). Thus, Lee posits, sellers as a rule will only part with property after being compensated for a normal amount of lost sentimental value (as well as for other commonly incurred costs, like moving expenses, making new friends, learning one’s way around a new neighborhood, and so on).<sup>15</sup>

This line of reasoning is provocative and well worth exploring. However, there is reason to doubt that typical amounts of sentimental value and other individualized costs wind up in FMV. As Lee recognizes, those who sell are not randomly selected from the population of owners, but rather are self-selected in ways that are likely to correlate with lower-than-average subjective premiums. Despite the attention that subjective value gets in the eminent domain context, homeowners do not *always* maintain a stably high level of positive attachment to their homes. Not only may subjective valuations in property grow over time,<sup>16</sup> but dramatic downward shifts may occur due to changes in employment, household configuration, health, and other factors.<sup>17</sup> People who have experienced these downward shifts are likely to be overrepresented among sellers, along with those who never formed strong attachments to the home in the first place.

Also overrepresented among sellers are those who have experienced a “pull” factor that overrides their attachment to their existing home, such as a new job offer in another place, a desire to move in with a partner, or a chance to get a child into a better school district.<sup>18</sup> What is significant about such

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15. Lee, *supra* note 1, at 610–14.

16. See, e.g., Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681, 736 (1973) (observing “long-occupied single-family homes in stable residential areas tend to attract increasing subjective valuations as the tenure of ownership increases”). Causation likely goes in both directions, with deepening attachments tending to lengthen the stay, even as longer stays lead (on average) to deeper attachments.

17. Downward shifts in subjective valuation need not be associated with negative life events. For example, a commuting location that is ideal for a job in downtown Cleveland will be a very poor commuting location for a new job in Chicago. Likewise, a trendy but edgy neighborhood may lose some of its appeal after one has children. The fact that fluctuations in subjective valuation can go in both directions explains why owners tend to place a high value on holding the “possessory option” to stay or leave at a time of their own choosing. See, e.g., Lee Anne Fennell, *Possession Puzzles*, in 11-1 Powell on Real Property WFL10-1, WFL10-4 to WFL10-8 (Michael Allan Wolf ed., 2010).

18. Census data on reasons for moves indicate that nearly half of all moves in the United States occur for either job-related reasons or family-related reasons. U.S. Census Bureau, Table 25: Reason for Move, by Sex, Age, Race and Hispanic Origin, Relationship to Householder, Educational Attainment, Marital Status, Nativity, Tenure, Poverty Status, and Type of Move (Collapsed Categories): 2011 to 2012 (2012), <http://www.census.gov/hhes/migration/files/cps/cps2012/tab25-1.xls> (on file with the *Columbia Law Review*). Most of the balance are due to

factors is their capacity to effectively introduce side payments or subsidies (pecuniary or not) from outside the four corners of the home sale itself. Such subsidies can turn the transaction into a positive expected value proposition even if existing subjective attachments are not fully compensated by the sales price. The interaction of the relevant labor markets, relationship markets, and housing markets will determine exactly how things play out in a given instance. But one thing is clear: Not every inducement for a given move must inevitably come from the pocketbook of the buyer or show up in the sales price.

Lee's response to the self-selection argument is that those who do not sell also influence FMV. Owners with high subjective valuations who sit on the sidelines put upward pressure on prices, Lee argues, ensuring that some of their subjective value gets built into FMV as well.<sup>19</sup> Lee is correct to observe that the presence or absence of competitors in the marketplace (on either the buying or selling side) will influence prices. But tracing the mechanism through which this influence occurs leads to somewhat different conclusions than the ones Lee reaches.

Suppose there are two identical houses whose owners value them at \$200,000 and \$300,000, respectively. If there are two would-be buyers who each value these homes at \$250,000, they will bid up the price of the low-valuing owner's home to epsilon below \$250,000. One buyer will win the bid, and the other will walk away empty-handed. The buyer in this story is forced to the top of the bargaining range not by the subjective valuation of the nonseller, but rather by the fact that demand for homes under \$250,000 outstrips supply in this housing market.<sup>20</sup> The outcome will not change if the high-valuing owner places a subjective value on her home of \$3 million instead of \$300,000. Owners with high subjective valuations may contribute to housing scarcity—a point pursued further below—but their valuations do not automatically work their way into home prices.

It is true, as Lee's examples show, that potential sellers whose reservation prices lie *below* those of some potential buyers can influence bargaining dynamics without actually becoming sellers themselves—if supply exceeds demand.<sup>21</sup> To adapt my example above, suppose there is just one buyer with a valuation of \$250,000, and the two sellers have reservation prices of \$200,000

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"housing-related reasons." *Id.* Both push and pull factors are likely to feature in each of these categories.

19. See Lee, *supra* note 1, at 627–29 (positing that higher reservation prices held by those who are not actively seeking to sell will place upward pressure on negotiated prices); *id.* at 628 n.115 (asserting "fair market value for a given piece of property will incorporate not only information about the subjective values of voluntary sellers of similar properties but information about the subjective values of nonsellers as well").

20. The example in the text implicitly assumes that the demand for owner-occupied housing is not completely price-inelastic, and that a would-be buyer could walk away (perhaps to double up with family, perhaps to rent, perhaps to obtain housing in a different housing market) rather than meet the reservation price of a high valuer.

21. The nonseller in my example had a reservation price above that of both buyers. Lee uses examples in which the nonseller has a reservation price lower than a buyer's reservation price but higher than the reservation price of the party who will end up being the seller. Lee, *supra* note 1, at 628.

and \$225,000, respectively. Here, the buyer can force the lower-valuing seller to the bottom half of the bargaining range by threatening to buy from the higher valuer instead.<sup>22</sup> But “near sellers” who provide negotiating leverage to buyers are not drawn at random from the population of homeowners either; rather, they are the owners who have the lowest valuations among those who do not end up selling. Their influence does not undermine the core idea that owners with relatively low subjective valuations determine FMV.

More interesting is the potential for high subjective valuers to contribute to a “seller’s market” in which the relative scarcity of homes under conditions of high demand allows sellers to glean a disproportionately large share of surplus. The relationship between high-valuing nonsellers and housing scarcity is not straightforward. For one thing, nonsellers often do more than keep competing homes off the market—they also keep competing homebuyers (i.e., themselves) off the market as well. Moreover, we would not expect a seller’s market to persist for long unless there were impediments to supply. Lee focuses on factors that keep existing owner-occupied homes off the market: the fixed costs of moving, the difficulty of learning about market prices, and widespread sentimental attachments to property.<sup>23</sup> But there are other sources of housing supply: the conversion of rental units into owner-occupied units, and new home construction.<sup>24</sup> Homes from these sources are, by definition, unencumbered by any sentimental value or special suitability to their sellers, and hence might be expected to limit any seller’s ability to charge a premium for giving up such advantages.

In thinking through these points, it is helpful to consider another type of nonfungible property that Lee mentions, citing Margaret Jane Radin: wedding rings.<sup>25</sup> Although Lee does not address the question, it would be odd to expect a “typical” amount of the subjective value that spouses hold in wedding rings to be reflected in the secondhand ring market. The reasons for this intuition track the points above. First, those who sell used wedding rings probably attach an atypically low sentimental value to the rings compared with the overall run of wedding ring owners. Sellers of wedding rings may include some devoted spouses who simply must raise cash quickly, but the secondhand market is likely dominated by those who have experienced breakups that have drained the ring of its sentimental value altogether, and possibly even flipped its emotional valence. Second, even if starry-eyed sellers of used wedding rings did not have to compete against the disillusioned, they would still have to compete against sellers in the new wedding ring market.

Of course, there is a striking difference between the ring market and the housing market: The supply of rings can easily rise to meet demand, whereas the supply of homes generally cannot. The addition of new housing stock is

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22. Of course, if we add another buyer or two to the story, our erstwhile nonseller becomes a seller.

23. See Lee, *supra* note 1, at 626–29.

24. Although Lee explains that one metric of FMV is keyed to rebuilding costs, *id.* at 617, he does not connect this fact to the potential for new housing stock to compete with existing housing stock.

25. See *id.* at 604 (citing and discussing Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957 (1982)).

heavily regulated through zoning and other land use restrictions,<sup>26</sup> and the conversion of rental units may also be constrained.<sup>27</sup> Such constraints on supply can artificially sustain elevated home prices as demand increases.<sup>28</sup> Meanwhile, many owner-occupants may remain on the sidelines, in part to avoid having to compete for new housing under the same constrained market conditions. Rising prices may also limit the entry of current homeowners for a reason unrelated to personal attachments—if owners anticipate that prices will continue to rise, they may find the option value of hanging onto the home increasingly valuable.<sup>29</sup>

Recognizing these facts changes the meaning of Lee's argument about nonsellers. Large numbers of nonsellers with high subjective values could help to sustain a seller's market when demand is rising and there are binding limits on housing supply. However, this is not because the market is taking nonsellers' subjective valuations into account; rather, it is taking the raw fact of housing scarcity into account. Legal restrictions on supply, along with any other factor that keeps competing sellers from entering a tight housing market, will tend to improve the bargaining position of those who sell, pushing up prices and FMV accordingly. This could make it more likely that FMV will approach or even exceed the reservation price of a randomly condemned owner—depending on the reason the owner stayed on the sidelines as prices rose.<sup>30</sup>

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26. See William A. Fischel, *Political Structure and Exclusionary Zoning: Are Small Suburbs the Big Problem?*, in *Fiscal Decentralization and Land Policies* 111, 114 (Gregory K. Ingram & Yu-Hung Hong eds., 2008) (using measure of housing supply elasticity to measure regulatory restrictiveness). See generally Edward L. Glaeser et al., *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 *J.L. & Econ.* 331 (2005) (empirically investigating gap between construction costs and condominium prices in Manhattan).

27. See, e.g., Margaret Jane Radin, *Residential Rent Control*, 15 *Phil. & Pub. Affairs* 350, 372 (1986) (“Common companions of rent control are condominium-conversion control and demolition control.”).

28. The fact that construction of new housing stock takes time (even in the absence of land use restrictions) can also keep supply from rising nimbly in response to increased demand. There may also be some natural or physical limits on suitable land for building. But see Fischel, *supra* note 26, at 114 (“[N]atural constraints on supply such as wetlands and steep slopes are seldom by themselves enough to deter a developer.”). Stickiness of supply may be even more important in sustaining a buyer's market in areas of falling demand for homes. Existing housing stock is durable and typically removed very slowly. See Richard K. Green, Stephen Malpezzi & Stephen K. Mayo, *Metropolitan-Specific Estimates of the Price Elasticity of Supply of Housing, and Their Sources*, 95 *Am. Econ. Rev.* 334, 334 (2005).

29. For work on a similar phenomenon, see generally Stephen Day Cauley & Andrey D. Pavlov, *Rational Delays: The Case of Real Estate*, 24 *J. Real Est. Fin. & Econ.* 143 (2002) (examining rationality of holding onto real estate in down markets for option value associated with potential market recovery).

30. If she simply failed to notice that prices were rising, or noticed the rising prices but had not yet had an opportunity to put her own home on the market, her reservation price may have been surpassed. See Lee, *supra* note 1, at 626–27. On the other hand, if she must buy new housing in the same overheated market, her own valuation will rise along with housing prices, making it less likely that FMV will approach her reservation price.



### B. *Other Uncompensated Elements*

Although the claim that eminent domain undercompensates owners has been largely based on subjective value, two other elements have been recognized in the literature as well: the opportunity to capture gains from trade, and the autonomy-based or “dignitary”<sup>31</sup> interest associated with being able to choose when to sell.

1. *Gains from Trade.* — Surplus from a sales transaction can be divided up among the parties in any number of ways. If buyers and sellers have roughly equal bargaining power over the run of cases, we would expect each group to garner half the surplus from the sales that occur, settling on prices that fall on average halfway in between their respective reservation prices. Current market conditions and future expectations may skew surplus division, however, which will influence sales prices and hence FMV. Lee is thus correct to observe that FMV will reflect the gains from trade that sellers can expect to realize on average.<sup>32</sup> Does it then follow that owners who have their property taken through eminent domain are not deprived of the opportunity to realize gains from trade?<sup>33</sup>

There are at least three reasons to resist this conclusion. First, a gain from trade can only be realized by a condemnee if she actually receives more than her own reservation price. This may not occur, for the reasons discussed above.<sup>34</sup> However, the earlier discussion also suggests that under some market conditions, FMV could exceed the reservation prices of some nonsellers, as where FMV has been driven up by housing scarcity and owners do not respond quickly to sell their properties. If such a nonseller suffers a condemnation, FMV would give her an amount in excess of her reservation price. By definition, this compensation would assign her some of the gains from the property’s transfer. Whether condemnees as a group receive an “average” amount of gains from trade, then, depends on whether they tend to receive an average amount of compensation in excess of their reservation prices, which in turn depends on the relationship between FMV and their actual subjective valuations.

Second, even if we were to assume (counterfactually) that every condemnee receives an amount above her reservation price that equates to her expected share of the surplus from a negotiated sale, she still loses the chance to negotiate for a share of the surplus under actual market conditions. On the assumptions just given, some condemnees will be better off for not having had to conduct their own negotiations or risk the vagaries of the market, while some will be worse off. Human optimism being what it is, we would expect most people to feel aggrieved over missing the chance to bargain for the lion’s share of the gain from trade under some imagined set of propitious future market conditions. This particular loss blends into the autonomy concern

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31. See, e.g., Garnett, *supra* note 4, at 109–10.

32. Lee, *supra* note 1, at 614–15.

33. Lee recognizes that condemnees do not share in the surplus produced by the development that is the reason for the condemnation. *Id.* at 615. He suggests that they receive compensation through the FMV standard for their other expected gains from trade, however. *Id.* at 614–15.

34. See *supra* Part I.A.

considered below, however, insofar as the individual's inflated view of the expected value of a hypothetical forgone bargaining opportunity exceeds the actual expected value of those future bargaining opportunities.

The third point connects subtly to the second. While every owner may hope to win big in some future unspecified land deal, condemnees may be deprived of a concrete prospect for negotiating supernormal returns. Where eminent domain is used as a substitute for a private land assembly that would have otherwise taken place, the owner loses the chance to bargain over supplying a valuable input to that assembly. If ownership in general confers a lottery ticket of sorts ("One day this place may be worth a fortune!"), holding a very well-positioned property that is essential to an important project can be analogized to holding a *winning* lottery ticket.

Some caveats apply. First, it may be unclear whether a given exercise of eminent domain has crowded out a private land acquisition that otherwise would have taken place; perhaps the land assembly would not have been attempted had eminent domain been unavailable. Second, it is impossible to know whether any particular landowner could have exerted sufficient leverage to claim a significant portion of the assembly surplus. Nonetheless, owners whose property is condemned lose any chance that they otherwise would have had to pursue a share of the gains associated with the project in question, and do not receive compensation for it through FMV.<sup>35</sup> Whether the landowner has any claim to this surplus is a separate normative question that is taken up below.

2. *Autonomy*. — For homeowners, the autonomy to decide whether and when to sell has two components that are worth separating out for purposes of this analysis. One element relates to the consumption experience of homeownership and the value of the option to remain in possession as long as one likes. From an instrumental perspective, this option provides the opportunity to sell when (and only when) one's subjective value in the property has dropped to a low level, or when strong pull factors are present, rather than requiring the owner to suffer dispossession at a randomly chosen time that might match up with neither of these occurrences. Autonomy thus supports the realization of subjective value through homeownership. It further assures owners that this subjective value can be realized in kind, through continued possession, at the owner's election, providing a form of security that resists monetization.<sup>36</sup>

The second facet of autonomy relates to the home as an investment and the ability to hold that investment for as long as one likes. The option value associated with ownership relates in part to the discussion above about pursuing gains from trade, but extends beyond it. Ownership, as Henry Smith

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35. Here too, the lost chance to bargain may leave some owners better off. For example, an owner might have miscalculated the amount of surplus available from a project and insisted on so much that she caused the project to fail, even though the FMV payout would have met her reservation price.

36. It is an empirical question how disruptive displacement from the home is, and thus how significant is an owner's right to continued possession. See Stephanie M. Stern, Residential Protectionism and the Legal Mythology of Home, 107 Mich. L. Rev. 1093, 1109–19 (2009) (critiquing assumption that displacement visits serious harms on those who are displaced).

has argued, delegates to owners the right to pursue a wide range of projects on their holdings.<sup>37</sup> That these projects may have a variety of time horizons presents no difficulty; an owner can hold onto the property until the investments pay off, or until she decides to give up on them. Ownership supports the owner's agency, then, and does so in ways that are independent of the expected value that the owner might glean from the property. As an institution, it lets owners hope and strive for more than the average returns for a property of a given type. It gives them the freedom to fail as well as to succeed in their efforts.

Eminent domain eliminates these sources of security and agency. The FMV measure does not (and could not) compensate for these losses. But, significantly, this observation is merely a positive fact and not a normative conclusion. To say that autonomy is not compensated by the FMV standard does not, on its own, establish that there is any normative problem requiring intervention. More broadly, the idea of "the uncompensated increment" does not lead ineluctably to an insistence that all elements of ownership be fully compensated. Instead, it can be used to structure an inquiry into which exercises of eminent domain are normatively consistent with leaving such increments uncompensated.<sup>38</sup> That inquiry finds much common ground with Lee's normative analysis, as the next Part explains.

## II. IS FAIR MARKET VALUE JUST ENOUGH?

Lee follows his examination of the contents of FMV with a set of normative arguments. He draws two conclusions. First, with respect to subjective value and gains from trade, FMV compensation is sufficiently just. Second, with respect to autonomy values, FMV falls short in a way that should be remedied not through a percentage premium above FMV, but rather through per capita lump sums. This Part considers each claim in turn.

### A. *Eccentrics and Opportunists*

Lee's positive arguments suggest that typical amounts of both subjective value and gains from trade are built into the FMV standard. His normative argument is that the portions omitted do not present a problem from the perspective of fairness. Consider first subjective value, which, on Lee's account, is only left out of FMV to the extent it is idiosyncratically large. If this is so, his analysis suggests, compensation only falls short for eccentric owners whose preferences the property system would be foolhardy to take into

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37. Henry E. Smith, Property and Property Rules, 79 N.Y.U. L. Rev. 1719, 1728, 1754–55 (2004); see also Larissa Katz, Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right, 122 Yale L.J. 1444, 1480–82 (2013) (discussing extent of, and limits on, delegation to owners).

38. See, e.g., Fennell, Taking, *supra* note 6, at 982 (posing question of "whether the confiscation of the uncompensated increment is a taking for which just compensation is required" (emphasis omitted)).

account. We have a society to run after all, and taking extreme valuations into account would gum up the works.<sup>39</sup>

Like eccentrics, presumed opportunists receive no quarter from Lee. He argues that only the special opportunity to reap gains from the project that is the basis of the condemnation itself is omitted from FMV, and fairly so. If no one has a right to any of the surplus that a condemnation assembly will produce, then nothing has been taken away when FMV fails to compensate for this element. Lee observes that the whole point of eminent domain is to get around exactly the sort of holdout problem that would result if people were allowed to bargain for surplus in such contexts, making it inconsistent to take such bargaining leverage into account in compensation.<sup>40</sup>

It is not hard to agree with the tenor of Lee's normative conclusions. It is entirely sensible to provide a measure of eminent domain compensation that omits some elements of value. One reason for doing so relates to the nature of eminent domain and the benefits that it confers on owners. Richard Epstein has used the term "implicit in-kind compensation" to refer to societal benefits that condemnees receive back as a result of takings.<sup>41</sup> Because these benefits can stand in for monetary compensation, the payment of FMV need not make condemnees whole on its own.<sup>42</sup> An extension of this argument would posit the following hypothetical bargain: In exchange for living in a society where certain collective goods and services can be feasibly provided, landowners agree to give up some of ownership's prerogatives in the event their property is needed as an input into those goods or services.<sup>43</sup>

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39. See Lee, *supra* note 1, at 629–32 (arguing that individuals with large idiosyncratic premia should not be allowed to block beneficial public projects). Lee appears to soften this stance somewhat when it comes to the sentimental value subcomponent of subjective value. See *id.* at 633–34 & n.125.

40. *Id.* at 620–25; see also *id.* at 633 (expressing concern that demands for shares of surplus by condemnees "could make low-margin beneficial projects infeasible, with a resulting net cost to social welfare").

41. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 195–215 (1985).

42. See *id.* at 195 ("The Constitution speaks only of 'just' compensation, not of the form it must take.").

43. See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 *Cornell L. Rev. (Special Issue)* 745, 775–79 (2009) (examining obligations of ownership in context of eminent domain); Krier & Serkin, *supra* note 7, at 866–67 (observing "classic public uses" provide in-kind compensation by delivering benefits to public at large). Epstein's endorsement of in-kind compensation would not go as far as the position outlined in the text. See Epstein, *supra* note 41, at 196–97 (deeming compensation to be just only if it leaves each party at least as well off as before government action). If one considers each condemnation in isolation, it likely leaves actual condemnees worse off *ex post*. See, e.g., Alexander, *supra*, at 776–77 (noting eminent domain contains "an element of individual sacrifice" because "[i]ts effects are necessarily concentrated on those whose property is condemned"); Krier & Serkin, *supra* note 7, at 866 (conceding "condemnees are still worse off relative to all the rest of the public who realize the benefits of the same government project but retain their property as well," although "[o]ver time . . . imbalances should even out"); see also Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 *S. Cal. L. Rev.* 1, 42 (1996) (contrasting *ex ante* vision of reciprocity of advantage with Epstein's view).

Scholars who pay attention to uncompensated costs are not necessarily bent on fully compensating them in each instance. Instead, these factors help to show why expanding the range of eminent domain beyond the terms of the hypothesized bargain might create difficulties.<sup>44</sup> For better or worse, ownership does generally entail the right to be an eccentric, or an opportunist,<sup>45</sup> or even an eccentric opportunist. Eminent domain represents a carve-out from that general rule, and thus bears a burden of justification—although not necessarily a burden of perfect compensation. This point is especially important given the difficulty of compensating for compromised autonomy, as the next section discusses.

### B. *Compensating for Lost Autonomy*

One element that Lee agrees is systematically omitted from FMV compensation is the autonomy interest associated with choosing when (and whether) to sell.<sup>46</sup> He argues that any eminent domain reform that attempts to target undercompensation should start by asking what sort of remedy would be well-suited to this particular shortfall. Plans that increase compensation for eminent domain by some percentage markup serve as a foil for Lee's analysis.<sup>47</sup> His proposed alternative begins with the premise that respect for autonomy is owed to each person, without regard to the value of her dwelling unit. He argues that compensation should therefore be awarded on a per capita rather than percentage basis.<sup>48</sup> There is much to be said for this approach, but it is also subject to some critiques.

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44. For example, if eminent domain is regularly wielded on behalf of powerful private parties against less powerful individuals, the reciprocity implicit in the hypothetical ex ante bargain referenced above will not be present. See Alexander, *supra* note 43, at 777.

45. I use the word “opportunist” in a limited sense to refer to the right that property rule protection confers on owners to hold out in an attempt to extract more surplus from the other party. Whether and to what extent the institution of property builds in limits on the use of leverage is open to question. See e.g., Katz, *supra* note 37, at 1458–68 (attempting to differentiate “legitimate leverage” from “illegitimate leverage”).

46. Of course, owners are only able to sell at a time of their own choosing if they can find willing buyers. In some cases, the government's role as a potential buyer could expand rather than contract the choice set available to owners—as where the exercise of eminent domain happens to coincide with the owner's own preferred time of sale.

47. See Lee, *supra* note 1, at 634–35 (discussing proposed and enacted percentage bonus provisions). Such approaches have not infrequently been criticized. See, e.g., Fennell, *Taking*, *supra* note 6, at 993–94 (noting percentage-based approach might undercompensate or overcompensate, while failing to respond to autonomy concerns); Rachel D. Godsil & David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership*, 77 *Fordham L. Rev.* 949, 978 (2008) (“[T]he application of the [percentage premium plan] exacerbates the wealth disparity at taxpayer expense.”); Merrill, *supra* note 7, at 92 (suggesting windfalls created by percentage premium approaches could spur rent-seeking behavior designed to attract eminent domain); Jeffrey Evans Stake, *Just (and Efficient?) Compensation for Governmental Expropriations*, in *Law, Mind, and Brain* 299, 314 (Michael Freeman & Oliver Goodenough eds., 2009) (observing “a simple multiplier for duration of possession might be unfair” because it would treat differently losses of poor and rich owners).

48. See Lee, *supra* note 1, at 645 (“[B]ecause all people are moral equals, their autonomy has equal value, so any compensation provided specifically for the loss of autonomy should not depend upon the market value of the recipient's property . . .”).

First, it is unclear how well Lee's proposal aligns with its internal logic. If displacement of individual people is the problem, then renters as well as homeowners should be compensated<sup>49</sup>—and this is likely what Lee has in mind.<sup>50</sup> But the fact that different sets of people may own and occupy the property raises a conceptual difficulty. As suggested above, there are two different types of autonomy interest with which eminent domain might interfere—one that relates to the option to retain physical possession, and one that relates to the option to hold the property as an investment as long as one likes. Only owners are deprived of the latter form of autonomy, while they may or may not be deprived of the former (depending on whether they occupy the property themselves). To the extent that compensation for autonomy is contemplated, payments must be sensitive to the differences between the interests affected by each of these types of incursions.<sup>51</sup>

At a broader level, Lee's compensation proposal seems to overstep what is necessary from a normative perspective, insofar as it disregards the notion of implicit in-kind compensation.<sup>52</sup> If it is viewed as unobjectionable to leave some prerogatives of ownership uncompensated in order to achieve society's objectives, why must an interference with autonomy always be redressed? The question (which the public use clause might be thought to address) is whether the exercise of eminent domain fits within a category for which these incursions have already been compensated in kind. Where this is not the case, all of the uncompensated elements become an issue; where the condition is satisfied, none requires special attention.

#### CONCLUSION

Fair market value compensation is not full compensation. Lee's analysis does not undercut that basic fact, though it does helpfully push us to examine the nature and extent of the undercompensation a fair market value standard generates. Nonetheless, the constitutional standard for just compensation may well be "just enough." In this Response, I have tried to both illuminate and challenge certain aspects of the path Lee takes in reaching and qualifying this conclusion. Whether or not one agrees with Lee's conclusions, the questions

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49. See Stake, *supra* note 47, at 314 (arguing "compensation ought to be awarded to every displaced member of the household with sufficient tenure to form ties to social networks and physical structures"—including family members and tenants).

50. Lee does not explicitly mention tenants, but instead refers to a "fixed-dollar-amount compensation bonus to each condemnee." Lee, *supra* note 1, at 645 (emphasis omitted). His later discussion of compensation for sentimental value refers to "each resident." *Id.* at 648 (emphasis omitted).

51. A deeper issue, which Lee addresses at length, is whether money can even compensate for lost autonomy. *Id.* at 639–45. My view remains that it cannot, although the public use clause can be understood as marking out the conditions under which interference with an owner's autonomy is permissible. Where public use is unclear, a voluntary self-assessment approach could offer a way to address autonomy concerns—not by putting a price on autonomy, but rather by allowing owners to exercise autonomy. See Fennell, *Taking*, *supra* note 6, at 995 ("The core idea is to overcome the incommensurability difficulty associated with autonomy interests by eliciting advance consent from landowners to takings that would go to private transferees under circumstances where public use is unclear.").

52. See *supra* text accompanying notes 41–43.

that he thoughtfully brings to the forefront can be expected to fuel future work on eminent domain.

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