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GIVINGS

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ABSTRACT

Givings – government acts that enhance property value – are omnipresent. Givings and takings are mirror images of one another, and of equal practical and theoretical importance, but the Takings Clause of the Fifth Amendment has enabled takings to dominate scholarly attention. This Article makes the first step toward rectifying this disparate treatment by laying the foundation for a law of givings.

The Article identifies three prototype givings: physical givings, regulatory givings and derivative givings. The Article shows that givings are a formative force in property, and that a comprehensive takings jurisprudence cannot be devised without an attendant understanding of givings and their relationship to takings.

The Article turns to the task of determining when a giving occurs, and when a "fair charge" – the givings' analogue of "just compensation" – should be assessed on the beneficiaries. By extracting the essential features of takings law, the Article molds the universe of givings into four conceptual clusters. The first cluster is organized around determining when and whether givings can be characterized as reverse takings. The second separates between singled-out givings and majoritarian givings. The third distinguishes between refusable and nonrefusable givings. The fourth differentiates between givings directly linked to particular takings and givings that are not. Finally, the Article offers a three-step model for identifying, assessing, and charging for givings, thereby demonstrating the practical administrability of a law of givings.

The Article argues that charging for givings would reduce interest group politics, enhance the efficiency of government and improve the fairness of the property system.

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INTRODUCTION

Eclipsed by its celebrated twin – takings – givings occupies a crucial yet barely visible role in the universe of constitutional property law. While takings – government seizures of property – have been the subject of an elaborate body of scholarship,[1] givings – government distributions of property – have been overlooked by the legal academy.[2] Givings are ever-present and yet not discussed. They can be found in almost every field of government endeavor. Every time the government "up-zones," or changes a zoning ordinance to the benefit of certain property owners, it has executed a giving.[3] Similarly, when the government relaxes environmental regulations, a giving occurs.[4] The same

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[1] Among the many famous examinations of takings are Richard A. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (hereinafter, Epstein, TAKINGS); William A. Fischel, REGULATORY TAKINGS: LAW, ECONOMICS AND POLITICS (1995) (hereinafter, Fischel, TAKINGS); Frank I. Michelman, *Property, Utility, and Fairness: Comments On the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); and Joseph L. Sax, *Takings and the Police Power*, 74 YALE L. J. 36 (1964) (hereinafter, Sax, *Takings I*). For a historical overview of takings, *see* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

[2] Givings have only been noticed in very narrow contexts such as unconstitutional conditions, Richard A. Epstein, BARGAINING WITH THE STATE (1993) (hereinafter, Epstein, BARGAINING), and offsets, *see, e.g.*, J. Gregory Sidak & Daniel F. Spulber, *Givings, Takings, and the Fallacy of Forward-Looking Costs*, 72 N.Y.U. L. Rev. 1068 (1997).

[3] The taking analogue is down-zoning, which may be a compensable taking if it goes "too far." *Pennsylvania Coal Co. v Mahon*, 260 U.S. 393 (1922); *see, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *See also*, *infra*, Parts I.C and I.D. Up-zoning and down-zoning are sometimes defined differently in different contexts. William A. Fischel, THE ECONOMICS OF ZONING LAWS 22 (1985) (hereinafter, Fischel, ZONING).

[4] *See, e.g., Lucas*, 505 U.S. 1003 (coastal protection is a taking); *Morris County Land Improvement Co. v. Township of Parsippanny-Troy Hills*, 40 N.J. 539, 139 A.2d 232 (1963) (holding a local wetland ordinance unconstitutional since it deprived the landowner of any reasonable use of the land); *Dooley v. Town of Fairfield*, 151 Conn. 304, 197 A.2d 770 (1964); *State v. Johnson*, 265 A.2d 711 (Me. 1970) (invalidating a wetland protection statute because the benefit it effected on harmed property owners "is so disproportionate to their deprivation of reasonable use that such exercise off the State's police power is unreasonable."). More recent cases took a more favorable stand on environmental regulation. See e.g., *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla. 1981) *cert. denied sub nom. Claridge v. New Hampshire Wetland Board*, 485 A.2d 287 (N.H. 1984) (sustaining very restrictive wetland regulations).

occurs when the government grants a license to engage in a certain business or transfers title to land or a lesser property interest to a private actor.[5] Other examples are legion.[6]

Like a reflection in a mirror, the massive jurisprudence of takings is everywhere accompanied by givings. For every type of taking, there exists a corresponding type of giving. In a recent article,[7] we demonstrated that takings come in three varieties: physical takings, regulatory takings and derivative takings. A physical taking occurs when the state seizes a property interest in order to put it to public use. In a regulatory taking, the state does not seize the property interest, but regulates its use in a manner that unduly diminishes property values. A derivative taking is present whenever a taking (or a giving) diminishes the value of surrounding property.[8] In the same manner, givings come in three varieties.[9] A physical giving occurs when the state grants a property interest to a private actor, such as when it grants broadcasting rights[10] or easements to cable and cellular phone companies.[11] In a regulatory giving, the state uses its regulatory power to enhance the value of certain private properties. This occurs, for instance, when the state eliminates development restrictions in wetlands.[12] Finally, a derivative giving is present whenever the state indirectly increases the value of property by engaging in a physical or regulatory giving or taking. Instances of derivative givings include the building of a park, or the shutting down of a power plant in a residential area.[13] In both of these cases, the value of nearby property increases as a result of the government action, even though the government action had no direct physical or regulatory effect on the nearby property.

Given their importance and ubiquity, how have givings eluded scholarly attention? To the textualist, the answer is straightforward. The Fifth Amendment bars only uncompensated takings;[14] there is no "Givings Clause." But the textualist's answer cannot carry the day.[15]

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[5] *Cf.* Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964) (discussing the expanded role of government in creating property and wealth).

[6] We discuss many other examples throughout the Article, especially in Parts II and III, *infra*.

[7] Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 271, _____ (forthcoming, 2001) (hereinafter, Bell & Parchomovsky, *Takings*).

[8] In *Takings Reassessed*, we defined derivative takings as "a hybrid of their more familiar close cousins. They resemble regulatory takings in that they reduce the value of property without physically appropriating it. Yet, they are distinct from regulatory takings in that they may arise as the result of a physical taking. And, unlike its cousins, the derivative taking may never appear alone; it must always be preceded by a physical or regulatory taking." *Id*. at ___. The existence of cognizable givings, as established in this Article, mandates a slight amendment of the concept of derivative takings to incorporate the possibility of derivative takings being created by an underlying giving. *See id*. at ____ n. 13.

[9] *See infra*, Part I.B.

[10] *See e.g*., Logan, *Getting Beyond Scarcity*, 85 CALIF L. REV. (1997); Cass R. Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499 (2000).

[11] *See e.g*., Jill K. Pearson, *Note: Balancing Private Property Rights with Public Interests: Compensating Landowners for the Use of Railroad Corridors for Fiber-Optic Technology*, 84 MINN. L. REV. 1769 (2000).

[12] *See* Steven W. Watkins, *Note:Congressional Attempts to Amend the Clean Water Act: American Wetlands Under Attack*, 72 N.D. L. REV. 125 (1996) (describing recent federal attempts at reducing wetlands restrictions on private property).

[13] Various studies have shown that "greenbelt" regulations enhance property values. *See, e.g*., G.J. Knapp & A.C. Nelson, *The Effects of Regional Land Use Control in Oregon: A Theoretical and Empirical Review*,18 REV. REG. STUD. 37 (1988); G.R. Parsons, *The Effect of Coastal Land Use Restrictions on Housing Prices: A Repeat Sale Analysis*, 22 J. ENVIR. ECON. & MANAG. 25 (1992); M.R. Correll, J.H. Lillydahl & L.D. Singell, *The Effects of Greenbelts on Residential Property Values: Some Findings on the Political Economy of Open Space*, 54 LAND ECON. 207 (1978).

[14] U.S. CONST. Amend. V ("nor shall private property be taken for public use, without just compensation").

[15] While we argue that a law of givings is necessary, we do not opine on whether it should be viewed as a branch of constitutional law.

First, takings and givings are so inextricably related that one cannot have a coherent takings jurisprudence without an attendant givings jurisprudence. Consider the seminal takings case of *Poletown Neighborhood Council v. City of Detroit*.[16] The City of Detroit seized a number of private lots in order to transfer them to General Motors for building a new factory. The court's decision focused on the question of whether the seizure satisfied the public use requirement of the Takings Clause.[17] Lacking any background understanding of the role of the state in givings, the court preferred effectively to read the public use requirement out of the Takings Clause. One imagines, however, that the court's decision would have been quite different had it been able to call on a body of givings law. Instead of dealing solely with the question of whether landowners' property could be seized, the court could have addressed the question of whether their property could properly be given to General Motors and whether General Motors would properly be required to pay for the "giving."

Second, once one recognizes that relative wealth is a potentially relevant baseline for examining state actions *vis-a-vis* property, one realizes that the barrier between givings and takings is far from clear.[18] When the state takes from Jane Smith, it has made her poorer relative to the rest of the world. When the state gives to everyone but Jane Smith, it has similarly made Jane Smith poorer. Yet, current takings jurisprudence is predicated on the assumption that the only relevant baseline against which the government action is measured is absolute wealth rather than relative wealth: only diminutions in property value in absolute terms trigger compensation. Once relative wealth is considered, there is no longer any justification for continuing to ignore givings.

Third, the same vices of the political system that give rise to constitutional protection for property in the Takings Clause also require protection against unfettered givings. The Takings Clause is meant, in relevant part, to ensure that an organized "faction," in the Madisonian sense,[19] does not use its power to enrich itself at the expense of the unorganized public.[20] In the context of takings, the principal concern is that the faction will enrich itself by converting the private property of unorganized property owners and bringing it into the public domain.[21] In the context of givings, the major concern is that the faction will enrich itself from the public domain at the expense of the unorganized

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[16] 304 N.W.2d 455 (Mich. 1981).

[17] *Id.* at 457.

[18] We do not endorse this conception of the Takings Clause on normative grounds. Nonetheless, relative wealth is a possible baseline for measuring takings, and various studies suggest that relative wealth is an important determinant of welfare. *See* Robert H. Frank, CHOOSING THE RIGHT POND 28-35 (1985); Fred Hirsch, LIMITS TO GROWTH (1976) (developing the concept of positional goods); Richard Easterlin, *Does Economic Growth Improve the Human Lot? Some Empirical Evidence in* NATIONS AND HOUSEHOLDS IN ECONOMIC GROWTH: ESSAYS IN HONOR OF MOSES ABRAMOVITZ (Paul David & Melvin Reder) 1973; Thorstein Veblen, THE THEORY OF THE LEISURE CLASS 26-34 (Random House 1934) (1899); Richard H. McAdams, *Relative Preferences*, 102 YALE L. J. 1, 18-21 (1992).

[19] THE FEDERALIST No. 10 (James Madison) (Clinton Rossiter ed., 1961).

[20] *See, e.g.*, Treanor, *supra* note 1, at 836-855 (discussing importance of Madisonian political analysis in drafting of Takings Clause); Cass R. Sunstein, *Naked Preferences and the Constitution* 84 COLUM. L. REV. 1689, 1690 (1984) (describing the Takings Clause as one of several clauses aimed at curbing "naked preferences" of faction) (hereinafter, Sunstein, *Naked Preferences*). *But see* Daryl J. Levinson, *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 396 (2000) (questioning whether modern public choice theory supports compensation for takings) and Part II.C *infra*.

[21] *See* Carol Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 839, 853-857 (1983) (using Madisonian analysis for local land use decisions); Michelman, *supra* note 1, at 1178.

public.[22] Whether the faction organizes a "taking" or a "giving" there is reason to worry about the public's ability to defend itself from the faction's predations.

Finally, fairness and efficiency,[23] the concerns animating takings jurisprudence, mandate a givings jurisprudence as well. The efficiency rationale for the Takings Clause is to ensure that the state exercises its eminent domain power only when the aggregate benefit exceeds the aggregate cost.[24] Compensation for takings, on this view, forces the state to take into account the cost of its actions.[25] However, the efficiency rationale dictates that the state also properly measure the benefits of its actions. Just as the state's failure to internalize the cost of takings creates fiscal illusion and inefficiency, the state's failure to internalize the benefit of givings creates fiscal illusion and inefficiency.[26] Takings, when uncompensated, generate negative externalities; givings, when unaccounted for, generate positive externalities. From an economic standpoint, neither type of externality should remain outside the state's calculus.[27]

The fairness principle embodied in the Takings Clause is that it is inequitable to "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[28] By the same token, it is inequitable to bestow a benefit upon some people that, in all fairness and justice, should be given to the public as a whole. In a giving, a small group is able to force the public as a whole to subsidize the group's preferential treatment. For example, when the state permits logging companies to chop down trees in national forests for lumber, it is forcing the public as a whole to surrender natural resources for the private profit of the logging companies.[29]

Like current takings jurisprudence, a givings jurisprudence must focus primarily on two questions. First, when does a giving occur? And second, when must the state collect a “fair charge” in exchange for the giving? As should be clear to the reader, this two-step inquiry parallels the two cardinal questions of takings jurisprudence.

In this Article, we sketch out, for the first time, a comprehensive framework for

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[22] *See infra*, Part II.C.

[23] *See* Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U.L. REV. 354, 408 (2000) ("Takings doctrine is complex and multifaceted; some say chaotic. If there is some measure of coherence or consensus in this vast and diverse body of judicial opinions and scholarly commentary, it is that the purposes of just compensation are essentially two: efficiency and distributive justice.").

[24] *See e.g.*, Richard A. Posner, ECONOMIC ANALYSIS OF LAW 58 (4th ed. 1992) (“[t]he simplest economic explanation for the requirement of just compensation is that it prevents the government from overusing the taking power."); William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269-70 (1988) (noting that the compensation requirement "disciplin[es] the power of the state, which would otherwise overexpand unless made to pay for the resources that it consumes"). *See also* Bell & Parchomovsky, *Takings*, *supra* note 7, 87 VA. L. REV. at ____.

[25] *See* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 567-569 (1986) (describing fiscal illusion justification for takings compensation).

[26] *See id.* at 567-568.

[27] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347-57 (Pap. & Proc. 1967).

[28] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

[29] *See e.g.*, Michael Axline, *Forest Health and the Politics of Expediency*, 29 ENVTL. L. 613 (1996) (exploring the negative impact of logging on natural resources and tax payers); Paul Stanton Kibel, *Reconstructing the Marketplace: The International Timber Trade and Forest Protection*, 73 N.Y.U. ENVTL. L. J. 735, 744-54 (1996) (explaining the cost of native forest destruction, and discussing the possibility of a government-logging interest collusion) R. Brent Walton, *Ellickson’s Paradox: It’s Suicide to Maximize Welfare*, 7 N.Y.U. ENVTL. L.J. 153, 155 (1999) (“The timber industry has destroyed millions of acres of America's silva.”); *Cf.* Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

analyzing givings. Rather than shoehorn all givings into a uniform regime, we divide the universe of givings into conceptual clusters – each embodying a distinct aspect of the givings jurisprudence we seek to develop. To this end, we devise a set of criteria to be applied by policymakers to determine when a giving has occurred, and which givings must be accompanied by a charge to the recipient. We list our proposed criteria by the order in which the inquiry should proceed.

First, policymakers must determine whether the government act that bestows a benefit (and potentially constitutes a giving) could be characterized as a taking were it reversed. For example, if a down-zoning of a certain magnitude would not have been considered a regulatory taking, an up-zoning of the same magnitude should not be seen as a giving. Similarly, if a demand for certain amount of funds from a given sector would be considered a tax or a penalty, rather than a compensable taking, the rebate of funds in the same amount should be considered a non-chargeable subsidy or a prize, rather than a chargeable giving.[30] Since wealth redistribution is often seen as a legitimate goal of government[31] and constitutes the cornerstone of programs such as unemployment benefits, it would not be proper to see all cash distributions as properly chargeable givings.

Second, policymakers must determine the extent to which the recipients of the giving constitute a readily identifiable group, and the degree to which the giving is available to the public at large. Here, too, the givings analysis can echo the takings analysis.[32] The provision of public land and subsidized use of a public arena to a professional sports franchise in a for-profit oligopolistic sports league looks very much like a giving.[33] The provision of public education to the public at large on equal terms looks much less like a giving.

Third, policymakers must determine whether the giving can be clearly associated with a taking. Where, as in *Poletown*, property is taken specifically for the purpose of executing a giving, the state should require the potential beneficiary of the giving to execute a "private taking," in which the beneficiary directly compensates the owners of property taken.[34] This rule would lead to a modified application of a 19th century takings rule called the benefit-offset principle.[35] The analysis might also be tied to the infrequently invoked modern doctrine of the average reciprocity of advantage.[36]

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[30] The line between takings and taxes or penalties is not an easy one to draw. See discussion *infra* in Part III.A.

[31] *See e.g.*, Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907, 918 (1993) ("[p]roperly understood, the defense of property rights is a defense of programs of redistribution as well."); Michelman, *supra* note 1, at 1168, 1182. *Cf.*, Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEG. STUD. 667-82. *But see*, Epstein, TAKINGS, *supra* note 1, at 298-99, 314-24 (disallowing redistribution as a public purpose).

[32] *See* Bell & Parchomovsky, *Takings*, *supra* note 7, 87 VA. L. REV. at ____.

[33] *See, e.g.*, Raymond J Keating, *It's Time to Get Government Out of the Sports Business*, USA TODAY (Magazine) (March 1, 2000).

[34] *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (allowing private takings by tenant farmers) and discussion in Part III.C *infra*.

[35] The "benefit-offset" principle allowed the actor executing the taking to reduce the compensation to property owners claiming a taking by the amount of benefit the taking conferred on the owners' remaining property. For discussion, see Fischel, TAKINGS, *supra* note 1, at 80-84; Harry N. Scheiber, *The Road to* Munn: *Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSP. AMER. HIST. 329 (1971); and Part III.C, *infra*. For cases applying the principle, *see, e.g.*, *St. Louis & S.F.R. Co. v. Mathews*, 165 U.S. 1 (1897); *McKeen v. City of Minneapolis*, 212 N.W. 202 (Minn. 1927); *Pierce County v. Thompson*, 144 P. 704 (Wash. 1914).

[36] The doctrine of "average reciprocity of advantage" originated with Justice Holmes in *Pennsylvania Coal Co. v Mahon*, 260 U.S. 393 (1922), who noted that some regulations, while diminishing the value of

Fourth, policymakers must determine whether the recipient of the giving can refuse the benefit bestowed upon her. For example, if the giving consists of an increase in the permissible floor-area ratio,[37] or a similar exercise of "up-zoning," the recipient property owner can refuse the benefit by refraining from building according to the new permissive zoning rules. On the other hand, where the state builds a park, individual owners lack the ability to refrain from enjoying the benefits of being in proximity of the greenery.[38] Where owners have the option to refuse the benefit of the giving, the state should demand immediate payment of a charge for the giving. Anyone not wishing to pay the charge has the option of refusing to accept the giving. On the other hand, where the giving is not refusable, the giving looks very much like a put, or a government right to force the property-owner to purchase.[39] To the extent that such a government power is seen as objectionable, the sting may be avoided by deferring assessment of the charge until a later event, such as the receipt of future government benefits that may be requested by the giving beneficiary. For example, owners claiming compensation for a taking occasioned by building limitations in an environmentally sensitive area might have their compensation offset by a charge for the benefit they receive in being adjacent to greenery, while the remainder of the charge would be assessed only upon sale of the property.

We mold these four conceptual clusters – reversibility of the act, identifiability of the recipient, proximity of the act to a taking and refuseability of the benefit – into a basic model of givings law. The model has three stages: identifying givings, assessing the value of the givings, and collecting charges. In the identification stage, the government determines whether a giving has taken place, and whether it is susceptible to charge. If a chargeable giving is identified, the government issues a notice of giving to the beneficiary, triggering the assessment stage. In the assessment stage, the second stage of the process, the giving beneficiary assesses the value of the giving for payment of the charge. Actual payment of the charge occurs only in the third stage of the process – the collection stage – which is triggered by a realization event. Sometimes, the realization event occurs at the time of the giving, making payment for the charge due immediately. At other times, the realization occurs much later, deferring the charge.

Our model of givings illuminates core aspects of the law of takings and provides an essential complement to any comprehensive theory of takings. Our basic givings model

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property in one respect, could be said to benefit the property owner in another respect, such that no additional compensation is required. For example, he explained that a regulation forcing mining companies to leave intact pillars of coal in abandoned mines was excused from the compensation requirement because the regulation benefited the mine owners by protecting the safety of their employees. *Mahon*,260 U.S. at 415.

It has never been entirely clear how the concept of "advantage" is to be measured in order to determine whether a given regulation produces average reciprocity. If the value of the advantage must be precisely equal to the loss, the question of whether there is average reciprocity of advantage (thereby defeating the need for finding a taking) becomes identical to the question of whether "just compensation" has been paid. On the other hand, if the calculus is looser, as seemed to be the case in *Penn. Central*, 438 U.S. at 130-135, some average reciprocity of advantage may be found in any taking of private property. *See generally* Bell & Parchomovsky, *Takings*, *supra* note 7, 87 VA. L. REV. at ____. *See also* Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297 (1990) (arguing for expanded use of reciprocity of advantage, and elimination of compensation whenever net effect of government action is positive) and Part III.C, *infra*.

[37] "The floor area ratio measures the amount of floor area relative to total site area, including all floor space in office and other nonresidential multi-story buildings." Frederick W. Acker, *Performance Zoning*, 67 NOTRE DAME L. REV. 363, 373 (1991).

[38] *See* note 13, *supra*.

[39] *See* discussion of puts and calls in the context of givings and takings in Part I.D, *infra*.

incorporates the conceptual clusters we identify in this Article, while leaving open the possibility of future development of other conceptual clusters, and refinement of the basic model.

Structurally, the Article consists of five parts. In Part I, we provide a comprehensive account of the distributional effects of government actions. We show how givings correspond to takings, and sketch the connections between the two. In Part II, we demonstrate why every theory of takings – whether based in efficiency or fairness – requires an understanding of givings. In Part III, we divide the universe of givings into our four conceptual clusters, and develop a set of rules to determine for which givings "fair charge" should be collected. In Part IV, we sketch out our basic model for identifying, assessing and collecting fair charges. Finally, in Part IV, we address potential objections to our analysis.

I. THE LAW OF GIVINGS AND TAKINGS

In this Part, we provide a comprehensive framework for understanding givings and takings. Following convention, we begin with takings. As we demonstrated elsewhere, takings come in three varieties: physical takings, regulatory takings and derivative takings.[40] After expounding each category, we unveil the world of givings. We demonstrate that it, too, may be divided into three categories: physical givings, regulatory givings and derivative givings. Thus, each type of taking has a giving analogue. Next, we expose the conceptual relationship between takings and givings. We argue that, in practice, every taking is accompanied by a giving. Consequently, every relevant government action involves both takings and givings, and no theory of takings is accurate without a corresponding theory of givings. Finally, we explore some theoretical aspects of givings, and illuminate the historical and present importance of givings.

A. A Taxonomy of Takings (Takings 101)

1. Three Types of Takings

The Takings Clause of the Fifth Amendment – the touchstone of takings jurisprudence – limits the "taking" of property for public use and mandates the payment of just compensation. Despite the seemingly clear language of the Takings Clause, its original meaning remains obscure.[41] Modern courts and scholars continue to disagree about the scope of the clause.[42] Thus, it is not surprising that takings jurisprudence is

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[40] *See* Bell & Parchomovsky, *Takings*, *supra* note 7, 87 VA. L. REV. at ____.

[41] *See* Treanor, *supra* note 1, at 798-818.

[42] *Compare, e.g., Miller v. Schoene*, 276 U.S. 272 (1928) (finding no taking where a state regulation required owners to cut down red cedar trees infected with a virus that could kill apple trees) *with Dep't of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc*. 521 So. 2d 101 (Fla.), *cert. denied*, 488 U.S. 870 (1988) (holding full and just compensation required when state, pursuant to its police power, destroyed healthy trees). *Compare also Mahon*, 260 U.S. 393 (elimination of mining rights is a taking) *with Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (elimination of mining rights is not a taking). *See, e.g.*, Bruce A. Ackerman, PRIVATE PROPERTY AND THE CONSTITUTION 3 (1977) (takings jurisprudence is " set of confused judicial responses"); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I – A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1301, 1304 (1989) ("[I]t is difficult to imagine a body of case law in greater doctrinal and conceptual disarray."); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561 (1984); Coletta, *supra* note 36, at 299-300 (Takings jurisprudence is a "chameleon of ad hoc decisions that has bred considerable confusion…"); Gideon Kanner, *Hunting the Snark, Not the Quark: Has the Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW 302, 308

considered a leading candidate for the "doctrine-in-most-desperate-need-of-a-principle prize."[43]

Despite the disagreement on various aspects of the Takings Clause, it is indisputable that the case law recognizes the existence of two types of takings: physical takings and regulatory takings. Physical takings involve physical seizure or entry into property.[44] Regulatory takings are far more difficult to define. In the watershed case of *Pennsylvania Coal Co. v. Mahon*,[45] Justice Holmes recognized that some government actions not involving physical occupation of property may nevertheless constitute a taking if they significantly diminish the property's value. The focus on government action that reduces property value naturally suggests a third type of taking, which we labeled a derivative taking. Derivative takings are a hybrid of their more familiar close cousins. While a regulatory taking involves regulating the use of property in a manner that unduly diminishes its value, a derivative taking is present whenever a taking – or a giving – diminishes the value of surrounding property.[46] The essential difference between a regulatory taking and a derivative taking is that in the former case, the government directly imposes a regulatory burden on the affected property, while in the latter case, the affected property is not directly regulated.

The three types of takings may be illustrated with an example. The city of Bespin seeks to build an airport. It seizes 20 lots for building the airport itself. In addition, Bespin limits the heights of 100 buildings north of the future airport in order to preserve open air lanes. Finally, as a result of completion of the new airport, the value of 200 lots adjacent to the new airport drops by 40%.[47] The owners of the 20 seized lots have suffered a *physical taking*. The owners of the 100 buildings placed under height limitations have sustained a *regulatory taking*.[48] The owners of the 200 lots of diminished value, who have suffered neither physical seizure nor a direct regulatory burden, have incurred a *derivative taking*.

2. The Takings Controversy

The Takings Clause has spawned an enormous literature on the question of when government action enters the crosshairs of the Takings Clause, creating a duty of just compensation. For the past quarter-century, the judiciary has struggled, mostly unsuccessfully, to devise a coherent test for determining when compensation is necessary.[49] The result has been a handful of islands of stability in an otherwise raging sea of uncertainty. A review of takings jurisprudence reveals three per se rules, and two discretionary multi-factored tests.

First, regarding physical takings, the Court has consistently treated permanent physical invasions, trivial as they may be, as takings. Thus, a law requiring property owners to grant an easement to cable television companies created a taking, even though

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(1998) ("The incoherence of the U.S. Supreme Court's output in this field has by now been demonstrated time and again by practitioners and academic commentators ad nauseam, and I refuse to add to the ongoing gratuitous slaughter of trees for the paper consumed in this frustrating and inherently pointless enterprise.").

[43] Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993).

[44] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

[45] 260 U.S. 393 (1922).

[46] *See* Bell & Parchomovsky, *Takings*, *supra* note 7, at ___ & n. 13.

[47] This example is very loosely based upon *United States v. Causby*, 328 U.S. 256 (1946).

[48] We assume that the restrictions are substantial enough to support a takings claim under *Penn Central v. New York City*, 438 U.S. 104 (1978).

[49] *See supra* note 42.

the total diminution in value amounted to $1.[50]

Second, in the context of regulatory takings, a regulation that effectively wipes out the value of a property, unless ascribable to nuisance-prevention, is a taking. Accordingly, a law prohibiting all development of a beachfront property constituted a taking.[51]

Third, government regulations that prevent the noxious use of property do not work a regulatory taking, and thus do not require compensation.[52] A municipal ordinance preventing the manufacture of bricks in a residential area simply curbed a noxious use of property, and, therefore, did not work a taking.[53]

Outside the realm of the per se rules, a regulatory taking may be identified by means of an *ad hoc* inquiry adopted by the Court in *Penn Central v. New York City.*[54] The *Penn Central* test requires that courts examine three factors to determine whether a regulation is also a taking: the owner's reasonable investment backed expectations, the nature of the government action, and the degree of diminution in property value.[55]

To complicate matters further, regulations of property that fail to meet certain rationality and proportionality requirements will be deemed takings. In *Nollan v. California Coastal Commission*,[56] the Court ruled that conditioning a land use permit upon a property owner's granting pedestrians permission to cross through the property constituted a taking because the condition lacked the necessary rational nexus between the governmental goal (preserving access to the beach) and the means chosen to advance toward the goal (attaching conditions to a building permit). In *Dolan v. City of Tigard*,[57] the Court added the requirement of a rough proportionality between the government action and its goal. It is uncertain whether these rationality and proportionality requirements apply to all regulations or simply to exactions – the conditioning of a government benefit on the payment of a property right.[58]

In an attempt to clarify this confused picture, scholars have proffered various alternative tests for identifying takings.[59] The most nuanced position is that of Frank Michelman, who explained that when a utilitarian calculus demonstrates the net positive benefit of the government action, one might appropriately let the losses lay where they fall, and refuse to pay compensation.[60] However, expressing some skepticism about the utilitarian approach, Michelman added that one of the costs to be taken account of is the demoralization that may result from the feeling of having been victimized by a

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[50] *Loretto*, 458 U.S. 419.
[51] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).
[52] *Id.* at 1015.
[53] *Hadacheck v. Sebastian* 239 U.S. 394 (1915).
[54] 438 U.S. 104 (1978).
[55] *Id.* at 124.
[56] 483 U.S. 825 (1987).
[57] 512 U.S. 374, 391 (1994).
[58] *See e.g.*, John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1046, 1051-52 (2000) ("According to some courts and commentators, the relatively demanding *Nollan* / *Dolan* analysis should apply not only to land use exactions but also to other kinds of regulations and other government actions that affect private property interests.") (footnotes omitted); Lee Ann Fennel, *Hard Bargains and Real Steals: Land Use Exactions* 86 IOWA L. REV. 1, 11 (discussing the various uncertainties concerning the scope of the *Nollan* and *Dolan* holdings).
[59] There have also been attempts to clean up doctrine without resort to grand theory. See, e.g., Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II -- Takings As Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53 (1990) (hereinafter, Peterson, *Takings Part II*).
[60] Michelman, *supra* note 1, at 1214-1224.

government taking.[61]

Various other commentators have proposed that takings be defined in reference to other social or legal norms. For instance, William Fischel has suggested that compensable takings should be found where regulations diverge from social norms.[62] In a similar vein, Saul Levmore has argued that "[r]esponsibilities that private parties can impose on each other through the tort system, and thus without compensation, can similarly be imposed by the government without compensation."[63]

Representing the extreme property rights view, Richard Epstein has proposed that practically any government action that reduces property values is a taking for which compensation must be paid.[64] At the other end, surprisingly echoing the welfare state view, Louis Kaplow has questioned the grounds for distinguishing compensable takings from other government actions diminishing property values, and has expressed some doubt about the necessity of government compensation altogether.[65] Like Kaplow,[66] Lawrence Blume and Daniel Rubinfeld[67] have suggested that privately supplied insurance for government-induced diminution of property values might be preferable to a scheme of government provided compensation; Blume and Rubinfeld concluded, accordingly, that compensation should mimic insurance and be available only where the owners are highly risk-averse and the losses large.

Still other theorists focus on the government's pre-taking motivation or post-taking use of the property. Joseph Sax has proposed requiring compensation whenever the government acts like an enterprise, such as when it uses the property to provide goods or services, but not when it arbitrates private disputes, for instance, by preventing noxious uses.[68] In a variation on Sax, Jed Rubenfeld would require compensation for purported regulatory takings whenever the post-taking property is put to public use.[69]

As the foregoing demonstrates, the prominence of takings in jurisprudence and scholarly attention has not yielded clear guidelines as to when a government action constitutes a compensable taking. Nevertheless, this inability to delineate the boundaries of takings has not generally been understood to call into question the validity of the very concept of takings. As is the case with many constitutional doctrines, takings jurisprudence consists of a well-defined core – physical takings of fee simple in land – and an increasing degree of vagueness as one moves towards the margins. As we will show, in Part III, *infra*, the same uncertainty that shrouds compensation in the takings context, also arises with respect to when givings should be accompanied by a fair charge. As with takings, the uncertainty at the margin of givings must not vitiate the viability of the core doctrine. Similarly, as with takings, a nuanced doctrine of givings can minimize

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[61] Michelman recognized the potential unfairness of refusing compensation on utilitarian grounds, even after taking into account demoralization costs, and he presented a Rawlsian fairness approach as an alternative to his utilitarian approach. However, he viewed a purely fairness-based jurisprudence of the Takings Clause as practically unworkable. *Id*. at 1248-1253.

[62] Fischel, TAKINGS, *supra* note 1, at 351-53.

[63] Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1334 (1991) (hereinafter, Levmore, *Takings*).

[64] Epstein, TAKINGS, *supra* note 1. Epstein also sees torts as giving rise to constitutionally required compensation.

[65] Kaplow, *supra* note 25, at 531.

[66] *Id*. at 538-541.

[67] Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 10 RES. L. & ECON. 53, 67 (1987) (hereinafter Blume & Rubinfeld I).

[68] Sax, *Takings I*, *supra* note 1, at 62-63. Sax later recanted major parts of his theory. Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L. J. 149 (1971).

[69] Rubenfeld, *supra* note 43 at 1077.

the uncertainty at the margins, and provide a workable test for determining when a fair charge should be assessed for givings.

B. A Taxonomy of Givings (Givings 101)

While the Constitution does not specifically refer to givings in the manner of the Fifth Amendment's Takings Clause, the concept of a giving is a necessary concomitant of the concept of taking. Any government redistribution of property necessarily involves givings and takings in equal amounts, and any government destruction of property can be matched with a government creation of property.[70] Takings and givings are two sides of the same coin. Not surprisingly, therefore, our taxonomy of takings applies with equal validity to givings.

Like takings, givings fall under three categories. In a physical giving, the government bestows a property interest upon a private actor.[71] A regulatory giving occurs when a government enhancement of property value by means of regulation goes "too far."[72] A derivative giving transpires when, as a result of a government giving or taking, surrounding property increases in value even though no direct giving has occurred.

Here too, an example is apt. Wildwestia has decided to offer the first 1,000 homesteaders to arrive in its territory the right to seize 100 acres of public land.[73] To promote the absorption of the homesteaders, Wildwestia relaxes zoning regulations in abutting counties, permitting all residential property (amounting to 2,000 lots) to double their built-up area. Finally, 4,000 lots in surrounding counties, not directly affected by the zoning change, experience a 100% increase in property value as a result of the homesteading. The 1,000 homesteaders have received a *physical giving*. The 2,000 abutting owners have enjoyed a *regulatory giving*. The owners of the 4,000 lots of enhanced value have benefited from a *derivative giving*.

All three types of givings are ubiquitous in reality. Examples of physical givings include the granting of cattle grazing rights, mineral rights and logging rights on public land to private interests, and the transfer of public land to private entities such as professional sports franchises.[74] Real world instances of regulatory givings pervade zoning law.[75] In principle, any case of up-zoning may constitute a giving. The same is true of grants of variances, exceptional uses and, even, transferable development rights.[76]

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[70] *Cf.* Reich, *supra* note 5 (discussing the role of government in creating wealth).

[71] There might also be givings to public actors, just as there are takings from public actors. *See, e.g.*, Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829 (1989).

[72] *Mahon*, 260 U.S. at 415.

[73] Homesteading acts were a popular form of government giving in the nineteenth century. *See, e.g.*, Homestead Act, ch. 75, §1, 12 Stat. 392 (1862) (repealed 1976); Enlarged Homestead Act, ch. 160 §§ 1-6, 35 Stat. 639 (1909) (repealed 1976); Stock-Raising Homestead Act, ch. 9, § 1, 39 Stat. 862 (1916) (repealed 1976). In citing homesteading acts as examples of givings, we do not argue that they should necessarily be viewed as *chargeable* givings. We discuss the mechanics of distinguishing chargeable from non-chargeable givings in Part III, *infra*.

[74] *See, generally,* C. Ford Runge, M. Teresa Duclos, John S. Adams, Barry Goodwin, Judith A. Martin and Rodrick D. Squires, GOVERNMENT ACTIONS AFFECTING LAND AND PROPERTY VALUES: AN EMPIRICAL REVIEW OF TAKINGS AND GIVINGS (Lincoln Inst. of Land Policy Res. Paper, 1996); *see also* Bill Johnson, *Editorial Notebook: How Fair is it for City to Grab Land for Select Firms?* DETROIT NEWS at A10 (Apr. 11, 1997).

[75] *See supra* note 3 and corresponding text for a definition of up-zoning.

[76] For description of recent zoning tools such as transferable development rights, *see* Julian Conrad Juergensmeyer, James C. Nicholas & Brian D. Leebrick, *Transferable Development Rights and*

Finally, derivative givings may be found everywhere there are physical and regulatory givings. For example, when the government builds a new park, the value of surrounding residential property increases dramatically, bestowing a derivative giving on the property owners.[77] Likewise, any zoning change that increases (or decreases) the value of the subject property might also enhance the value of neighboring property not subject to the change.[78]

Currently, givings are not a recognized category of law. Givings implicate no fair charge on the recipient. Often, they are not even taxed.[79] As we show in Part II, *infra*, this state of affairs is unfair, inefficient, and thoroughly unwarranted. Overlooking givings causes a massive misallocation of resources, imposes an enormous cost on the public, and creates opportunities and incentives for political mischief. Moreover, as we show in the following section, failing to take account of givings distorts our understanding of takings.

C. Givings and Takings (Givings 102)

The various types of givings and takings discussed so far are summarized in the form of a table:

Table 1. *Six Types of Takings and Givings*

	Physical	Regulatory	Derivative
Takings	Seizure	Down-zoning	New dump nearby
Givings	Grant	Up-zoning	New park nearby

Traditionally, takings jurisprudence concerned itself with only two of these six categories: physical takings exemplified by seizures, and regulatory takings exemplified by down-zoning. Elsewhere, we unveiled a third category - the derivative taking exemplified by the building of a nearby garbage dump on condemned land.[80] In the preceding discussion, we have brought to light the three categories of giving in the lower half of the table: physical (exemplified by land grants), regulatory (exemplified by up-zoning) and derivative givings (exemplified by the creation of a park on nearby land). We have also shown that the categories in the top half of the table have analogues in the bottom half of the table and that each taking has a potential reciprocal giving, equal and opposite in effect.

In the remainder of this Part, we explore the relationships among the various types of givings and takings. We show that, in principle, a government action may combine different categories. Indeed, the ordinary government action that works a classic taking (physical or regulatory) will be accompanied by another taking (generally, a derivative taking), as well as a giving (generally, a derivative giving). This is due to two basic facts that shape the world of takings. First, the Takings Clause permits takings only for public

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Alternatives After Suitum, 30 URB. LAW. 441 (1998); Charles L. Siemon *Successful Growth Management Techniques: Observations from the Monkey Cage*, 29 URB. LAW. 233 (1997); John M. Armentano *Zoning and Land Use Planning*, 27 REAL EST. L. J. 216 (1998). As is the case with regulatory takings, it is difficult to delineate precisely when the use of zoning bestows a giving. *See infra*, Part I.E.

[77] *See* note 13, *supra*.

[78] *See* Parsons, *supra* note 13, and Bell & Parchomovsky, *Takings*, *supra* note 7, 87 VA. L. REV. at ____.

[79] For a discussion of current taxes on givings, *see* Part V.A, *infra*.

[80] *See* Bell & Parchomovsky, *Takings*, *supra* note 7, 87 VA. L. REV. at ____.

use.[81] Thus, any taking must confer some benefit on the public, which will ordinarily come in the form of a derivative giving. Second, most physical or regulatory takings produce negative as well as positive effects on the values of adjacent properties, creating derivative takings.[82]

We show that any type of giving or taking may be accompanied by any other type or types of giving or taking. Moreover, we show that givings and takings are legal Siamese twins, and that certain combinations of takings and givings may be anticipated. The presence of those combinations produces important insights into the distributive effects of government actions regarding property. These insights provide the informational basis for crafting the doctrine of givings and takings.

To further the discussion of the analytic relationships among the various categories, we will use the following table, representing the central combinations of givings and takings. We have numbered the cells in order to facilitate the discussion. It should be noted that the table is necessarily incomplete, as it does not reflect the possibility of the most common type of government action – one that simultaneously creates more than one type of giving or taking. Nevertheless, it suffices to demonstrate the illuminating power of examining givings and takings together.

Table 2. *Combined Takings and Givings*

		Taking		
		Physical	Regulatory	Derivative
Giving	Physical	I. *Hawaii Housing Authority v. Midkiff*	II. *St. Louis and S.F.R. Co. v. Mathews*	III. *Poletown Neighborhood Council v. City of Detroit*
	Regulatory	IV. *Nollan v. California Coastal Commission*	V. *Penn Central Transportation Co. v. City of New York*	VI. *Boomer v. Atlantic Cement Co.*
	Derivative	VII. *Miller v. Schoene*	VIII. *Pennsylvania Coal Co. v. Mahon*	IX. *United States v. Causby*

Currently, takings law tends to treat all cases as if they were outside this table altogether, ignoring givings in determining compensation. Consider the following example. Gotham City amends its zoning ordinance to impose a height restriction on the neighborhood of Bellevue. As a result of this change, Belinda Belle, a property owner, is deprived of the ability to add another two floors to her ranch-style home. She claims that the change constitutes a regulatory taking, as a result of which she is entitled to compensation in the amount of $40,000.[83] Belinda has a neighbor, Clarence Clearsight,

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[81] U.S. CONST. Amend. V.

[82] *See* Runge, *et al*, *supra* note 74.

[83] We assume for purposes of this example, that the height restriction in fact constitutes a compensable regulatory taking. Under *Penn Central*'s multi-factor test, the precise determination is highly fact-specific. *See Penn Central Transportation co. v. New York City*, 438 U.S. 104 (1978), and discussion in Part I.A.2, *supra*.

who enjoys a view of the sea from his living room that would be blocked by Belinda's proposed second floor. The value of this view to Clarence is $40,000. Under current law, the case is treated as being outside the table. Belinda will receive $40,000 in compensation for her loss, and Clarence will pocket the $40,000 in improved value. In a givings analysis, however, the taking from Belinda, when properly understood, is also a giving to Clarence. This is a cell VIII case, in which it might be most appropriate for Clarence, rather than the public, to compensate Belinda.[84]

Ironically, takings jurisprudence can be blind to the possibility of givings, even when the recipient of the giving is identical to the person suffering the giving. Imagine in the previous example, that Gotham City's newly imposed height restrictions create an air of exclusivity in Bellevue, eventually raising the value of all homes in Bellevue including the value of Belinda's home by a future sum whose present value is $40,000 (again, making this a cell VIII case). Thus, Belinda's loss from the foregone opportunity to build a second and third floor is later offset by her gain due to the greater value of the neighborhood as a whole. Under the current legal system that focuses exclusively on harm at the time of the taking, Belinda could collect $40,000 in compensation for the lost opportunity to build, and later collect another $40,000 for the increase in neighborhood property values – an anomalous outcome by all accounts. Takings law avoids this abysmal result only if the gain to Belinda is incorporated into the oft-neglected concept of average reciprocity of advantage.[85] In this case, Belinda would likely receive compensation under existing law, since Belinda's lags significantly behind her loss, leading the courts to wrongly treat the case as not belonging in this table.

Cell VIII cases are not alone, nor do they exist solely in the realm of authors' hypotheticals. As we show, there is no shortage of cases that can be placed in the several cells of the table. By analyzing these cases with an eye towards givings, we demonstrate the indispensability of a givings analysis for takings.

1. Cell I: Physical Takings and Physical Givings

Physical takings are not infrequently accompanied by physical givings, as illustrated by the case of *Hawaii Housing Authority v. Midkiff*.[86] In *Midkiff*, the state of Hawaii confiscated property of large landowners to redistribute it to the erstwhile tenants. The Court determined that the giving (the redistribution) constituted a "public use," and since Hawaii paid compensation for land confiscations, the Court found no constitutional infirmity. Importantly, the Hawaii legislation linked the givings to the takings. Hawaii only seized property when more than half of the tenants of that property expressed an interest in purchasing it. The purchasing tenants would then pay the former landlords directly for the seized property at a negotiated price or at a price set by the condemning

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[84] We discuss this remedy further in Part III.C, *infra*.

[85] *Id.* at 134-45. Linda Oswald observed that the average reciprocity of advantage has undergone a dramatic, and unfortunate, transformation through time:

> "Simply put, in its original form, the rule stated that a land use regulation that resulted in benefits to regulated landowners roughly equal to the burdens imposed on them did not violate the United States Constitution. In its modern, corrupted form, however, the average reciprocity of advantage rule states that if a land use regulation results in benefits to society as a whole roughly equal to the burdens imposed upon the regulated landowners, no taking has occurred. As a result of this perversion, the average reciprocity of advantage rule has lost its former potency as a tool for distinguishing valid police power actions from invalid regulatory takings and instead has become a method for simply rubberstamping legislative acts."

Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449, 1489 (1997).

[86] 467 U.S. at 229.

court.[87] We posit that this system, which did not occupy the attention of the Supreme Court is an exemplary model of linking takings' compensation with givings' charges.[88] Although Hawaii adopted it only for cell I cases, the same approach to compensation and charge is, in principle, equally applicable to other cells.

A less congenial approach is represented by the case of *Poletown Neighborhood Council v. City of Detroit*,[89] to which we shall return in our discussion of cell III. For our purposes here, it is sufficient to note that Detroit's scheme of physical takings from landowners and a physical giving to General Motors did not require General Motors to pay just compensation to the harmed owners. Among its many vices, Detroit's approach depleted public funds by more than $200 million, as the liability for compensating harmed owners greatly exceeded anticipated costs.[90]

2. Cell II: Regulatory Takings and Physical Givings

Cell II cases are rarer, but may be found in situations similar to those underlying *St. Louis and S.F.R. Co. v. Mathews*.[91] A landowner had sued the St. Louis and San Francisco Railway company for property damages resulting from a fire ignited by sparks thrown off by the company's locomotives. The Supreme Court upheld a Missouri statutory scheme that departed from the common law negligence rule and imposed strict liability on railroads, while granting railroad companies the power to condemn land for tracks. The pairing of a physical giving (in the form of the land grants to railroads through private takings) and a regulatory taking (in the form of an enhanced liability standard) effectively forced the railroad companies to keep their property, tracks and locomotives, in good repair. The heightened liability standard also offered neighboring landowners some compensation for the involuntary taking of their land, as it increased the value of the remaining property that was not condemned.[92]

The Supreme Court did not directly discuss Missouri's compensation scheme for landowners whose property was seized. As we explain later, in Part III, most 19th century jurisdictions permitted railroads to use the benefit-offset principle in determining the proper level of compensation for the physical taking.[93] In one sense, the benefit-offset principle was ideal, in that it offset compensation for takings from a landowner by the value of givings to that landowner. Thus, the railroad companies and the state were forced to take into account the true effect on the seized landowner's property. The problem with this scheme lay elsewhere. As William Fischel noted in his summary of the historical evidence, railroads increased the property values of all surrounding farmland. Thus, application of the benefit-offset principle to takings compensation, while ignoring the derivative givings bestowed upon all neighboring owners whose land was not physically affected, created the ironic situation in which the one property owner who paid a charge for a giving was the owner whose land was seized.[94]

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[87] *Id*. at 233-34.
[88] We develop this idea further in Part III.D, *infra*.
[89] 304 N.W. 2d 455 (1981).
[90] *Editorial: Protect the Taxpayers*, DETROIT NEWS (Oct. 19, 1999) at A10; Tina Lam, *De-Stadium*, DETROIT FREE PRESS (May 17, 1999).
[91] 165 U.S. 1 (1897).
[92] Some commentators concluded that railroads received excess subsidies and homeowners inadequate compensation. *See, e.g.*, Scheiber, *supra* note 35, and discussion in Fischel, TAKINGS, *supra* note 1.
[93] *See*, *infra*, Parts III.C and III.D.
[94] Fischel, TAKINGS, *supra* note 1, at 82-83. An additional problem was direct subsidy of construction costs. *See* notes 137-138 *infra* and corresponding text.

3. Cell III: Derivative Takings and Physical Givings

Poletown Neighborhood Council v. City of Detroit[95] is, at first blush a cell I case, in which land was physically taken from some Detroit landowners in the Poletown neighborhood and physically given to General Motors to allow G.M. to build a new automobile manufacturing facility. Upon closer examination, however, *Poletown* can also be placed in cell III. The physical giving to G.M. resulted in losses in property values not only to the owners whose property was directly seized, but also to neighboring owners whose property values sank due to proximity to the new factory. Prior to the physical giving, Poletown was a thriving, ethnically diverse community. Subsequent to the giving, G.M.'s new plant and parking lot occupied most of the neighborhood.[96]

4. Cell IV: Physical Takings and Regulatory Givings

Real world examples of physical takings matched with regulatory givings abound, and they can be seen in such phenomena as exactions[97] or incentive zoning.[98] In *Nollan v. California Coastal Council*,[99] one of the leading exaction cases, the California Coastal Council had conditioned the granting of a development permit for the Nollans' beachfront property on the Nollans' yielding an easement to the public over its property. The Court ruled that the state's taking of the easement, even in the form of an exaction, constituted a physical taking.[100] The existence of a regulatory giving in the form of a development – placing the case in cell IV – entered the Court's analysis only as part of the question of whether the state had constitutionally exercised its police powers.[101] Had the Court been more conscious of the presence of a giving, it could have ruled that a taking had, indeed, occurred, but the state had adequately compensated the Nollans for the taking by providing the regulatory giving.

Similarly, incentive zoning involves the granting of additional zoning rights (a regulatory giving), in exchange for the dedication of private property to public uses, such as parks and plazas (a physical taking).[102] The additional zoning rights are intended to serve as an "incentive" for the provision of public amenities. In result, incentive zoning is difficult to distinguish from cases involving exactions, like *Nollan* and *Dolan v. City of Tigard*,[103] and some commentators have concluded that they should be viewed as physical takings.[104] In principle, we do not oppose this view, but it only captures half of

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[95] *Poletown*, 304 N.W.2d at 455.
[96] *See* P. E. Millspaugh, *Eminent Domain: The Emerging Government/Business Interface*, 59 U. DETROIT J. URB. L. 167 (1982).
[97] An exaction is the conditioning of a government benefit on the payment of a property right. *See supra* note 58 and corresponding text. A narrower definition of exaction would presume the wrongfulness of the condition, and view the payment as improperly compelled. *See* BLACK'S LAW DICTIONARY 557 (6th ed., 1990).
[98] *See* Jerold S. Kayden, *Zoning for Dollars: New Rules For an Old Game? Comments On the* Municipal Art Society *and* Nollan *Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3, 3 (1991) ("Through the land use regulatory technique formally known as 'incentive zoning,' cities grant private real estate developers the legal right to disregard zoning restrictions in return for their voluntary agreement to provide urban design features such as plazas, atriums, and parks, and social facilities and services such as affordable housing, day care centers, and job training."); Benson, *Bonus or Incentive Zoning – Legal Implications*, 21 SYRACUSE L. REV. 895 (1970).
[99] 483 U.S. 825 (1987).
[100] *Id.* at 841-842.
[101] *Id.* at 833-837.
[102] *See* Kayden, *supra* note 98.
[103] 512 U.S. 374 (1994).
[104] Peterson, *Takings Part II*, *supra* note 59, at 78-79.

the picture. The additional building rights (or incentive zoning rights) constitute a regulatory giving for which the recipient should be charged.[105]

5. Cell V: Regulatory Takings and Regulatory Givings

Examples of regulatory takings matched with regulatory givings are similarly numerous. Interestingly, takings law has sometimes taken account of a regulatory giving to the victim of a regulatory taking, allowing takings law to take account of cell V of the givings-takings table. Consider, for instance, *Penn Central Transportation Co. v. City of New York*.[106] In analyzing whether a zoning restriction that prevented the plaintiff from building an office tower above Grand Central station constituted a regulatory taking, the Court took note of the municipal scheme of transferable development rights (TDRs). Using TDRs, Penn Central could transfer some of the "taken" development rights to adjacent properties.[107] Translated into terms of a givings analysis, the Court had placed the government action into cell V, allowing the Court to decide whether the regulatory taking of development rights over the Grand Central station should be offset by the regulatory giving of development rights in other Penn Central properties.

Although the Court heeded the fact that Penn Central received TDRs, the Court did not analyze the grant in terms of givings. Instead, the Court considered the grant of TDRs as factor affecting the magnitude of the appellants' loss, as part of the regulatory taking analysis.[108] We argue that a better way to account for the TDRs is to see them as a giving distinct from the taking, which may be viewed as separately chargeable, though the charge and compensation may offset one another.

6. Cell VI: Derivative Takings and Regulatory Givings

In light of the fact that neither derivative takings nor givings are part of classic takings' vernacular, it is not surprising that little explicit recognition of cell VI cases may be found in the case reports. Nevertheless, situations characterized by regulatory givings coupled with derivative takings underlie cases such as *Boomer v. Atlantic Cement.*[109] In *Boomer*, community property owners brought a nuisance suit against the Atlantic Cement Company for pollution emitted by the defendant's cement plant. Instead of enjoining the pollution, the New York Court of Appeals permitted the cement plant to continue operating in exchange for a one-time payment of "permanent damages."[110]

Although the case involved the tort of nuisance, the decision can be seen, and is indeed perceived by law and economics scholars, as having effectively worked a taking on the homeowners.[111] Under our terminology, the taking is a derivative one, deriving from a regulatory giving. Atlantic Cement, on the other hand, benefited from what can

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[105] The difference between exaction and incentive zoning terminology might be seen as a question of where the baseline building right is seen to lie. If the building rights are viewed in some sense as already inhering in the property, the demanded public amenity should be called an "exaction." However, if the building rights are viewed as a gift by the zoning authority given as a reward to those who provide public amenities, the additional building rights should be referred to as incentive zoning rights.

[106] 438 U.S. 104 (1978).

[107] *Id*. at 114.

[108] *Id*. at 137.

[109] 309 N.Y.S.2d 312 (1970).

[110] More precisely, the court granted the residents a conditional injunction to be vacated upon the payment of permanent damages. *Id*. at 319.

[111] *See e.g*., Ian Ayres and Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L. J. 1027, 1039-40 & n.46 (1995) (using *Boomer* as an example of a private taking case).

be treated as a regulatory giving. The *Boomer* court effectively changed the existing regulatory framework and permitted Atlantic Cement a new profitable use of its property that would have been enjoined under the common law rules of nuisance.[112]

The *Boomer* decision has proved controversial on many grounds.[113] In retrospect, we can see that the court ordered too small a level of compensation.[114] There is also room to question whether the court, in exercise of its equitable powers, was the proper institution to effect the giving and takings.[115]

7. Cell VII: Physical Takings and Derivative Givings

As we noted earlier, the "public use" requirement of the Takings Clause makes derivative givings likely companions of physical takings. *Miller v. Schoene*[116] is one of the numerous takings cases properly assigned to cell VII. In *Miller*, the state ordered the destruction of cedar trees in Miller's lot in order to prevent the spread of a fungus to nearby apple tree lots. Miller suffered a physical taking – without compensation – while his neighbors received a derivative giving. However, the Court closed its eyes to the givings half of the picture and determined that, as a result of the public benefit, no compensable taking had taken place at all.[117] A better result would have been similar to that of *Boomer*, absent the valuation problems: the apple tree farmers should have been charged for the benefit to their properties, and Miller should have received compensation.

8. Cell VIII: Regulatory Takings and Derivative Givings

Pairings of regulatory takings and derivative givings are similarly numerous. *Pennsylvania Coal v. Mahon*,[118] arguably the most famous of all regulatory takings cases, belongs in cell VIII. Pennsylvania Coal, owner of the subsurface property, suffered a regulatory taking, but the surface property owners received derivative givings as a result of the reduction in the likelihood of subsidence. *Lucas v. South Carolina Coastal Council*[119] presents a similar combination. Prevented from developing his beachfront property by anti-erosion regulations, Lucas suffered a regulatory taking. However, more inland properties that enjoyed access to an open beach enjoyed derivative givings. In each case, a requirement that the benefiting properties pay a charge for the givings would have considerably simplified measurement of the efficiency and the equities of the regulation.

9. Cell IX: Derivative Takings and Derivative Givings

As we have defined the concepts of derivative givings and derivative takings, it is impossible for the two to be matched in the absence of a predicate physical or regulatory giving or taking.[120] Nevertheless, there are cases dominated by the pairing of derivative

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[112] *See Boomer*, 309 N.Y.S.2d 312, 319-321 (1970) (Jasen, J., dissenting).
[113] *See* Daniel Farber, *Reassessing* Boomer *: Justice, Efficiency, and Nuisance Law*, *in* PROPERTY LAW AND LEGAL EDUCATION 7 (Peter Hay & Michael Hoeflich, eds. 1988).
[114] *Id.* at 11-12.
[115] Neil K. Komesar, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS & PUBLIC POLICY 14-28 (1994).
[116] 276 U.S. 272 (1928).
[117] *Id.* at 280.
[118] 260 U.S. 393 (1922).
[119] 328 U.S. 256 (1946).
[120] For a justification of this limit on the definition of derivative takings, *see* Bell & Parchomovsky, *Takings*, *supra* note 7, 87 VA. L. REV. at ____.

givings and derivative takings. *United States v. Causby*,[121] in which the Court found that a new airport created physical takings of property directly overflown by airplanes, could be placed in cell IX. The overflights in *Causby* harmed the values of many properties abutting the airport not directly overflown by aircraft using the airport. Thus, *Causby* involved many more derivative takings than physical takings.[122] However, the new airport in *Causby* also doubtless created a host of derivative givings for nearby hotel owners and the like. The derivative givings, like the derivative takings, belong in a full accounting of the costs and benefits of the government action.

D. Give and Take, Put and Call

The framework of put and call options provides a useful lens through which to see the relationship between givings and takings, and the absurdity of not charging for givings.[123] A call option creates the power to purchase an asset from a specific seller at a later time; a put option is an option to force a sale in the future. The call or put eliminates the need for future acceptance by the call seller or the put buyer. Instead, the call seller or put buyer grant their acceptance upon creation of the option, allowing the "caller" (the call buyer) or the "putter" (the put seller) to make a future offer with acceptance assured. The call or put option generally specifies an "exercise price," i.e., the price at which the option-holder can buy or sell the underlying asset.[124]

Seen in this light, the power of eminent domain is a call option in the hands of the government. All property is subject to the government power to "call," i.e., the power to force a sale to the government. The exercise price to be paid by the government is "just compensation" (under current doctrine, the objective market price of the property).[125] The giving power, in this framework, is equivalent to a put option. Remarkably, under current law, which does not fully recognize the concept of givings, the exercise price of the government's put option is zero. That is, the government can bestow valuable benefits, but the recipients are not required to pay for them.

The call and put options embodied in government's power to take and give are unusual in that they are not created by agreement; they are created by law.[126] Both options must therefore be treated with care, as they are not consensual in nature.[127] The government is the only actor in society with the power to unilaterally create put and call options in this fashion, and that power must be crafted to ensure its exercise for the public benefit. Under existing doctrine, only the call option is circumscribed by law. The put option is generally unrecognized by courts and scholars, and its exercise is unregulated. Yet, no theory seems to justify the discrepancy in legal treatment of the two options.

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[121] 328 U.S. 256 (1946).
[122] Bell & Parchomovsky, *Takings, supra* note 7, 87 VA. L. REV. at ____.
[123] We are indebted to Ian Ayres for this insight.
[124] *See* Ian Ayres, *Protecting Property with Puts*, 32 VALP. U. L. REV. 793 (1998) (discussing and evaluating protection of property rights with put and call options). For criticism, *see* Carol M. Rose, *The Shadow of the Cathedral*, 106 YALE L. J. 2175, 2182-88 (1997) (characterizing *Boomer* and other pollution cases as shadow examples).
[125] *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (Posner, J.).
[126] Reluctance to take by law rather than agreement has commonly led to negotiated compensation for exercises of the eminent domain power, rather than court-determined compensation. Fischel, TAKINGS, *supra* note 1, at 69.
[127] For further discussion of this point, *see supra*, Part III.D.

E. Take It or Give It?

The enormous body of scholarship on takings,[128] especially in contrast with the complete absence of givings scholarship,[129] would lead one to believe that takings are infinitely more important than givings. In fact, givings play at least as prominent a role in public life as takings, and, quite likely, an even greater role.

Government largesse is widespread.[130] Broadly defined, givings can be found in any government action that bestows a benefit upon someone. Whereas the power to take is the province of such specialized government powers as eminent domain and taxation, the touchstone of nearly every other power of government is giving. Indeed, even the takings power is required, ultimately, to benefit the public.

One might argue that no restrictions on givings are necessary because the constitution does not create a power to bestow benefits parallel to the power of eminent domain. However, the argument collapses in light of the fact that nearly every power of the government should ultimately be seen as a power to benefit some or all members of the public.[131] If a limitation on takings is mandated by possible abuses of the power of eminent domain, a givings jurisprudence is necessary to prevent abuses of the other powers of the government. As we will show, the possibility of abuse in the case of givings may be even higher than in the case of takings. This is due to several important differences between givings and takings.

Although takings must always be accompanied by givings – due to the "public use" proviso of the takings clause in the Fifth Amendment – the opposite does not hold true. A government can bestow certain benefits without creating corresponding harms. For example, the government can up-zone a particular neighborhood without creating a matching loss in property values. In that sense, the symmetry between givings and takings is not perfect, and the government can take advantage of this fact. Givings may be used to produce winners without producing identifiable losers, making givings a very attractive policy tool. Givings that harm no identifiable person do not usually attract public attention, and are very unlikely to lead to legal challenges. The dark side, of course, is that the government may abuse its power to reward political supporters.

Armed with this insight, it is easy to see that in certain cases the givings power dominates the power of eminent domain. Assume that in *Poletown*, the city of Detroit had two options to satisfy G.M.'s demand for a bigger plant. The first was to condemn the property of Poletown's residents and to give the land to G.M. The second was to grant G.M. a variance to expand the capacity of one of its existing properties. If the latter option were available in reality, *Poletown* would not be the celebrated case it is now. Indeed, in ordinary circumstances, Detroit and other municipalities would prefer the second option since regulatory givings do not visibly impoverish the public fiscs, and consequently, they give rise to less political criticism.

Furthermore, the government can use its budget in ways that benefit some but not others. For example, a municipality may decide to build a new park in neighborhood A, but not in neighborhood B. As a result of the new park, real estate prices in neighborhood A increase by 15%, while real estate prices in neighborhood B remain the same. Formally, no taking has occurred because the residents of neighborhood B are no

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[128] *See supra* notes 1 and 42.
[129] *See supra* note 2.
[130] *See* Runge, *et al*, *supra* note 74.
[131] Indeed, this makes a formal powers analysis an unlikely candidate for framing the law of givings. However, a power analysis may remain useful in the context of takings. *See* Part III.B, *infra*.

worse off now than they were before. However, given that municipal budgets are limited – indeed, budgetary decisions are often zero-sum games[132] – the decision to bestow the benefit upon the residents of neighborhood A is a lost opportunity to the residents of neighborhood B. Yet, as long as the decision of the municipality is reasonable and nondiscriminatory, it will stand and no account will be taking of possible allocative injustice.

This observation implies another interesting difference between takings and givings. While takings effecting a considerable loss on an individual or a group will always attract attention and are likely to generate legal challenges, givings with the opposite effect might not. Victims of takings who suffer a considerable personal loss will find it cost-effective to pursue public and legal action. For givings, however, the costs involved in organizing the victims may lead to inaction until a much higher magnitude of giving. The recipient of a considerable benefit will likely be pleased with the giving. The public at large may not be content with the decision. But when the cost of the giving is spread thinly over a large population, and implies an inconsequential cost on each individual member of the public, the cost for each individual of opposing the giving is likely to outweigh the benefit.[133]

These characteristics of givings can create opportunities for political abuse that cannot be matched by takings. Imagine that Peter Politician is the corrupt mayor of Sellout City. Peter raises cash for his reelection campaign by granting zoning variances to his corrupt developer friends Barry Bagman and Cody Cashncarry. For each $1 million in zoning variances, Barry and Cody donate $1,000 to Peter's campaign. Peter also takes revenge on enemies such as the honest developers David Dogood and Edward Eleemosynary by down-zoning their property. However, other than the psychic enjoyment of making David and Edward suffer, evil Peter realizes no gains from his takings. While political abuse for the sake of spite via the takings power should not be discounted, there is good reason to suppose that Peter will often find the financial attractions of kickbacks from givings more appealing.[134]

The role of givings in political abuse is hardly restricted to hypothetical situations. The distribution of government benefits provided the lifeblood of debilitating scandals throughout the history of the United States. The 18th century Yazoo land scandals, for example, resulted from the Georgia legislature's giving of huge land tracts at grossly understated prices to four land companies. Until then, Georgia had distributed land on the "headright" system, which allowed families to claim land for each family member, up to a maximum of 1,000 acres.[135] In the wake of the Revolutionary War, however, Georgia began making large land grants to favored individuals, and in the Yazoo transactions, Georgia sold tens of millions of acres to the four "Yazoo" companies for a small fraction of their true worth. Motivated by bribes, the Yazoo transactions subsequently brought in numerous innocent third parties that bought land from the land companies. Litigation, rebellion and even a small war resulted, casting a cloud on national and state politics for several decades.[136]

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[132] *See* Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 502, 503 (1998).

[133] We develop this point further in Part II.C, *infra*.

[134] Takings may also present opportunities for financial gain for the corrupt. Barry Bagman may wish to sell his property in Cercla Estates, but be unable to find a buyer. In exchange for an appropriate campaign contribution, Peter might arrange for Barry's property to be confiscated by means of eminent domain.

[135] We discuss the differences between grants to singled-out individuals or companies, on the one hand, and grants to the public at large, on the other, in Part III.B, *infra*.

[136] C. Peter McGrath, YAZOO: LAW AND POLITICS IN THE EARLY REPUBLIC (1966). The Yazoo land frauds

The 19th century Credit Mobilier scandals emerged from givings associated with the construction of the Union Pacific railroad. The Union Pacific railroad received givings of land and subsidies from the government in order to build a low-traffic railroad.[137] While the railroad was unlikely to produce high revenues, the construction – thanks to the subsidies – proved to be quite profitable. Investors created the Credit Mobilier company to perform the construction work, and bribed members of Congress with Credit Mobilier shares to continue subsidies. The scandal undermined the presidency of Ulysses S. Grant and later implicated President James A. Garfield and presidential candidate James G. Blaine.[138]

The 20th century Teapot Dome scandal, also called the Oil Reserves or Elk Hills Scandal, involved Secretary of the Interior Albert Fall's giving of sweetheart leases over conservation land to several petroleum companies in exchange for cash "gifts" and "loans." The land had been set aside to preserve petroleum reserves for future emergencies, and Fall, who opposed the policy, used the givings to prevent land conservation, and enhance his personal wealth. Fall became the first former cabinet officer to be jailed, and a Senate investigation prompted the first-ever appointment of special councils by the President – the forerunners of the independent council.[139] A North Dakota Senator labeled the affair the "slimiest of slimy trails beaten by privilege."[140]

Givings retain the power to produce scandal. Insufficient accounting for givings in the form of pork barrel politics has rightly drawn criticism from nearly all quarters.[141] In all, there is real reason to suspect that the power to give is, indeed, a major source of potential corruption and mischief. Givings are not only widespread and closely tied to takings, they are potentially more important than takings.

II. WHY GIVINGS: EFFICIENCY, FAIRNESS AND PUBLIC CHOICE

Having demonstrated the prevalence and importance of givings, we next explain why, in principle, the government should assess charges for givings. We show that the animating concerns of takings jurisprudence – fairness and efficiency – apply with equal force to givings, and demand a givings doctrine. Because givings must be understood in political context, we draw on public choice literature to support our claim that lack of a givings jurisprudence undermines good government.

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provided the background for the Supreme Court's landmark decision on the Contracts Clause, *Fletcher v. Peck*, 10 U.S. 87 (1810). *See also* Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73 (2000).

[137] The Pacific Railway Acts granted 12,800 acres to railroad companies for every mile of track laid, as well as $48,000 for every mile laid in mountainous terrain, and subsidized loans. *See* 12 Stat. ch. 120 (1862), 13 Stat. ch. 216 (1864), and 15 Stat. ch. 159 (1866) (Pacific Railroad Acts).

[138] David Howard Bain, EMPIRE EXPRESS: BUILDING THE FIRST TRANSCONTINENTAL RAILROAD (1999).

[139] Timothy Martin, *The Development of International Bribery Law*, 14 FALL NAT'L RESOURCES AND ENVIRONMENT 95, 97 (1999). For a discussion of these and other prominent cases of corruption, *see* John T. Noonan, Jr., BRIBES (1984).

[140] Leases Upon Naval Oil Reserves and Activities of the Continental Trading Co. (Ltd.) of Canada, Supplemental Report. S. Rep. No. 70-1326, Part 2, at 3 (1928).

[141] Larry Sandler, *Amtrak Critic Wants Thompson Ousted*, THE MILWAUKEE JOURNAL SENTINEL (Jul. 13, 2000) ("When you add pork-barrel trains to carry very few people through rural districts represented by powerful congressmen, that is the opposite of what is needed"); Kimberly Kindy and Hanh Kim Quach, *Proposed Budget Most Pork-Laden Yet*, THE ORANGE COUNTY REGISTER (June 15, 2000) ("The problem is the entire budget has become a grab bag of pork-barrel projects."). In one notable, and apparently facetious exception, a recent essayist proclaimed: "Pork is good. Pork is virtuous. Pork is the American way." Jonathan Cohn, *Roll Out the Barrel: The Case Against Pork*, NEW REPUBLIC (Apr. 20, 1998).

A. The Fairness of Givings

From the vantage point of fairness, the law of takings is concerned with the allocation of burdens; our proposed law of givings focuses on the allocation of benefits. Justice Hugo Black famously summarized the fairness concern of the Takings clause in *U.S. v. Armstrong*,[142] explaining that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[143] By the same token, fairness concerns should bar the government from allowing some people alone to enjoy benefits that in "in all fairness and justice" should be enjoyed by the public as a whole.

Unaccounted-for givings have the potential to create distributive injustice by allowing a select few to benefit disproportionately from the public's limited resources. Just as it is inequitable to single out members of society to bear the burden of societal needs, it is inequitable to privilege a few by permitting them to enrich themselves at the expense of the public. Distributive justice demands that the government allocate burdens and benefits in accordance with some principle of equality.[144] To be sure, theorists of different political bents will disagree about the precise meaning of equality in this context, and, even as to whether equality is the supreme value.[145] However, all theorists agree that the government must not allocate benefits on the basis of one's ability to exploit the political system. The government must not discriminate among its subjects based on favoritism.[146]

Furthermore, in the same way the takings power is often used by the those with the greatest political influence to cast burdens on the least well off,[147] the givings power is likely to be used to the disadvantage of society's weakest members. The likely recipients of givings are politically influential individuals, or factions.[148] The ability of the politically powerful to extract benefits for themselves invariably comes at the expense of the politically disenfranchised – individuals and groups with insufficient political clout and limited financial resources. This unhappy result stems from two different, yet related, phenomena. First, the same political process that distributes benefits imposes burdens, and collects taxes. Thus, when the government collects taxes from both Alice and Beth, and then gives the revenues to Alice, Beth is indirectly paying for Alice's benefit. Second, by making Alice better off relative to Beth, Beth's position is society has relatively been worsened.

Both takings and givings, albeit differently, generate demoralization. In his classic treatment of takings, Frank Michelman observed that "a visible risk of majoritarian exploitation" might cause an individual to "be paralyzed by a realization that [she is] at the mercy of majorities."[149] Unlike other misfortunes that might befall one's property to which one can psychologically adjust, a government decision to burden particular individuals thrusts upon them "a perception that the force of a majority is self-determining and purposive, as compared with other loss-producing forces which seem to be randomly

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[142] 364 U.S. 40 (1960).
[143] *Id.* at 49.
[144] John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164 (1958).
[145] *See* Will Kymlicka, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION (1990).
[146] *See* Sunstein, *Naked Preferences*, *supra* note 20, at 1670. *See also* Alan E. Brownstein, *Illicit Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1 (1988).
[147] *See e.g.*, Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 487-488 (1976) (studying exercises of eminent domain in Chicago, and finding that the indigent -- i.e., those with lower value property -- were consistently under-compensated relative to affluent property owners).
[148] *See* Runge, *et al*, *supra* note 74.
[149] Michelman, *supra* note 1, at 1216-1217.

generated."[150] Thus, "even though people can adjust satisfactorily to random uncertainty … they will remain on edge when contemplating the possibility of strategically determined losses."[151] Logically, this demoralization will occur not only after takings, but also after givings. While people can view windfalls that befall another with sanguinity, when the windfall arrives as a result of a strategic and deliberate decision of the government, the reaction may turn to resentment and frustration.

Recall our earlier discussion. Givings and takings are intimately linked. Government largesse is not manna from the heavens. It does not come free of charge, and it does not benefit everyone in the same way. Takings, as we have shown, are generally accompanied by givings.[152] It would be inconsistent to argue that fairness requires compensation for takings but permits ignoring the givings. Our goal here is not to develop a meta-theory of fairness for determining when the government can take and when the government can give. Such an enterprise is beyond the ken of this Article. For our purposes, it is enough to show that fairness, as understood in the context takings, mandates accounting for givings.[153]

Admittedly, a degree of vagueness inheres in any theory to takings, or givings, since there is no scholarly, nor judicial, consensus regarding the definition of property. Here, too, we make no pretense of providing a clear definition that simplifies the complexity of property. We merely point to the fact that notwithstanding divergent understandings of property, uncompensated takings of property are generally understood to violate the demands of fairness.[154] The same is true of givings.

Of course, government services are not a Procrustean bed.[155] One cannot expect at the end of the day to find that all citizens have received identical benefits and have borne identical burdens. However, systemic bias against the least well-off cannot be condoned by any theory of fairness.

B. The Efficiency of Givings

Under the assumption that the government behaves as a rational wealth-maximizing actor – an assumption we revisit and revise in the next subsection[156] – the government will bestow benefits on members of the public only when the overall benefit of the act to the government exceeds its aggregate cost.[157] If one further assumes perfect information, the government will bestow the benefit on the actor who values the asset most highly.[158] Given this framework, the goal of takings jurisprudence is to end the fiscal illusion

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[150] Michelman, *supra* note 1, at 1217.
[151] Michelman, *supra* note 1, at 1217.
[152] *See* Part I.C, *supra*.
[153] In this Part, we do not, yet, provide criteria for determining when givings call for a charge. We defer that discussion to Part III, *infra*.
[154] *See, e.g.*, Michelman, *supra* note 1, at 1218-1224; Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 998-1002 (1999); Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 764 (1999).
[155] Procrustes, in Greek mythology, had one bed for all. Those who were too tall for the bed had their legs chopped off, while those who were too short were stretched to fit. Edith Hamilton, MYTHOLOGY 210-11 (1942).
[156] *See* part II.C, *infra*.
[157] As a normative theory, economic efficiency prescribes that "law should be made to conform as closely as possible with the dictates of wealth maximization." Richard A. Posner, THE PROBLEMS OF JURISPRUDENCE 362 (1990).
[158] Absent perfect information, the government may identify the wrong actor. About the importance of perfect information, *see* George J. Stigler, THE THEORY OF PRICE 82 (4th ed. 1987).

created by the government's ability to impose harms on individuals without paying compensation. Under traditional takings analysis, the just compensation requirement effectively forces the government to internalize the cost of its decisions and impose burdens only when the net gain of so doing exceeds the cost. However, fiscal illusion will persist if the government fails to consider givings.[159]

Economic efficiency is achieved through the taking into account of costs and benefits.[160] Takings jurisprudence ensures an accurate accounting of costs. Givings jurisprudence is necessary to guarantee a precise accounting of benefits. Consider the following example. Mirage city is considering the construction of a new exit to the Interstate highway. The actual cost of building the roadway is $1 million. In addition, the government will have to pay $2 million to property owners whose land will be condemned for the project. We assume that no derivative taking occurs in this case, and thus, the total cost of the project is $3 million. Turning to the benefit side, the government estimates that the new exit will spur economic activity in a ten-block area of Mirage, raising local property values in that area by $5 million. As a result, Mirage's income from property tax revenue will increase by $100,000.[161] Under the assumption that Mirage acts like a wealth-maximizing individual it will reject the project. By Mirage's taxes- and takings-influenced calculation, the project will lead to a net loss of $2.9 million.[162] However, if Mirage took into account both takings and givings, it would see that project produces a net benefit of $2 million.[163] Since economic efficiency is concerned with aggregate efficiency, Mirage's decision is clearly welfare diminishing.

Importantly, so long as government is subject to fiscal illusion, unaccounted-for givings and takings will distort government incentives, even if the government is not treated like a rational wealth-maximizing individual.[164] This is due to the fact that as long as government action is distorted by the illusion that harms and benefits are costless, government action will be most accurate if government takes into account the full set of costs and benefits occasioned by its behavior. While there is little empirical data to suggest that government acts precisely like a wealth-maximizing individual, there is a wealth of data to suggest that government does operate under fiscal illusion.[165]

Uncompensated takings and unaccounted-for givings distort allocative efficiency in an additional way. The absence of government compensation, or charge, may lead individuals to make inefficient investment decisions. Turning first to takings, assume that Development Inc., is considering a plan to expand its assembly plant. Doing so would cost the company $10 million, and would yield $11 million in new revenues. Since

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[159] A government suffering from fiscal illusion labors under the misimpression that the true net value of its action is reflected by the effect on the government's budget. *See* Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 621 (1984).

[160] Law and economics literature generally employs a Kaldor-Hicks wealth maximization criterion for efficiency. *See* Thomas J. Miceli, ECONOMICS OF THE LAW: TORTS, CONTRACTS, PROPERTY, LITIGATION 4 (1997) (hereinafter, Miceli, ECONOMICS).

[161] This figure represents the present value of the future revenue stream to be created by property taxes.

[162] The $2,900,000 loss represents the difference between the $3,000,000 in costs and the $100,000 in revenues.

[163] The $2,000,000 gain represents the difference between the $5,000,000 in societal benefits, and the $3,000,000 in costs.

[164] Our fuller treatment of the incentives on government behavior appears *infra* in Part II.C. Due to distributional effects among voters, as well as the non-uniformity of non-pecuniary factors, such as ideology, that affect government and the electorate, distorted incentives may persist even in the instance of a mechanism that compensates for fiscal illusion.

[165] *See* Fischel, TAKINGS, *supra* note 1, at 96-97. *See also* discussion in Bell & Parchomovsky, *Takings, supra* note 7, 87 VA. L. REV. at ____.

the plan results in net gain, economic efficiency prescribes that Development Inc. move forward with its plan. Assume, now, that there is a 20% chance that the municipality where the new plant is planned will condemn the land. Absent compensation, Development Inc. will forego its expansion plans, even though the decision to expand promotes economic efficiency. Given the probability of an uncompensated taking, Development Inc.'s expected return is $8.8 million, while the expected cost remains constant at $10 million. Thus, by Development Inc.'s takings-distorted lights, the project would produce a net loss of $1.2 million. However, if Development Inc. could rely on compensation, its expected return would remain $11 million, against an expected cost of $10 million, producing a net gain of $1 million. Consequently, only takings compensation would permit Development Inc. to go forward with its efficiency-promoting expansion.[166]

A similar distortion may arise as a result of unaccounted-for givings. Assume that Shop-a-Lot is considering building a new regional headquarters. The new headquarters will produce additional revenues of $19 million, while its construction costs will be $10 million, plus another $10 million in land acquisition costs. Under these circumstances, Shop-a-Lot, being a profit-maximizing company will refrain from building – the economically efficient result. Building would yield a net loss of $1 million ($19 million in revenues less $20 million in costs). However, suppose that there is a 20% chance that the local municipality will give, without charge, frontage land worth $10 million to commercial property owners. Shop-a-Lot will now change its decision and decide to build the new headquarters. Building will now yield an expected net gain of $1 million ($19 million less $18 million in costs).[167] This result is the inefficient one, but the inefficiency is masked by the municipal subsidy in the form of the land giving.[168]

Our efficiency analysis shows that unaccounted-for takings lead to two potential distortions. First, from the vantage point of the government, unaccounted-for givings, like uncompensated takings, create fiscal illusion and lead to inefficient policies. Government failure to account for the benefits of givings may lead to failure to undertake economically efficient projects. Second, the possibility of uncharged-for givings also distorts the investment decisions of individuals, thereby further skewing allocative efficiency.[169]

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[166] *See* Thomas J. Miceli, *Compensation for the Taking of Land Under Eminent Domain*, 147 J. INST. & THEOR. ECON. 354 (1991) (providing similar examples) (hereinafter, Miceli, *Compensation*).

[167] We treat the probability of the giving as reducing land acquisition costs from $10 million to $8 million.

[168] To be sure, the argument that failure to pay compensation for takings generates distortions has been challenged. Most famously, Blume and Rubinfeld, as well as Kaplow, have argued that compensation, rather than its absence, distorts individual incentives. *See* Blume & Rubinfeld I, *supra* note 67; Kaplow, *supra* note 65. They argue that the availability of government compensation encourages inefficient capital expenditures, creating a moral hazard problem. Thus, they argue that private insurance is a better alternative than government compensation for takings because it both allows reallocation of risk, and allows pricing that reflects the actual likelihood of a taking. This approach is not without its problems. *See* discussion in Bell & Parchomovsky, *Takings, supra* note 7, 87 VA. L. REV. at ____. Two such problems are worth noting. First, this approach ignores the need to devise the right incentives for the government. In the same way one should seek to deter individuals from inefficient investments, it is necessary to deter the government from engaging in inefficient takings. Second, as Thomas Miceli notes, in a regime of takings compensation, inefficient capital expenditures will be deterred as a result of individual property owners' fear that their excessive expenditures will themselves deter government takings. *See* Miceli, *Compensation*, *supra* note 166.

[169] As we noted, the precise dimensions of this distortion are subject to debate in the takings context. *See supra*, note 168.

C. The Politics of Givings

In the previous section, we evaluated the effects of fiscal illusion on government incentives, and explained why failure to consider givings distorts efficiency. In this section, we demonstrate that a more complex view of government decisionmaking buttresses the conclusion that failure to account for givings leads to inefficiencies. Using the tools of public choice analysis, we show that decisionmaking about givings is highly susceptible to improper influence and rent-seeking at the public expense.

Public choice theories of government view government decisionmakers as maximizers of their narrow self-interests, primarily maintaining power.[170] On this view, government decisions do not aim to promote some concept of the public good or to maximize social welfare.[171] Nor can government actions be traced to a cost-benefit analysis aimed at maximizing government wealth. Rather, government decisions result from majoritarian or interest group rent-seeking to which decisionmakers cater in order to maintain power.[172] Less cynical scholars suggest that the truth probably lies somewhere in between the pure rent-seeking view of politics and the Pollyanish view of Pigouvian theorists, in which government serves as the neutral servant of the public good.[173]

Whatever the precise mix of rent-seeking and good government, there can be little doubt that givings are among the chief means of distributing largesse to interested parties,[174] and that failure to account for such givings allows exploitation of the political process.[175] The giving to General Motors described in *Poletown*,[176] for example, has been criticized as a flagrant wealth transfer from ordinary residents of a mixed ethnic neighborhood to the more politically powerful General Motors.[177] Even more disturbing is the magnetic effect of givings toward corruption. Givings allow the unscrupulous to tap the vast resources accumulated by the government in state coffers. So long as givings do not give rise to a charge, influential individuals may use a small amount of campaign contributions to induce a much larger giving.

In interest group models of public choice, pioneered by Mancur Olsen,[178] well-organized interest groups are able to manipulate the government and assure activity that benefits the interest group at the expense of society. Interest group public choice theory would interpret the *Poletown* episode as the politically influential General Motors extracting rents from the ill-mobilized citizens of Detroit. Ironically, as Daryl Levinson has noted, compensation for takings (absent the assessment of charges for givings) may *increase* the likelihood of interest group exploitation of the public fisc.[179] Takings compensation spreads the price of interest group rent-seeking over the entire public, reducing the likelihood that any given interest group will oppose the takings plan. It is only by charging interest groups for givings that the incentive for feeding at the public trough can be defeated.

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[170] *See generally*, Daniel A. Farber & Philip P. Frickey, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).
[171] This view is generally, if not entirely accurately, referred to as Pigouvian. See Fischel, TAKINGS, *supra* note 1, at 203-204.
[172] *See* Farber & Frickey, *supra* note 170.
[173] *See id*.
[174] For a discussion of the differences between subsidies and givings, *see infra* Part III.A.
[175] *See supra* Part I.E.
[176] 304 N.W.2d 455 (1981).
[177] Millspaugh, *supra* note 96.
[178] Mancur Olson, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).
[179] Levinson, *supra* note 20, at 396 (2000).

However, even without positing corruption or self-dealing by the government, public choice theory demonstrates the need for a givings regime. This can be shown by examining Daryl Levinson's recent attempt to craft a majoritarian public choice model of the incentive structure of government decisions on takings. Levinson's model, by demonstrating the possible distortions created by mandatory compensation for takings, inadvertently highlights the need for incorporating charges for givings into a takings regime.[180]

In his majoritarian model,[181] Levinson imagines decisionmakers who vote precisely according to the preferences of the majority of citizens, where each citizen's preference corresponds precisely with each person's pecuniary self-interest.[182] In this basic model, certain skewings of the costs and benefits of government action will lead the government to take property inefficiently and pay compensation. Suppose, for example, that the city of Democracopolis decides to take citizen number 1's $100,000 property, and turn it into a park, resulting in givings worth $11,000 to each of citizens number 2-10.[183] Suppose further that each the compensation of $100,000 to citizen number 1 is paid by a tax levied on all 10 citizens. The net value of the taking and givings to society is a loss of $1,000. The taking and givings are therefore inefficient. However, since nine citizens benefit and only one loses, the taking and giving will take place. The results are summarized in the following table.

Table 3. *Majoritarian Public Choice Model with Taking Compensation*

Citizen	Taking	Benefit	Tax	Compen-sation	Net Value	Vote
1	(100,000)	0	(10,000)	100,000	(10,000)	No
2	0	11,000	(10,000)	0	1,000	Yes
3	0	11,000	(10,000)	0	1,000	Yes
4	0	11,000	(10,000)	0	1,000	Yes
5	0	11,000	(10,000)	0	1,000	Yes
6	0	11,000	(10,000)	0	1,000	Yes
7	0	11,000	(10,000)	0	1,000	Yes
8	0	11,000	(10,000)	0	1,000	Yes
9	0	11,000	(10,000)	0	1,000	Yes
10	0	11,000	(10,000)	0	1,000	Yes
Society	**(100,000)**	**99,000**	**(100,000)**	**100,000**	**(1,000)**	**Yes**

Levinson concludes that even a compensation regime for takings will not eliminate

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[180] *Id*. Levinson discusses the difficulties with the takings regime, and does not discuss the possibility of creating a jurisprudence of givings. He does occasionally allude to the possibility of accounting for benefits. *See infra* notes 184-187 and accompanying text.

[181] Levinson offers three distinct models of government decisions on takings – one based on majoritarian decisionmaking, one based on interest group power, and one based on bureaucratic aggrandizement. Levinson, *supra* note 20, at 396.

[182] *Id.* at 363-364.

[183] Our example is a slightly modified version of Levinson's. *See id*. at 365-366. The terminology of givings is ours. Levinson refers to "benefits." Levinson presumes that the person from whom the property is taken can be excluded from the benefits. While this presumption is unlikely in our simplified example, it is quite possible in more complex real world situations.

inefficient takings and majoritarian distortions. However, a givings regime could eliminate the distortion.[184] Suppose that Democracopolis, in addition to paying compensation for takings, would now assess charges for its givings. Under the new rule, Democracopolis would reject the taking and givings, as shown by the following table:

Table 4. *Majoritarian Public Choice Model with Taking Compensation and Giving Charge*

Citizen	Taking	Benefit	Tax	Compen-sation	Charge	Net Value	Vote
1	(100,000)	0	(100)	100,000	0	(100)	No
2	0	11,000	(100)	0	(11,000)	(100)	No
3	0	11,000	(100)	0	(11,000)	(100)	No
4	0	11,000	(100)	0	(11,000)	(100)	No
5	0	11,000	(100)	0	(11,000)	(100)	No
6	0	11,000	(100)	0	(11,000)	(100)	No
7	0	11,000	(100)	0	(11,000)	(100)	No
8	0	11,000	(100)	0	(11,000)	(100)	No
9	0	11,000	(100)	0	(11,000)	(100)	No
10	0	11,000	(100)	0	(11,000)	(100)	No
Society	**(100,000)**	**99,000**	**(1,000)**	**100,000**	**(99,000)**	**(1,000)**	**No**

The introduction of a regime for assessing charges for givings thus eliminates the problem of inefficient takings prompted by self-interested decisionmakers and restores the proper incentives for efficient government decisionmaking.

A third type of public choice analysis, focused on agency problems in decisionmaking in government democracies, would sound a more cautionary note about extensive accounting for givings.[185] This analysis focuses on government bureaucrats as decisionmakers, positing that they are primarily interested in expanding their own budgets as a way of aggrandizing their power. Levinson argues that such bureaucrats will not be deterred from taking by compensation. On the contrary, Levinson posits, compensation expands government budgets without any corresponding increase in responsibility for the bureaucratic, creating a perverse incentive to take too much

[184] While Levinson does not suggest a regime for assessing charges for givings, he does acknowledge that if "compensation were financed from a tax on regulatory windfalls, only efficient regulations would win majority support." *Id*. at 366. In Part V.A, *infra*, we demonstrate the inadequacy of the alternative of taxing givings.

[185] *See e.g*. *See Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981) (mentioning "the unspoken premise that government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission"); William A. Niskanen, Jr., *Bureaucrats and Politicians*, 18 J.L. & ECON. 617, 618 (1975) (constructing a model of bureaucratic supply on the "assumption that the bureau acts to maximize its budget"); William A. Niskanen, Jr., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 5-12 (1971); Anthony Downs, INSIDE BUREAUCRACY (1967); Aaron Wildavsky, THE POLITICS OF THE BUDGETARY PROCESS (1964). *But see*, David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L. J. 97, 121-22 (2000) (arguing that "agency capture is no longer regarded as a valid descriptive theory of bureaucratic behavior"); Ian Ayres & John Braithwaite, *Tripartism: Regulatory Capture and Empowerment*, 16 L. & SOC. INQUIRY 435, 436 (1991) (reporting that the theory of agency or bureaucratic capture "has not seemed to be theoretically or empirically fertile to many sociologists and political scientists working in the regulation literature").

property.[186] A similar argument might be made regarding givings. Importantly, however, the establishment of a direct compensation channel between givings' beneficiaries and takings' victims mitigates the bureaucratic agency problem.[187] Direct transfers of money from benefited property owners to harmed ones will diminish the opportunity for government self-aggrandizement, thereby weakening the incentive to engage in unnecessary takings and regulation of property. Thus, remedies in the givings regime must take account of and curb the risk of excessive bureaucratic intervention. It is to these remedies that we now turn.

III. CHARGING FOR GIVINGS

In this Part, we turn to the task of crafting a jurisprudence of givings. Having established the indispensability of accounting for givings, we craft a model for creating a law of givings and for incorporating givings into takings jurisprudence. Our model addresses the three essential elements of the law of givings: identifying a giving, creating a mechanism for assessing charges for the givings, and deciding when and how such charges should be assessed.

Rather than adopt an artificially uniform system for charging all givings, we divide the universe of givings into four conceptual clusters. Each cluster is organized around a characteristic feature of givings, and embodies a rule for treating the giving. Our list of conceptual clusters is not exhaustive, and yet it highlights the essentials of a givings jurisprudence. By organizing givings around these clusters, we also preserve the ability to add other principles to givings jurisprudence, in the form of new conceptual clusters.

The central aim of this Part is to establish when the government must assess a charge for a giving, and how it must collect that charge. By a "charge" we mean a payment by the recipient, or beneficiary of a giving,[188] in exchange for the benefit received. The concept of charge is the equivalent of compensation in the context of takings. The magnitude of the charge, like compensation, reflects the value of the transferred property interest,[189] but moves in the opposite direction. That is, in givings, as in takings, one side receives a property interest, and the other side receives a payment, i.e. the charge or the compensation award.

As we shall discuss, not every conferment of a benefit gives rise to a givings charge, just as not every deprivation of a property right calls for compensation. We call the granting of a benefit a "chargeable giving" when the giving must be accompanied by the assessment of a charge. This parallels the accepted terminology of "compensable takings."

Methodologically, we frame our four clusters around their primary characteristics. Our first cluster is organized around the symmetry between givings and takings. The second looks to the number and character of beneficiaries of the giving. The third examines the relationship between the givings and attendant takings. Finally, the fourth focuses on the ability of the beneficiary to refuse the giving.

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[186] Levinson, *supra* note 20, at 396

[187] *See infra*, Part III.C.

[188] We use the terms "recipient" and "beneficiary" interchangeably.

[189] Valuation of the measure of compensation might be accomplished by a number of different metrics, such as market value or willingness to sell. We discuss valuation questions *infra* in Part V.C, and a fuller analysis is beyond the scope of this Article.

A. A Giving or a Taking

Eliminating all possibility of government distribution of benefits or subsidies would mean a radical change in our conception of the role of the state in creating and distributing wealth. That is not our aim. Therefore, a central goal of a workable giving jurisprudence must be to distinguish between chargeable givings and non-chargeable distribution of benefits.

We propose that this line dividing givings from non-chargeable distributions should mirror the line between compensable takings and non-compensable deprivations of property.[190] Unfortunately, the line between a compensable takings and non-compensable deprivations of property is notoriously fuzzy,[191] and the same fuzziness will blur the line between non-chargeable subsidy and a chargeable giving. But, notwithstanding this fuzziness, a formidable body of case law and scholarship has developed around the identification of compensable takings,[192] and this knowledge can be put to use in identifying chargeable givings. The manner for doing so is a straightforward principle. A giving is chargeable if its inverse would constitute a compensable taking.

We develop this principle by examining several possible types of property grants that, when reversed, produce non-compensable deprivations of property. The first of these types is a prize. A prize is properly seen as the reversal of a penalty. It is the award of a government benefit in response to socially beneficial activity.[193] Its inverse analogue is the penalty,[194] imposed upon socially harmful activity.[195] Just as the penalty is not considered a compensable taking,[196] the prize should not be seen as a chargeable giving. When the government rewards socially beneficial activity, no charge should be assessed. The reason for this treatment is two-fold. First, to require the payment of a charge for a prize would defeat the purpose of the government action. The prize is granted in order to lead actors to internalize positive externalities caused by their actions. Payment of a charge would eliminate the incentive produced by the prize, and eliminate the social benefit. Second, the granting of a prize to produce widespread social benefits transforms the nature of government benefit from a giving to an individual to a benefit to society at large. As we discuss in the next section, benefits to the wider public should generally not be considered chargeable givings.[197] Both of these rationales assume that the prize is proportionate to the social benefit. Where prizes are grossly excessive, the excessive portion should be treated as a chargeable giving, just as grossly excessive penalties are not validly treated as penalties.[198]

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[190] Bell & Parchomovsky, *Takings*, *supra* note 7, 87 VA. L. REV. at ____.
[191] *See* Part I.A.2, *supra*.
[192] *See* sources cited in Bell & Parchomovsky, *Takings*, *supra* note 7, 87 VA. L. REV. at ____.
[193] *See* Richard H. McAdams, *Relative Preferences* 102 YALE L. J. 1, 62 (1992) (suggesting that prizes are cultural means of solving public good market failure).
[194] Similar arguments may be made about the curbing of noxious uses. *See supra* note 53 and accompanying text.
[195] *See* Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1466-68 (1979); William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 655 (1983); A. Mitchell Polinsky, AN INTRODUCTION TO LAW AND ECONOMICS 73-84 (1983); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880 (1979); George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970); Richard A. Posner, ECONOMIC ANALYSIS OF LAW 207 (3d ed. 1986).
[196] The distinction between a taking and a penalty has been recognized since the days of Grotius. Hugo Grotius, THE LAW OF WAR AND PEACE, Bk. II, ch. XIV, s. VII (Francis W. Kelsey trans., 1925) (1625).
[197] *See, infra*, Part III.B.
[198] *Compare, e.g., U.S. v. Hosep Krikor Bajakajian*, 524 U.S. 321 (1998); *Austin v. U.S.*, 509 U.S. 602

Another type of non-chargeable giving can be derived by analogy to taxes. Several elements may make the appropriation of property a tax rather than a taking. Among these is the character of the property transferred in the tax.[199] When the government collects cash, it is generally deemed to have taxed, while government seizure of a property interest itself is, in all likelihood, a taking.[200] The reason for distinct treatment of cash is two-fold. First, when taxed, Citizen Jane has the power to determine which, if any, assets to convert the cash to pay the tax. Jane may attach an idiosyncratic value to Rosebud, which she will lose if the property is taken.[201] Second, the taking of cash is often more readily exposed to public scrutiny than the taking of land.[202]

Chargeable givings may be separated from non-chargeable subsidies on similar grounds: a cash payment will often be a non-chargeable subsidy, while the granting of land is a chargeable giving. The same justifications for treating cash and in-kind payments differently obtain in the context of givings, albeit in the reverse order. Cash subsidies, like cash taxes are generally easier to expose to public scrutiny than are in-kind gifts. For instance, the total value of cash subsidies to farmers can be readily ascertained by examining government budgets, but the value of zoning variances to influential developers is often far more difficult to evaluate. Likewise, the payment of cash rather than property creates greater choice among beneficiaries. In some cases, this choice is crucial to avoiding allocative inefficiency.[203]

The picture that emerges is that cash payments require a different treatment than in-kind givings. As general rule, cash givings should be exempt from charge.[204] It should be noted, however, that the justifications for the cash-property interest distinction are weaker in the context of givings than with respect to takings. The giving of property interests, for example, cannot be said to produce the same kind of loss in idiosyncratic value as the taking of such property. The principle of non-chargeability of cash givings, accordingly,

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(1993) (striking down large civil forfeitures as excessive fines). The treatment of penalties and prizes is not entirely symmetrical, in that excessive prizes are not completely barred; rather, in our system, such prizes are charged in the amount of the excess. We discuss later the reason for assessing charges, rather than outlawing excessive givings. *See*, *infra*, Part V.D.

[199] *See* Bell & Parchomovsky, *Takings*, *supra* note 7, 87 VA. L. REV. at ____.

[200] A more important distinction, discussed in section III.B, *infra*, is whether the target of the property deprivation is "singled out."

[201] This is due, at least in part, to the well-documented cognitive phenomenon of the endowment effect, which causes people to overvalue their entitlement. For discussion of endowment effects, *see* Richard Thaler, *Toward a Positive Theory of Consumer Choice*, J. ECON. BEHAV. & ORG. 1 (1980); Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990); Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991). On the impact of the endowment effect on legal policymaking, *see* Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal And Economic Implications*, 71 WASH. U. L. Q. 59 (1993); and Russell Korobkin, *Note*: *Policymaking and the Offer/Asking Price Gap: Toward a Theory of Efficient Entitlement Allocation*, 46 STAN. L. REV. 663 (1994).

[202] Of course, in certain individual cases the opposite may be true. For instance, if Citizen Jane's Rosebud is a famous and popular site, its seizure through eminent domain may become a much greater *cause celebre* than the assessment of a large tax on Jane's property.

[203] Two examples of in-kind benefits that attracted particular wrath from U.S. economists are rent controls and implied warranties of habitability. *See e.g.*, Richard Arnott, *Rent Control: the International Experience*, 1 J. REAL EST. FIN. & ECON. 203, 203 (1988) (stating that "North American economists are virtually unanimous in their opposition to rent control in almost any form."); Anthony Downs, RESIDENTIAL RENT CONTROL AN EVALUATION (1988); *see also*, *Chicago Board of Realtors v. City of Chicago*, 819 F.2d 732 (1987) (Posner J. and Easterbrook J. concurring). For a comprehensive review of the literature on rent control *see* Edgar O. Olson, *Is Rent Control Good Social Policy*, 67 CHI.-KENT L. REV. 931 (1991).

[204] This is not to say, of course, that cash givings are always legitimate. There may be problematic cases of cash givings to single individuals or companies, we discuss these cases *infra* Part III.B.

should be applied more rarely than non-compensation for cash takings.

B. One or Many

The distinction between taxes and takings provides guidance for another givings principle. Saul Levmore has noted that a useful way to determine when takings require compensation is to examine the number of people affected by the government action. On Levmore's view, when the government singles out condemnees, compensation is presumptively required. However, a broad taking from the public at large should not require compensation.[205] By the same token, we posit that a giving to a single beneficiary should presumptively give rise to charge. When, by contrast, the government action affects a broader public, there is more reason to view it as a tax or a non-compensable regulation.[206] Likewise, when the government action benefits the public at large, the need for assessing a charge is presumptively weaker.[207]

An important caveat is in order here, however. One must bear in mind that tax burdens may not be distributed uniformly over the relevant group members; some members may be disproportionately burdened relative to others.[208] The same may be true of givings. Even when a giving benefits the broad public, the benefit to some members may far exceed the benefit to others.[209] Public choice theory suggests that those standing to be disproportionately benefited by the giving have a strong motivation to engage in political rent-seeking in order to ensure that the giving is effected.[210] Thus, in addition to examining whether a giving affects one or many, it is also necessary to examine how the benefits of a giving are distributed over the group of beneficiaries. If the distribution is uniform, no charge should be assessed. However, as the distribution becomes increasingly skewed, there is greater reason to view the giving as singling out particular beneficiaries, and, consequently, the prima facie case for assessing charge becomes stronger. Finally, it is also important to consider the randomness of the distribution of benefits. As the benefits are more randomly distributed, the likelihood of improper interest group capture is correspondingly less.

The singling-out principle is the core of Levmore's distinction between the compensable and the non-compensable. Levmore's primary justification for the singling-out principle lies in the realm of public choice theory. However, the principle can be justified as well on grounds of fairness. We begin with fairness before proceeding to Levmore's justification.

As we discussed earlier, as the famous formulation in *Armstrong v. United States* put it, the essential fairness principle embodied in the Takings Clause is that one person should not be forced to bear "public burdens which, in all fairness and justice, should be

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[205] Levmore, *Takings, supra* note 63, at 1348 ("Compensation for a governmental intervention will be required when a politically unprotected loser is singled out and when there is a close substitute in the form of a private purchase."). *See also* Bell & Parchomovsky, *Takings, supra* note 7, 87 VA. L. REV. at ____.

[206] *See* Levmore, *Takings, supra* note 63, at 1348.

[207] Obviously, many actions lie on the continuum between the paradigmatic giving to a single individual and a giving to the public at large. We discuss these cases after examining the two extreme scenarios of singling out and benefiting the public at large.

[208] Sometimes, the relative equality will have to be equal treatment with regard to economic circumstances rather than equal per capita treatment. An example of such treatment is provided by the "progressive" income tax. The givings analogue is welfare payments to the indigent.

[209] The Yazoo land frauds provide an apt example of this. *See supra* note 135-136 and corresponding text.

[210] *Compare* Donald J. Kochan, *Public Use and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. LAW & POL. 49 (1998) (calling for reinterpreting the Takings Clause to reduce private rent-seeking).

borne by the public as a whole."[211] It is evident, therefore, that when the burden is borne by the public as a whole, this fairness criterion has not been violated. While the *Armstrong* rule tells us neither when the public as a whole ought to bear burden, nor when the burden has fallen on the public as a whole, *Armstrong*'s fairness criterion clearly militates against singling people out. As we explained earlier, the *Armstrong* fairness principle applies with equal force to givings. It would be unfair for an individual to enjoy a benefit, at society's expense, when the benefit should, in all fairness and justice, be enjoyed by society as a whole. It is only when the state bestows an identical benefit on every member of the public, and when we assume that the state is a proxy of the entire public, that we can characterize the giving as nothing more than a transfer from the public to itself. It would be wasteful under such circumstances for the public to charge itself for the giving.

This result is underscored by a public choice analysis. From a public choice perspective, politics is driven by rent-seeking.[212] When the public as a whole is the beneficiary of a giving in equal parts, it is insensible to speak of rent seeking. However, absent such parity in the distribution of benefits, political decisions may be attributed to factional rent-seeking.

Minoritarian interest group rent-seeking is well-documented. *Poletown*, as we have shown, is best understood as a giving to General Motors, at the expense of the public. Givings to private sports franchises, politically connected real estate developers and gambling interests[213] provide other commonplace examples of givings prompted by minoritarian rent-seeking. These groups share an organizational and financial ability to influence the political process to their benefit. Acting as self-interest maximizers, such groups are able to outmaneuver diffuse political opponents whose ability to take advantage of their larger numbers is hampered by high coordination costs. Naturally, minoritarian rent-seeking leads to the enrichment of the better organized groups at the expense of the larger public. Forcing interest groups to pay a fair a charge for the benefits they receive is an effective way to curb minoritarian rent-seeking. Doing so will not only benefit the public financially, but will also improve the political decisionmaking process in the long run. Moreover, forcing interest groups to pay will diminish their incentive to influence political processes, which will reduce in turn the deadweight loss stemming from political lobbying and counter lobbying.[214]

Obviously, factional rent-seeking may be majoritarian as well. Less glamorous land use decisions, such as ordinary suburban zoning, are less likely to fall prey to minoritarian rent seeking, but are far more likely to attract majoritarian rent seeking.[215] While in such cases, singling out of givings beneficiaries is rare, the giving is likely to be accompanied by the singling out of the victims of takings. Consider, for example, *Kinzli v. City of Santa Cruz*.[216] Kinzli owned an undeveloped tract of land in a rapidly developing

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[211] *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *See* discussion, *supra*, in Part II.A.

[212] To provide a complete picture, there is also a third possibility of rent-seeking: rent-seeking by bureaucrats. We seek to curb this type of rent-seeking by matching givings with takings. *See infra* Part III.C.

[213] *See* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49 (1998).

[214] *See e.g.*, Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 295-96 (1974) (analyzing the efficiency effects of political lobbying); Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 809 (1975) (same).

[215] *See* Fischel, ZONING, *supra* note 3, at 233 (1985).

[216] 620 F.Supp. 609 (N.D. Cal. 1985), *rev'd on other grounds*, 818 F.2d 1449, *amended*, 830 F.2d 968 (9th Cir.1987), *cert. denied*, 484 U.S. 1043 (1988).

suburb. After neighboring landowners profited from the development, they adopted a "greenbelt" plan, barring further development, and preventing Kinzli from developing his land. The result can be characterized as the singling out of Kinzli for a regulatory taking in order to grant derivative givings to a majority faction of landowners who had already profited from previous development. The ability of suburban majorities to abuse the zoning process to extract rents for majority factions has been widely noted, especially in the context of exclusionary zoning.[217] In these cases, as we shall note later, the best remedy is to be found in taking compensation, rather than givings charges.[218] For example, in *Kinzli*, assuming that the environmental plan conferred roughly equal benefits to all homeowners, there would be no need to assess charges against all givings recipients since the larger public benefited from the derivative givings in the form of the "greenbelt." However, as the taking did not fall on the larger public, payment of compensation would be warranted under the singling-out principle. Since takings compensation comes out of the public fisc, the recipients of the benefit indirectly sponsor the compensation to the singled-out property owner.

An important caveat should be inserted at this point. If the majoritarian rents are of such a nature that the majority may exclude the minority from participation in the benefits of givings, the givings should no longer be immune from charge. For example, if *Kinzli* involved a mechanism for excluding Kinzli himself from enjoyment of the greenbelt, charges for the givings would be necessary alongside compensation for the taking.[219] Such cases are rare, but certainly within the realm of possibility. For example, a majority may allow itself expansive building rights, while denying similar rights to a minority of homeowners in order to preserve scenic views or other benefits that would accrue only to the majority.

Our analysis implies the following general principle. Considerations of fairness and minoritarian rent-seeking mandate assessment of charges for givings to individuals, or to discrete interest groups. We emphasize that we exclude from this general principle givings to discrete minority groups that purport to compensate such groups for past wrongs.[220] In such cases, the giving should properly be viewed as compensation for past takings or deprivations and should not be classified as a benefit. By contrast, givings triggered by majoritarian pressure, which benefit the general public roughly equally do not require assessment of charge.[221] Only when the majoritarian giving specifically excludes a minority should the giving be chargeable. Otherwise, when majoritarian givings single out individual victims, it would be best to use takings compensation to alleviate their plight.

C. Give and Take

In this section, we turn to the relationship between givings and takings for further guidance in determining whether and how to assess charges for givings. As we have shown, both of our previously enunciated principles – givings that cannot be

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[217] *See generally*, Fischel, ZONING, *supra* note 3 at 233; Robert C. Ellickson, *Alternatives to Zoning; Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 695 (1973); Charles M. Haar, SUBURBS UNDER SIEGE: RACE, SPACE AND AUDACIOUS JUDGES (1996).

[218] *See*, *infra*, Part III.D.

[219] *See*, *supra*, Part II.C.

[220] We examined the option of giving government benefits in order to undo past wrongs elsewhere. *See* Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965 (2000). *Cf.* Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L. J. 507 (1999).

[221] Additionally, as we noted earlier, relative equality will sometimes have to be equal treatment with regard to economic circumstances rather than equal per capita treatment. *See supra* note 208.

characterized as inverse takings, and widely and equally distributed givings, should not give rise to charges – involve questions of takings as well as of givings. This is hardly surprising in light of the intimate connection between givings and takings that we have highlighted. We now show that the relationship between givings and takings can be specifically adapted to the question of when and how to assess charges for givings.

Indeed, even though current takings jurisprudence does not explicitly recognize the concept of givings, it looks to the relationship between givings and takings for an important guideline in determining eligibility for compensation.[222] For instance, the average reciprocity of advantage doctrine, enunciated by Justice Holmes in *Jackman v. Rosenbaum & Co.*,[223] and *Mahon*,[224] establishes that no takings compensation is warranted where the government action works an average reciprocity of advantage, i.e., it creates diffuse public benefits from which all benefit, including the owner whose property is taken.[225] The underlying logic is that both the wealth-enhancing (giving) and wealth-diminishing (taking) elements of government action must be taken into account in determining compensation. Following the same logic, we show that in determining charges for givings, attendant takings must also be taken into account. In determining the amount of compensation to be paid or charge to be assessed, the total value of givings and takings must be taken into account. Takings compensation must be reduced by the value of attendant givings received by an owner, and givings charges must be reduced by the value of attendant takings. Moreover, in some cases, when givings can be specifically tied to takings, it may be appropriate to channel both into a scheme of private takings, such as the one described in *Hawaii Housing Authority v. Midkiff*.[226]

The relationship between takings and givings suggests two principles for determining charges. First, it implies consideration of the overall effect of government actions, i.e., both harms and benefits. Second, it implies that when compensable takings are associated with chargeable givings, the recipients of the giving should compensate the victims of the taking.

A natural starting point for our discussion is the benefit-offset principle of the 19th century. Under this principle, the government (or private agents empowered to take by eminent domain) would reduce compensation paid for takings by the value of the benefits that accrued to the aggrieved homeowner as a consequence of the government action.[227] For example, when railroad laid track through farmland, the value of all surrounding farmland would rise. Using delegated powers to take through eminent domain, and the benefit-offset principle, railroads would take farmland in order to lay track, and then reduce the amount of compensation by the value of the benefit to the owner's remaining farmland.[228]

The benefit-offset principle was a more sophisticated version of today's average reciprocity of advantage doctrine, incorporating several elements that were lost in the later doctrine. First, while not using the term givings, the benefit-offset principle aggregated the total value of the derivative giving and physical taking in order to

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[222] *See generally*, discussion in Part I.C., *supra*.
[223] 260 U.S. 22, 30 (1922).
[224] 260 U.S. at 415. For a historical review of the concept *see* Oswald, *supra* note 85 at 1490-1510.
[225] *See also Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).
[226] 467 U.S. 229 (1984).
[227] The "benefit-offset" principle allowed the government to reduce the compensation to property owners claiming a taking by the amount of benefit the taking conferred on the owners' remaining property. For a discussion of the "benefit-offset" principle, see discussion in Fischel, TAKINGS, *supra* note 1, at 80-84. *See also* note 35, *supra*.
[228] Fischel, TAKINGS, *supra* note 1, at 80-89.

determine the amount of compensation. By contrast, the average reciprocity of advantage doctrine is binary. It either determines that there is a rough "reciprocity," negating the finding of a regulatory taking and eliminating the need for compensation, or that there is no such reciprocity, whereupon compensation will be based solely on the value of the taking, while the giving is ignored.[229] Second, the average reciprocity of advantage doctrine is only understood to apply to regulatory takings, and not to physical takings (or derivative takings).[230] The benefit-offset principle, on the other hand, was applied specifically to physical takings.[231]

Despite its relative advantages, the benefit-offset principle remained clumsy, and inadequate. First, the principle served only to reduce compensation for takings. Thus, property owners that received givings in excess of the value of the taking, or from whom no property was taken at all, paid no charge.[232] Second, the principle left open the possibility of other unaccounted-for givings' and takings' effects, such as the adverse effects of derivative takings.[233] In the particular setting in which the benefit-offset principle was applied, unaccounted-for givings posed the more daunting problem. The railroads, for the benefit of whom property was taken, increased the property values of all surrounding farmland. Thus, applying the benefit-offset principle to takings compensation, while ignoring the derivative givings bestowed upon all neighboring owners whose land was not physically affected led to an odd outcome. A charge was assessed only on property owners who suffered the brunt of the government actions: those whose land was actually seized. All others received the giving free of charge.[234]

The benefit-offset principle's shortcomings ultimately doomed it, despite its periodic resurfacing.[235] Nevertheless, an updated benefit-offset principle is an important asset of any proper application of a law of givings. The intuition underlying the benefit-offset principle is correct: any payment in compensation for a taking must be reduced by the value of the giving to the property owner.

A complimentary detriment-offset principle must be used in the law of givings, i.e., any charge for a giving must be reduced by the absolute value of the taking to the property owner. Finally, care must be taken to avoid the one-dimensionality that undid the benefit-offset principle. Assessing charges for all givings to all property owners will undo the core unfairness of the 19th century version of the benefit-offset principle. Additionally, the updated principles must take into account all three types of givings and all three types of takings in order to lead to just and efficient results.

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[229] *See* Coletta, *supra* note 36 at 321.
[230] *Id.* at 356.
[231] As *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), had not yet created regulatory takings, it is not surprising that the benefit-offset principle was not applied to regulatory takings.
[232] *See* Fischel, TAKINGS, *supra* note 1, at 85-89.
[233] *Cf.* Bell & Parchomovsky, *Takings*, *supra* note 7, 87 VA. L. REV. at ____.
[234] Fischel, TAKINGS, *supra* note 1, at 82-83. *See also*, *supra*, Part I.C.2. Other commentators criticized the benefit-offset principle on the grounds that it unfairly subsidized railroads. *See, e.g.*, Scheiber, *supra* note 35. This would have been true only if there were other unaccounted-for takings that outweighed the unaccounted-for givings, or if the actual values of the givings and takings were measured inaccurately. While the former explanation is belied by the historical evidence, the latter is a real possibility. The accurate measurement of values enhanced or diminished by givings or takings is of obvious importance for the proper functioning of the law of takings or givings. *See* discussion in Fischel, TAKINGS, *supra* note 1, at 80-89. However, issues of the adequacy of the yardsticks for measuring takings (and, by implication, givings) are beyond the scope of this Article. *See also infra* Part V.B.
[235] *Newman v. Metropolitan Elevated Railway*, 23 N.E. 901 (N.Y. 1890); *Bohm v. Metropolitan Elevated Railway*, 29 N.E. 803 (N.Y. 1892); *Bookman v. New York Elevated Railroad*, 41 N.E. 705 (N.Y. 1895); *see also* Charles M. Haar & Barbara Hering, *The Determination of Benefits in Land Acquisition*, 51 CAL. L. REV. 833 (1963).

Unified treatment of givings and takings need not be restricted to cases where the giving beneficiary and taking victim are the same person. Sometimes, the takings and givings are intimately linked, and the givings recipients sufficiently well-identified and discrete, such that takings compensation and givings charges can best be taken care of by having beneficiaries make payment directly to victims. *Poletown*[236] provides a particularly salient example. The obvious beneficiary of the physical giving was General Motors; the victims of the physical takings were numerous homeowners in Poletown. Direct compensation from General Motors to the homeowners would have eliminated an unnecessary public subsidy to the auto company, and might have led General Motors to reevaluate whether the Poletown facility was cost effective.

Indeed, the proper course in cases such as *Poletown* is to aggregate the givings and takings and reinterpret the total government action as a government mediated private taking. In a private taking, the government empowers a private individual or organizations, such as a utility company, to take property by using the government's power of eminent domain, while remaining subject to the requirement of just compensation.[237] While the notion of private takings may sound exotic or corporatist, the technique is widespread, and past examples of private takings fall on various points on the political spectrum. For example, *Hawaii Housing Authority v. Midkiff*[238] involved a Hawaii statute that achieved land reform by allowing tenant farmers to privately take land from large landowners. Private takings by railroads were commonly permitted in the 19th century.[239] As long as all the relevant givings and takings are accounted for, the private taking should create significant savings in transaction costs by eliminating the unnecessary middle role of the government.

The rendering of compensation by givings recipients to takings victims in cases of government mediated private taking is mandated not only by efficiency principles but also by the demands of corrective justice.[240] Corrective justice requires that individuals who wrong others rectify the victims for their losses.[241] Wrongs consist of actions that harm or invade individual rights or the legitimate interests of others.[242] When individuals or corporations enlist government power to transfer property from other owners to

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[236] 304 N.W.2d 455.

[237] A private taking, also known as a private condemnation is "the taking of private property by a private individual for a public use." Kent M. Brown, *Casenote & Comment:* Cohen v. Larson*: The Idaho Constitution and the Right of Eminent Domain*, 31 IDAHO L. REV. 623, 624 (1995) *See also* note 34 *supra*.

[238] 467 U.S. 229 (1984).

[239] Fischel, TAKINGS, *supra* note 1, at 80-89.

[240] While there is no single, universally accepted, definition of corrective justice, in a recent article, Gregory Keating, relying on the work of characterized corrective justice as follows:

> First, it applies to human agency, not, say, to natural misfortunes. Second, it is concemed with repair or rectification. Third, it is concerned with rectifying some kind of wrongdoing--with 'wrongful losses' in Coleman's case. Fourth, it involves correlativity.

Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 197 (2000) (citing Jules L. Coleman, *The Practice of Corrective Justice*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53 (David G. Owen ed., 1995)). Given this list, it is not surprising that tort law has captured the attention of corrective justice theorists. Notable accounts grounding tort law in principles of corrective justice include Jules L. Coleman, RISKS AND WRONGS 303-28 (1992); Arthur Ripstein, EQUALITY, RESPONSIBILITY, AND THE LAW 24 (1999); Ernest J. Weinrib, THE IDEA OF PRIVATE LAW 56-83 (1995); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); George P. Fletcher, *Fairness and Utility in Torts Theory*, 85 HARV. L. REV. 537 (1972). For a critical review of the attempts to base tort law on corrective justice, *see* Benjamin Zipursky, *Civil Recourse, Not Corrective Justice* (unpublished manuscript on file with the author).

[241] Coleman, RISKS AND WRONGS, *supra* note 240, at 332 ("[c]orrective justice imposes a duty to repair wrongful losses.").

[242] *Id.* ("Wrongs are actions contrary to rights").

themselves, they should be held responsible for the losses they inflict. The involvement of the government should not blind one to the underlying quasi-tortious situation – the taking of one's private property by another. The private taking power should not be granted lightly. This power has its drawbacks. A private taking power is a potent tool that alters property rule protection into liability rule protection.[243] It should only be used promote important societal goals, and not to redistribute wealth from one individual to another.

The relationship between givings and takings can thus be seen to produce two distinct principles of importance for a comprehensive understanding of givings. First, payment of compensation for a taking, or assessment of a charge for a giving should reflect the net effect of all givings and takings befalling the property owner. Compensation, if any, should reflect the net property loss occasioned by the aggregated takings offset by the aggregated givings. Charges, by the same token, must incorporate the net value of the benefit to the property, after the aggregated givings are offset by the aggregated takings. Second, where linkage between the giving and taking is sufficiently clear; the number of givings beneficiaries and takings victims is sufficiently small; and, the givings and takings sufficiently measurable, compensation and charge should be made directly between the parties to the extent feasible. In some cases, this may take the form of direct authorization of a private taking.

D. Take It or Leave It

Our fourth, and final, conceptual cluster is organized around a principle we extract from the law of gifts and unjust enrichment. Both bodies of law require voluntary acceptance by the recipient of the benefit.[244] The rationale for this requirement is straightforward. The law does not force people to accept benefits against their will. The underlying goal of the voluntary acceptance requirement is to prevent forced transactions in which professed "benefactors" involuntarily impose "benefits" on others and later demand the recipients to pay. Forcible extraction of a payment in exchange for an involuntary "gift" may carry the odor of extortion.[245]

Suspicion about the appropriateness of forced transfers is grounded in foundational

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[243] Property rule protection confers upon the entitlement holder the exclusive power to determine the price non-holders would have to pay for using the protected asset or right. Thus, all transfers of entitlements protected by a property rule must be consensual; all attempts to transfer the entitlement nonconsensually would be met with an injunction. Liability rule protection, by contrast, gives the non-holder the power to take the entitlement without the consent of the entitlement holder and pay a price to be determined by a third party, typically a court or the legislator. The entitlement holder would not be able to enjoin third parties from taking her entitlement; instead, she would have to settle for damages. *See* Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (introducing and explaining the distinction between property rules and liability rules as modes for protecting rights).

[244] "Defendants who are the recipients of gifts, for example, clearly are enriched. However, that enrichment is clearly not unjust.... The same thing is true regarding 'volunteers.' If a person voluntarily provides something to another, the other may well be enriched. But, because of the voluntariness, the enrichment is not unjust." Paul T. Wangerin, *The Strategic Value of Restitutionary Remedies*, 75 NEB. L. REV. 255, 272 (1996).

[245] "Although there are some exceptions to this rule, the general policy of restitution favors recovery only when the defendant takes an active role in retaining the benefit. ...Because restitution defendants are usually passive rather than active recipients of others' actions, courts are reluctant to impose liability upon them. ... [T]he very paradigm of corrective justice is best described as a relationship between "doer" and "sufferer." Imposing liability on a nondoer requires special justification." Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 202 (1992).

assumptions about morality and efficiency. Primary among these is the belief in the moral autonomy of individuals, and confidence in their right and ability to make decisions that promote their own interests.[246] When a would-be beneficiary refuses to accept a transaction that the "benefactor" deems to be in the beneficiary's best interests, respect for the beneficiary's autonomy and decision-making capacity dictates deference to her decision.

Reverting to our analysis of givings and takings as put and call options adds an additional dimension to our analysis of the importance of voluntary acceptance.[247] Because the creation of government call and put options is by operation of law, such options lack the consensual basis of commercial options. Individual property owners have granted to the government neither the power to take, nor the power to give.[248] The government must therefore exercise these options with great caution. The reason to be even more cautious about givings than about takings is grounded in notions of autonomy. In the context of takings, the government may prefer its judgment to that of the individual property owner since the government, subject to the discipline of the Takings Clause, represents the interest of the public, whereas the harmed property owner only considers her own interest.[249] In the context of givings, on the other hand, the intended beneficiary is the property owner who receives the giving. The receiving property owner is thus the best judge of whether the giving actually constitutes a benefit, and her right to make her own decisions about her own welfare should be respected.

Implementing an acceptance requirement in the law of givings leads us to the following rule. If a giving is refusable and the beneficiary accepts it, she should pay the charge upon receipt. If on the other hand, the giving is not refusable, payment of the charge should be deferred until a future realization event transpires.[250]

Consider the following example. The City of Gro decides to up-zone one of its neighborhoods by granting all the residents the possibility of adding two extra floors to their houses. Harriet Height, who has been waiting for years for the possibility of adding upper floor to her low-slung ranch style home decides to avail herself of the giving immediately. Her more cautious neighbor Lea Low has no need of the extra space and has no desire to alter her dwelling. Under our proposed rule, Harriet will be assessed a charge for the giving immediately, while Lea will not be assessed any charge at present. However, should Lea or her successors in interest decide to build in the future, they will have to pay a charge at that time.

Sometimes, realization will be more difficult to determine. Imagine that Gro now decides to convert a large land holding into a nature preserve, raising the value of all neighboring property owners. Denise Dale, Elise Evergreen and Francine Forest are ecstatic about the new preserve, but Geraldine Grouch dislikes the new greenery. In this case, the benefit is not refusable. There is no way to grant the benefit to Dale, and Elise and Francine, while preserving for Geraldine an option to refuse. The moment the benefit is created, all affected neighbors receive a financial benefit; the benefit in this case is non-excludable. Once she is outvoted by the other residents, Geraldine will have

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[246] *See* Immanuel Kant, GROUNDWORK OF THE METAPHYSICS OF MORALS 62-66, 93-95 (H. Paton trans. 1948) (1st ed. Riga 1785).

[247] *See supra*, Part I.E.

[248] Presumably, it is the polity of which the owners are a part that has empowered the government to give and take.

[249] As we noted earlier, public choice theory disputes the Pigovian view of government, and requires the discipline of the Takings Clause to prevent excess use of the power of eminent domain. *See supra*, Part II.C.

[250] Realization is the conversion of property into money. BLACK'S LAW DICTIONARY 1264 (6th ed., 1990).

no power to reject the financial benefit created by the new preserve. Our rule dictates that the charge for this non-refusable benefit must be deferred until its value is actually realized – for example, by sale of the property. Geraldine will enjoy the same financial benefits upon sale of the property as her neighbors, and at that time, she should pay the same charge. By the same token, since the giving is non-refusable, Denise, Elise and Francine should not be punished for their external manifestation of support for the nature preserve, and they too should be asked to pay only when they realize the gain.[251]

This last example highlights a common aspect of takings and givings. In both cases, an element of coercion is necessary to overcome potential hold-out problems.[252] In the context of takings, property owners might hold out in order to extract greater payment from the government. In the context of givings, property owners might hold out to extract higher payments from their neighbors. In our example, if Geraldine could refuse the giving, she could abuse her refusal power to force her neighbors to pay for the benefit she receives. It is to alleviate the risk of such strategic behavior that the government is granted the extraordinary power to take and the power to give.[253]

Our discussion may be summarized as follows. In principle, recipients of givings should not be forced to pay a charge if they elect to refuse the giving. If the giving is non-refusable, all beneficiaries should be permitted to defer payment of the charge until a later realization event, typically a sale of the property.

IV. PAYING FOR GIVINGS

In this Part, we translate the conceptual clusters of givings into a basic working model for identifying, assessing and collecting charges for givings. Our central purpose here is illustrative. That is, we propose this model in order to demonstrate how a law of givings can be formulated and implemented. We do not foreclose the possibility of other models of administering the law of givings.

Our model uses our conceptual clusters to craft the three central pillars of the law of givings: identification, assessment and collection. At the identification stage, the government recognizes that a chargeable giving has taken place and it issues a notice of giving to the beneficiary. In the assessment stage, the beneficiary assesses the value of the giving for purposes of paying the charge. In our model, assessment can take place immediately upon receipt of the notice of giving, or at some later time when the charge is collected. In the third, and last stage, collection, the government collects the charge for the giving in accordance with the giving's assessed value. Depending on the character of the giving, collection is either made upon receipt of the benefit, or triggered by a realization event, such as sale of the benefited property.

A. Identifying Chargeable Givings

The first stage in the givings process, after a government decision to confer a benefit, is the determination of whether a chargeable giving has occurred. Answering this question requires using the first two of the four conceptual clusters presented in the previous Part. For a giving to be chargeable, it must be determined that character of the

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[251] Our rule would function in a manner not dissimilar to realization rules for taxes of capital gains. *See Commissioner of Internal Revenue v. Gillette Motor Transport, Inc.*, 364 U.S. 140 (1960).

[252] For a discussion of the hold-out problem in the context of takings, *see* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 749-761 (1986).

[253] Epstein, TAKINGS, *supra* note 1, at 164-66.

government act - due to its singling out of beneficiaries,[254] or, more generally, its character as an inverse taking[255] - is properly seen as a chargeable giving. Unfortunately, the determination relies upon judgments of degree, like decisions about whether deprivations of property constitute compensable takings.

Once the government determines that the conferment of a benefit is a chargeable giving, it should give notice to all beneficiaries of the giving that they have received a giving and that it is chargeable. In the notice of giving, the government should also state whether the charge for the giving is immediately payable, or whether the charge is deferred until a later realization. That decision should be made in accordance with the process we describe in our discussion of the collections stage, later in this Part.[256]

B. Assessing Givings

The duty to assess the magnitude of the giving passes to the giving beneficiary upon receipt of a notice of giving. Giving beneficiaries should be given the option of making the assessment at one of two times – either within a reasonable period of time after receipt of the notice of giving (for example, until the next income tax filing deadline), or, if payment of the charge is deferred, at the time of realization of the giving.

Of course, self-assessment may give rise to a problem of underreporting. Left to their own devises, property owners may understate the benefits they receive from state action. To counter the proclivity of the assessors to exaggerate in their own favor by understating the magnitude of their benefits, the state must employ a mechanism of probabilistic audits and penalties of sufficient magnitude to deter false reporting. We propose a self-assessment mechanism similar to that which we described in our proposal for valuing derivative takings,[257] modeled in part on the income tax enforcement apparatus,[258] meeting the need for low cost and accuracy.

Alternatively, the government could adopt the self-assessment model proposed by Saul Levmore.[259] Levmore pointed out that the incentive of property owners to underreport may be countered by making the assessed value serve as a call and put price. In Levmore's system, third parties could periodically "call" the property, forcing a sale at the self-assessed price. Under this system of forced sales, an underreporting property owner exposes herself to the risk of her property being purchased at a lower than market price. Thus, underreporting is a self-defeating strategy.

Finally, one can simply adopt the assessment of local government assessors as the benchmark for charges. Admittedly, these assessments are not accurate.[260] Yet, they form the basis for tax liability. Furthermore, assuming that the ratio of under-assessments to over-assessments is roughly equal – and we have no reason to assume otherwise – on the whole, the two effects will cancel each other out and the government will collect the amount due.

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[254] *See supra*, Part III.B.
[255] *See supra*, Part III.A.
[256] *See infra*, Part IV.C.
[257] *See* Bell & Parchomovsky, *Takings*, *supra* note 7, 87 VA. L. REV. at ____.
[258] *See* James J. Freedland *et al.*, FUNDAMENTALS OF FEDERAL INCOME TAXATION 962-985 (11th ed. 2000) (surveying the self-assessment, auditing and penalty procedures in the federal income tax apparatus), and studies cited in James Andreoni, Brian Erard & Jonathan Feinstein, *Tax Compliance*, 36 J. ECON. LIT. 818 (1998).
[259] Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771, 779 (1982).
[260] For a discussion of the assessment system and its drawbacks, *see id*. at 771-775.

C. Collecting Charges for Givings

The last stage of the givings process is the collection stage, in which givings beneficiaries pay the giving charge. If the giving is refusable, the charge should be paid within a reasonable time (perhaps a year) of receipt of the benefit. Otherwise, payment of the charge should be deferred until a realization event. Whether payment of the charge is immediate or deferred, givings should be treated together with other associated givings and takings, and the relevant charges and compensations should be offset. An individual who suffers a taking together with a giving should receive, or pay, in accordance with the aggregate value of the government action. If the number of givings beneficiaries is sufficiently small, the givings beneficiaries should make payment directly to takings victims, or the government action should be turned into a private taking.

The collection stage may thus be summarized by the following table.

Table 5. *Collection Stage of Giving Charge*

	Linked to Taking	**Unlinked to Taking**
Refusable	Offset taking and pay remainder of charge, if any	Pay charge
Unrefusable	Offset taking and defer remainder of charge, if any	Defer charge

Where charges are deferred, payment should be made only when the giving benefit is realized. The realization event may be the sale of the affected property, or any other event deemed appropriate.

V. MISGIVINGS

So far, we have demonstrated the need for a law of givings, and sketched out its necessary components. We have laid the foundation for a givings jurisprudence, and we have offered a practical model for identifying chargeable givings, and assessing and collecting charges. In this Part, we take issue with potential objections to our framework. Most importantly, we discuss programs – such as exactions, special assessments and impact fees – that are associated with the core concerns of the law of givings. We also address a host of lesser objections having to do with the practicality of a law of givings, and defining its outer boundaries.

A. Exactions

The first objection that we address is the argument that specialized development fees such as exactions and special assessments adequately address the challenge of givings. An exaction is a required concession imposed upon developers who are granted zoning benefits.[261] Municipalities often impose exactions on developers.[262] Exactions can take

[261] *See supra*, notes 97 and 105.
[262] In a 1991 article, Vicki Been reported that 89% of all communities require dedications and that 58%

various forms, including in-kind dedications for infrastructure, such as roads, parks and schools, and "in lieu" fees for the same purpose. Exactions also include impact fees, or special assessments, to cover the cost of development.[263] The main goal of the imposition of exactions is "to shift to the developer the costs of the public infrastructure that the development requires."[264] Essentially, exactions force developers to internalize the "external cost" they impose on the surrounding community.

One might argue that since developers already pay for the cost they impose on the surrounding community there in no need to charge them for the giving they receive. This argument, however, does not obviate the need for a law of givings, for two main reasons. First, exactions are required only for a small segment of the spectrum of givings. Exactions are assessed only when the municipality is required to make an additional investment in infrastructure.[265] In other cases, exactions are not imposed. Thus, if the giving does not impose any direct cost on the municipality, no exaction will be imposed, and the giving will manage to escape charge.

Second, and more importantly, exactions are not actually aimed at the same problem as givings jurisprudence. Exactions only address out-of-pocket costs incurred by the municipality as a result of givings.[266] They do not at all address the benefit that constitutes the giving. Put differently, exactions only cover the expenses the surrounding community might incur following certain givings. The remaining benefit to the recipient remains unaccounted for, even if the benefit far outweighs the cost of development. This leads to odd outcomes. Assume that New Dork City decides to up-zone Ronald Crump's property, thereby bestowing upon him $50 million dollars in added value. Assume that Crump's construction of the new Crump Tower will result in greater need for municipal services such as transportation and sanitation, requiring the municipality to invest $2 million in infrastructure upgrades. By imposing an exaction on Crump, the municipality prevents Crump from transferring a $2 million cost onto the municipality. The $50 million gain remains untouched.

Our point is not to criticize the imposition of exactions. As should be clear by now, our goal is to achieve full accounting for both the costs and benefits of government action. Exactions are a step in the right direction. However, as the above example illustrates, they fall short of satisfying the need for a givings law.

Similar observations may be made about increased property tax payments that might result from givings. The $50 million increase in the value of Crump's property will produce increased property tax revenues for New Dork City. However, unless the property tax rate is sufficiently high that the present value of all property taxes is equal to the value of the property itself (a highly unlikely occurrence), Crump will be able to pocket the difference between the tax payment and the actual increase in property value resulting from the taking. If the annual property tax rate is 2% of assessed value, for

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demand some sort of fees. *See* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 481 n. 42 (1991).

[263] *See* John P. Dwyer & Peter S. Menell, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 1032 (1998). State courts characteristically uphold impact fees if there is adequate proportionality between the fee and the additional burden imposed on the community as a result of the development. *Id*. at 1035.

[264] Been, *supra* note 262 at 482. Been points out that the shifting of the cost to the developer is desirable for several reasons.

[265] *See* James A. Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, 50 LAW & CONTEMP. PROBS. 85 (1987); Julian C. Jurgensmeyer & Robert M. Blake, *Impact Fees: An Answer to Local Government's Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 418 (1981).

[266] *Id.*

example, the present value of the increased property tax payments will be only $12.5 million (assuming a discount rate of 8%). This contrasts with a charge of $50 million, if Crump actually had to pay for the giving.

In fact, the law of givings would prove useful in resolving some of the difficulties currently plaguing the field of exactions. In the aftermath of *Nollan v. California Coastal Commission*[267] and *Dolan v. City of Tigard*,[268] exactions have been subject to special rationality and proportionality requirements. Exactions that fail to meet the requirements are viewed as regulatory takings, for which compensation must be paid.[269] The scope of *Nollan*'s and *Dolan*'s requirements have proven difficult to define, in light of the fact that givings are so often paired with takings that there are an enormous number of government actions can be creatively described as exactions.[270] The necessity of drafting special requirements for exactions would be eliminated if all givings and takings were properly accounted for.

In short, exactions are hardly an adequate replacement for a law of givings. Indeed, the law of givings is, in some respects, a superior way of examining exactions.

B. Baselines for Givings and Takings

The preceding discussion raises a more general question. Why should giving beneficiaries be asked to pay for anything more than the costs they impose on society? Why should the magnitude of the giving be measured from the baseline of the immediately prior property and land use scheme?

This objection might be a variant of a broader property rights critique of land use law aimed at expanding takings compensation. The expansive property rights critique views property rights as absolute, subject only to the traditional limitation of *sic utero tuo ut alienum non laedas* (one should use one's property in such a manner as not to injure others' interests).[271] On this view, the baseline from which givings and takings should be measured is one in which property owners are subject to few limitations, and many government actions that raise property values should be seen as removals of wrongly uncompensated takings, rather than givings. In our example, the advocate of this critique would argue that the $50 million addition to Crump Tower rightly belongs to Crump, and that he should not be asked to pay for anything other than actual cost Crump imposes on society by way of required infrastructure improvements.

Another version of the objection might take precisely the opposite view, positing that property rights are purely a creature of law, and arguing that the baseline from which givings and takings should be measured is a point of zero property rights.[272] On this view, Crump should be charged for the full $50 million in value of the benefit, but would not be entitled to compensation for down-zoning.

In both versions of the objection, using the legal status quo ante as the baseline for

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[267] 483 U.S. 825 (1987).
[268] 512 U.S. 374 (1994).
[269] *See supra*, notes 56-58 and accompanying text.
[270] *See* Epstein, BARGAINING, *supra*, note 2, at 11; Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 10-11 (2000).
[271] *See* Epstein, TAKINGS, *supra* note 1, at 3-31; Myrl L. Duncan *Property As a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis* 26 ENVTL. L. 1095, 1147 & n. 310 (1996).
[272] Richard E. Levy, *Escaping* Lochner's *Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 392-393 (1995); Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

measuring givings and takings would be attacked as arbitrary and unjust. We elected to use the status quo ante as the relevant benchmark, nevertheless, because this is the baseline generally employed by the courts in takings' cases.[273] As we have shown throughout this Article, takings and givings are inextricably related. Therefore, it would be inconsistent to use one baseline for takings' compensation and another for givings' charges. Doing so would unnecessarily inject additional confusion and incoherence into an already complex body of law.

A related objection concerns the other end of the measuring stick for givings and takings. The extent of the giving or taking has been measured in reference to willingness to pay market value. This measure does not include subjective and idiosyncratic value, and may therefore lead to insufficient charge or compensation.[274]

We do not deny the validity of these concerns. The general critiques of imprecise measurements in the law of takings naturally apply to the law of givings as well, and we do not purport to resolve this puzzle. We simply note the link between givings and takings measurements and follow accepted takings measurements in the law of givings. Again, consistency demands that the same method of calculating damages be employed for takings and givings. In addition, the conventional objection that subjective value is unverifiable by third parties makes it extremely unlikely that policymakers will ever choose to account for subjective harms or benefits resulting from takings and givings. Just as imprecision in the law of takings does not obviate the need for a takings jurisprudence, parallel imprecision regarding givings does not avert the need for a givings jurisprudence.

C. Administering Givings and Takings

Next, we address the concern that creating and administering a law of givings is impractical and overly costly. In this Article, we have sketched out the elements of a givings jurisprudence in order to show that it can be implemented. The self-assessment system, in particular, is designed to reduce administrative costs and to promote implementation.

Nevertheless, one important difference between givings and takings must be acknowledged. Self-assessment for takings compensation should have the side effect of eliminating *de minimis* claims for compensation, because property owners will not prepare self-assessment takings reports if the cost of reporting and obtaining compensation exceeds the actual compensation reward. No such incentive is present regarding self-assessment for givings charges. This problem might be rectified by adding a *de minimis* exception to the givings assessment requirement.[275] The government, for example, could exempt givings from charge if they were lower than a given value. This exemption could serve a function similar to minimum income requirements for income

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[273] As Andrea Petersen has noted, the baseline understanding of property has also been the source of some confusion in takings jurisprudence. Peterson, *Takings Part II*, supra note 59, at 57.

[274] *See* Jesse Dukeminier & James E. Krier, PROPERTY 1121-1123 (4th ed. 1998); Miceli, ECONOMICS, *supra* note 160, at 115-139; *see also Coniston Corp.*, 844 F.2d at 464 ("Compensation [for takings] in the constitutional sense is [] not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to his property. Many owners are 'intramarginal,' meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, they value their property at more than its market value (i.e., it is not "for sale").").

[275] *Compare*, Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 1008-09 (1999) (calling for the introduction of a "de minimis" exception into takings doctrine, and explaining why such an exception is desirable).

tax reporting in reducing transaction costs and eliminating overly small claims. The exemption could also be cast as a standard deduction, allowing even those who are required to file self-assessments to deduct a certain amount from the charge in order to cover administrative costs.[276]

D. Charges and Alternative Remedies

Another potential objection focuses on our choice of remedy. We propose a fair charge as the correct remedial measure for objectionable givings. One could argue, however, that injunctions, not charges, are the adequate remedy for givings. This objection draws on cases, such as *Mahon*,[277] in which the Supreme Court struck down regulation that unduly diminished property values. Reasoning by analogy, one could propose that whenever the state engages in a "chargeable giving" the government act should be invalidated.

We submit that this objection should be rejected for both doctrinal and policy reasons. To be sure, we do not argue that givings should never be enjoined. Clearly, not all givings are permissible. For example, givings that violate the Establishment, Due Process or Equal Protection Clauses by favoring a certain group based on religion, race or gender should certainly be invalidated.[278] Yet, for the reasons that follow, enjoining the government should be the exception rather than rule. First, the enjoinment of regulation that goes beyond the legitimate limits of the police power has been criticized as wrong and baseless. Several commentators have noted that regulation that goes "too far" is simply a compensable taking under the Fifth Amendment.[279] Indeed, in recent cases, starting with *San Diego Gas & Electronic Co. v. City of San Diego*,[280] and ending with *First Evangelical Lutheran Church v. County of Los Angeles*,[281] the Supreme Court seems to have adopted the view of the critics, stating that compensation, rather than injunctive relief, is the correct remedy of aggrieved property owners. This new judicial trend is consistent with both the language and goals of the Takings Clause.

In addition, there are weighty prudential reasons to adopt charge as the appropriate remedy for givings. As we explained, bestowing benefits is an integral part of the job of the government.[282] Barring the government from engaging in givings would strip the government of one of its most fundamental powers. It would also deprive the public of the only effective means to overcome certain collective action and hold-out problems. In a world replete with transaction costs, the coercive power of the government is often the

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[276] *Cf.* Internal Revenue Code, § 63(c), codified at 26 U.S.C. § 63(c) (2000).

[277] 260 U.S. 393 (1922) (voiding the Kohler Act).

[278] *See, e.g., Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994) (striking down law drawn for benefit of religious sect).

[279] *See* Robert I. McMurry, *Comment, Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 U.C.L.A. L. REV. 711 (1982); Roberts, *Mining with Mr. Justice Holmes*, 39 VAND. L. REV. 287, 292 (1986). *But see* Babcock, Mandelker, Siemon, Smith & Williams, *The White River Junction Manifesto*, 9 VT. L. REV. 193, 211-12 (1984). *See also* Thomas E. Schnur, *Note: Compensation and Valuation for Regulatory Takings*, 35 DEPAUL L. REV. 931 (1986) (describing controversy as debate over whether takings are struck down as exceeding police power, or for failure to pay compensation for exercise of eminent domain).

[280] 450 U.S. 621 (1981) (Justice Brennan dissenting). In this case involving an open-space zoning, a five Justice majority decided to dismiss the appeal on the grounds that it was premature. In an important dissent, Justice Brennan, joined by three Justices, opined that the case was not premature, and that if the challenged zoning regulation worked a taking, compensation is the right remedy.

[281] 482 U.S. 304 (1987) (holding that compensation is the remedy mandated by the Constitution when a land use regulation works a taking).

[282] *See supra* Part III.A.

only viable way of improving allocative efficiency,[283] and, as we showed, the government must have both the power to take and the power to give in order to perform its role successfully. Granted, it is important, for all the reasons we stated, to impose a check on the power of the government to give. However, injunctions are an unnecessarily harsh means of achieving this purpose. Assessed adequately, charges provide an effective mechanism for forcing government to internalize harms and benefits without unduly impairing the ability of the government to function. By requiring them to pay for the benefits they receive, charges force beneficiaries to consider the cost they impose on the general public, and accept only givings that effect a net gain. The use of charges also guarantees that when a giving is efficient, the public at large receives adequate consideration in exchange for the giving. Moreover, the use of charges confers the decision-making power on the best decision-maker: the individual property owner. Under our scheme recipients can reject refusable givings. The ability to refuse the giving, and thus, to avoid the charge, provides property owners with sufficient protection against governmental abuse of power. There is no reason, therefore, paternalistic or other, to enjoin the government from giving.

CONCLUSION

In this Article, we laid out the foundations for a law of givings. Givings are ubiquitous in practice, and a theoretical inevitability. Yet, they have received scant scholarly attention, and no consistent doctrinal and theoretical treatment. The Takings Clause in the Fifth Amendment has allowed takings to hog the scholarly limelight, relegating givings to a dark corner of the stage. There, givings have patiently been waiting to be discovered. In this Article, we made the first step on the way to rectify the disparate treatment. Givings are a formative force in the world of property. Indeed, as we showed, it is impossible to devise a comprehensive takings jurisprudence without an understanding of the phenomenon of givings and the relationship between givings and takings.

Givings and takings are mirror images of one another. The same policy rationales that call for a takings law – namely, fairness, efficiency and public choice theory – also mandate a law of givings. The only major difference is that while in the context of takings these underlying policy rationales prescribe compensation, in the case of givings, they call for a charge. By exploring takings law, identifying its essential doctrinal and policy features, and adapting them as necessary, we developed the legal tools to determine when a giving occurs, and when fair charge must assessed. Furthermore, we designed a three-step model of identifying, assessing, and charging for givings, demonstrate the practical administrability of a law of givings. Adopting our policy guidelines would eliminate the lopsidedness of the our property governance system where the general public, via the government, bears the cost it imposes on individuals, but does not share in the benefits it bestows upon individual members. Charging for givings would reduce interest group politics, enhance the efficiency of government decisions and improve the fairness of our property system.

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[283] Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L. J. 1211 (1991); Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).