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Just Compensation, Incentives, and Social Meanings

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TABLE OF CONTENTS

INTRODUCTION

In *Takings and Distributive Justice*,[1] I proposed a progressive interpretation of the Compensation Clause. In his response, published in this issue,[2] Professor Lunney challenges the plausibility and the desirability of my interpretation and proposes an alternative. This Essay compares our approaches. It concludes that Professor Lunney's careful examination of the public choice analysis of takings does refine my theory. Contrary to Professor Lunney's claims, however, these refinements reinforce — rather than undermine — the viability of a progressive takings doctrine.

Parts I and II set the stage by summarizing the principal claims made, respectively, in my original Article and in Professor Lunney's response. Parts III and IV constitute the core of this Essay, vindicating both the plausibility and the normative desirability of my proposed doctrine. Part V provides two examples. A brief conclusion follows.

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1. Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741 (1999).

2. Glynn S. Lunney, Jr., *Takings, Efficiency, and Distributive Justice: A Response to Professor Dagan*, 99 MICH. L. REV. 401 (2000).

I. A PROGRESSIVE TAKINGS LAW

In *Takings and Distributive Justice*, I claimed that takings law can accommodate the ideals of social responsibility and equality, and argued against the conventional wisdom that a relaxed regulatory takings doctrine — one that seeks to minimize the occasions of compensating owners due to governmental regulation of their assets — promotes these ideals.[3] By reconceptualizing two familiar tests in takings jurisprudence — reciprocity of advantage and diminution of value — I proposed a more refined test for distinguishing a taking from a regulation with a view to both civic virtues and egalitarian concerns. Finally, I suggested that, rather than radically transforming the current law, my theory provides a doctrinal vocabulary and normative underpinnings for understanding a significant segment of the already-extant takings jurisprudence.

The premise of a progressive approach to takings law is that ownership is not merely a bundle of rights, but also a social institution that creates bonds of commitment and responsibility among owners and others affected by the owners' properties. Furthermore, property is an expression of a cluster of values — primarily privacy, security, and independence — each of which necessarily entails the distribution as well as the retention of wealth. Property necessarily entails distribution since ownership is a source of economic and, therefore, social, political, and cultural rights and powers, the correlatives of which are other people's duties and liabilities.[4]

Takings and Distributive Justice maintained that a progressive takings doctrine, committed to social responsibility and egalitarian concerns, must not — contrary to some conventional wisdom — be too oblivious to the imposition of disproportionate burdens in the pursuit of public actions. A relaxed takings doctrine, which calls for compensation only in extreme cases, would tend to yield a systematic exploitation of small and relatively less well-off owners, who are ill-equipped to protect themselves.

Rejecting a relaxed takings doctrine of minimal compensation, however, does not mean that progressives, being committed to social

3. For the conventional wisdom see, for example, C. Erwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 764-65 (1986) (arguing that protection against exploitation may not be best guide for property jurisprudence because ban on unjust individual exploitation would necessarily be so broad that it would also prevent desirable government actions); Frank Michelman, *The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein*, 64 U. CHI. L. REV. 57, 69 (1997) (arguing that most regulatory restrictions of land use should be perceived as ordinary examples of background risks and opportunities against which we take our chances as owners of property).

4. For a recent account of the progressive conception of ownership published after *Takings and Distributive Justice*, see JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF PROPERTY (2000).

responsibility and equality, must subscribe to a libertarian regime that would require full compensation in every case. Libertarians would require full compensation every time a taking's impact on one owner is disproportionate to the burden carried by other beneficiaries of that public use.[5] But progressives must reject a regime of full compensation in every case because such a regime would bar any redistribution of society's aggregate resources, wealth, and legal advantages.[6] In addition, progressives should be apprehensive about the libertarian strict proportionality rule because it implies that our mutual obligations as citizens are derived solely from either consent or self-advantage. Thus, the strict proportionality regime underplays the significance of belonging, membership, and citizenship, and it therefore undermines social responsibility.

A takings doctrine attuned to the virtues of social responsibility and equality must therefore avoid both of these extreme positions of uniform no compensation and uniform full compensation. Instead, it should start with a rule of long-term reciprocity of advantage: A public action imposing a disproportionate burden is not a taking as long as the immediate burden on the claimant is not extreme, and the claimant stands to enjoy benefits of similar magnitude from other public actions, even if those benefits are not contemporaneous. This conception of reciprocity of advantage attempts to recognize, preserve, and foster the significance of membership and citizenship. At the same time, this approach still cautiously avoids being too utopian about citizenship by acknowledging the detrimental consequences that a no-compensation regime would have in our non-ideal world and, thus, requiring long-term rough equivalence of burdens and advantages.[7]

A further refinement is necessary. An egalitarian takings doctrine must be cautious lest it consistently require disproportionate contributions to the community's well-being from owners who are either politically weak or economically disadvantaged. A government's claim that a citizen should bear a disproportionate burden of a public action based on the citizen's responsibility toward her fellow citizens is not

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5. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 4, 205, 207 (1985).

6. Professor Lunney suggests that wealth distribution need not rely on takings doctrine, but can instead be accomplished through progressive taxation. Lunney, *supra* note 2, at 424. I have addressed this view in my original article in some detail, and have found it unpersuasive. Dagan, *supra* note 1, at 785-92. For a recent critique of the view that distributive goals are best accomplished through the tax code, see Chris W. Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797 (2000).

7. I also noted that localism can be an important component of long-term reciprocity of advantage: "[The] conception of long-term reciprocity requires some distinction between public actions that benefit localities and public actions of larger governmental bodies. In the former category — where the beneficiary of the burden is one's local community — tolerance toward deviations from proportionality is especially warranted." Dagan, *supra* note 1, at 776.

credible if it systematically targets the weaker sectors of society. This concern is especially warranted when the direct beneficiaries of a government action enjoy significant political or economic power. The egalitarian prong of my proposed takings doctrine addresses these concerns. Where the claimant is weak or disadvantaged, I propose to replace the standard of rough reciprocity of advantage with the more stringent standard of strict proportionality, which then better serves the goals of a progressive takings doctrine.

Notwithstanding these concerns, the socioeconomic status of the claimant should be considered overtly only in extreme cases. In most cases, the egalitarian requirement of a progressive takings regime should be satisfied using a proxy based on the diminution of value test:[8] If the diminution of value inflicted by the public action is measured against the value of the claimant's affected land as a whole (or her total holdings in the same locality), and the applicable threshold is not set at the extreme positions of either total deprivation or *de minimis* reductions, this test yields a built-in disincentive against imposing the public burden on small, politically weak landowners.[9]

Takings and Distributive Justice demonstrated (perhaps surprisingly) that considerations of efficiency also support a progressive takings regime.[10] A progressive takings law is efficient, I maintained, since

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8. My colleague, Professor Roderick Hills, disagrees. He claims that, as a matter of fact, small landowners tend to be politically influential. In contrast, big landowners — developers — in mid-sized American municipalities tend to be politically weak, because their "constituents" are non-resident home-buyers who do not vote in municipal elections. Thus, Professor Hills believes that existing takings doctrine gives too much, rather than too little, protection to individual lot owners — overwhelmingly homeowners, whose politics tend to be NIMBY (not in my back yard) politics. By the same token, current doctrine, in his view, does not give enough protection to big developers who usually represent high-density housing, and therefore low-income households.

If these claims are correct, then my proposed doctrine is seriously misguided, as it strengthens the strong and weakens the weak, contrary to its own normative prescriptions. In other words, under these empirical assumptions, the way to implement my call to use takings law to counterbalance disproportional advantages of political influence is through a very different doctrinal test, one that alters the law to protect developers more, because they are the practical proxies for such home-buyers. *Cf.* Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982) (landowners should have voting power in municipal elections proportionate to their acreage, in order to allow developers to represent their buyers by proxy more equally and effectively).

9. Indeed, *Takings and Distributive Justice* was consciously modest regarding the role that substantive equality can play in takings doctrine. It openly acknowledged "the demanding limitations that planning places on the possibility of promoting social justice through [judge-made] land use law." Dagan, *supra* note 1, at 779. Accordingly, it focused merely on the attempt to avoid any preferential treatment of the better off. At times, Professor Lunney's response ignores this subtlety. *See, e.g.*, Lunney, *supra* note 2, at 417, n.34 and accompanying text.

10. I also maintained that considerations of personality support my progressive test and that it does not unduly hinder the liberty concerns of the better-off. Dagan, *supra* note 1, at 790. Since Professor Lunney's response focuses on efficiency, I also ignore these other considerations. Professor Lunney also briefly refers to a concern of "horizontal equity." Lunney, *supra* note 2, at 413. I have responded to this concern in some detail in my original article and have found it unpersuasive. Dagan, *supra* note 1, at 788-89.

it provides proper incentives to both private landowners and public officials. Because Professor Lunney's critique does not address my arguments about private landowners,[11] I will confine my discussion to public officials.

Assuming that democratic mechanisms make public officials accountable for budget management, compensation is important to create a budgetary effect that forces governments to internalize the costs that their decisions impose on private resource holders. Without a compensation requirement, public officials might suffer from a "fiscal illusion" as to the true social cost of government action. The need to overcome public officials' "fiscal illusion" applies especially when the injured parties are part of the nonorganized public — where they are "occasional individuals," or where they are members of a marginal group with little political influence. In these cases, in which the risk that public officials will dismiss private costs is acute, compensation may be the only feasible counterbalance. In contrast, in cases in which the public action imposes costs on members of powerful and organized groups, the landowners will probably be able to protect themselves politically, even in the absence of required compensation. Even if a powerful landowner suffers a loss due to the public use, the political system offsets this loss (in many cases) by a *quid pro quo* elsewhere, either with regard to planning issues or in other matters.

Thus, a uniform nonprogressive compensation regime distorts the incentives of public officials by systematically encouraging them to impose the burden on members of the nonorganized public or on marginal groups, even where the best choice, from a planning perspective, would place the burden on members of powerful or organized groups. Only a progressive compensation scheme equalizes the pressures that the public authority faces when selecting the land that will bear a public project, and only a progressive compensation scheme induces the public authority to focus solely on planning considerations.

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11. For private landowners, progressive compensation appropriately mediates between two conflicting investment considerations. Compensation is said to be required to prevent underinvestment by risk-averse landowners in their property. However, if the law guarantees the full value of landowners' investments whenever they could have foreseen the prospect of a loss in value as the result of a public use, landowners may inefficiently overinvest. Due to the diminishing marginal utility of income, the concern of inefficient underinvestment by landowners is heightened (and compensation consequently gains in importance) to the extent that the taking affects a more substantial segment of the injured party's estate (all other things being equal). A progressive compensation regime approximates a proper balance since it offsets this increased risk of underinvestment by increasing compensation.

Thus, a private homeowner, who is not a professional investor and who has purchased a small parcel of land with her life savings, may be a typical example where full compensation should be required. In contrast, wealthier individuals — and even more so, broadly-held corporations — who own land as part of diversified investment portfolios — are less risk-averse. Facing a possibility of an uncompensated investment, they are likely to efficiently adjust their investment decisions commensurate with the risk that their land will be put to public use. For extremely wealthy landowners, the concern of under-investment may not mandate full (or even any) compensation.

II. PROFESSOR LUNNEY'S CRITICISMS

Professor Lunney's response discusses only the egalitarian prong of my theory, but he does not address how the diminution of value test (as a proxy for egalitarian concerns) implements this component. Rather, Professor Lunney criticizes my idea of "compensat[ing] more readily or at a higher level the less wealthy property owners."[12] His critique is twofold. First, he claims that "inject[ing] an express distributive justice component into the compensation analysis . . . will not work,"[13] namely, that such a scheme will not effectively neutralize the lobbying pressure of politically powerful contingents. Second, he maintains that even if my scheme does work, "achieving a balance in such a way would prove undesirable."[14]

Professor Lunney discounts the notion that a progressive takings law would generate an effective counterbalance to the lobbying pressure of powerful groups as "implausible."[15] He analyzes two types of cases and anticipates results opposite to those predicted by my theory.[16] First, Professor Lunney discusses cases in which "the government must choose between acting, and thereby imposing a cost on a powerful interest group, and not acting at all."[17] Regarding these "act or abstain" planning decisions, Professor Lunney is not persuaded by my claim that "we need not compensate politically powerful interest groups as readily because their political power will enable them to extract compensation through the give-and-take of the legislative process."[18] The political power to block a specific measure, he maintains, may not be convertible to political power elsewhere. Professor Lunney reminds us that political power "is usually contextual and therefore inherently dependent on the position one is taking."[19] Therefore, a "principled opposition" to a proposed government action on the merits is more effective than "attempted extortion" of compensation.[20] If successful, principled opposition would reveal that the proposed action was "undesirable," and would therefore leave no room for any

12. Lunney, *supra* note 2, at 406.

13. *Id.* at 402.

14. *Id.* at 407.

15. *Id.* at 409.

16. For methodological reasons, I start my discussion with "act or abstain" planning decisions and only afterwards turn my attention to placement planning decisions. Professor Lunney discusses these cases in the opposite order. Nothing but the flow of my argument turns on this reordering.

17. Lunney, *supra* note 2, at 417-18.

18. *Id.* at 418.

19. *Id.*

20. *Id.*

further "log-rolling bargain."[21] Only "[a]n up-front promise of compensation . . . can substantially overcome this public choice problem."[22]

Professor Lunney reaches a similar conclusion regarding cases in which there is a choice between imposing the burden on a relatively powerful and a relatively powerless property-owning group. His claim regarding these cases of placement planning decisions is twofold. As the relative compensation to powerful contingents decreases, he claims, their opposition to the costs of public planning decisions imposed on them "would likely grow stronger and even more strident."[23] By the same token, "as you pay more to the [powerless] landowners, their opposition...would be reduced."[24] Given these consequences, public planning burdens are more likely to be borne by the less powerful, regardless of efficient planning considerations, thereby increasing the likelihood that the planning authority's decision will be regressive and inefficient. Professor Lunney also maintains that we cannot count on "[t]axpayers and other groups competing for government funding"[25] to oppose the higher cost of planning decisions since "[t]hese budget-concerned groups are . . . only indirectly affected by the higher [project] cost that progressive compensation may generate" and are thus unlikely to be an effective counterbalance.[26] At best, trying to force effectively unbiased placing decisions through progressive compensation would result in governmental inaction. The regressive (and inefficient) placement will no longer be affordable; the progressive (and efficient) one "would not be politically viable."[27]

Even if my progressive takings doctrine works as I expect, however, Professor Lunney still would not endorse it for three main reasons. First, the "simpler and more appropriate avenue" of increasing compensation to approximate the landowners' true losses should "tend to quiet" political opposition to placement decisions and thereby achieve my goal.[28] Thus, uniform full compensation encourages planning authorities "to adopt the efficient, rather than the politically-expedient, solution."[29] Funding compensation through progressive taxation is how Professor Lunney would further the proper distributive goals. Second, a progressive compensation scheme would

21. *Id.* at 419.

22. *Id.*

23. *Id.* at 409.

24. *Id.* at 410-11.

25. *Id.* at 410.

26. *Id.*

27. *Id.* at 411.

28. *Id.* at 412.

29. *Id.*

require courts either to second-guess what constitutes socially optimal planning decisions or to separate legitimate from illegitimate uses of political power on the part of affluent powerful groups and "award progressive compensation in those cases in which it appeared that the illegitimate political power was driving" the project placement decision.[30] These determinations — as well as the concept of distributive justice itself — are "the least susceptible to judicial resolution."[31] Thus, Professor Lunney invokes "*Lochner*'s shadow" to warn against the institutional difficulties my theory raises. Finally, while Professor Lunney does not dispute the value of social responsibility and civic virtue, he insists that "these, like all virtues, come from within and cannot be forced by legal rules."[32] A progressive takings regime may force property owners "to give up their property...for the sake of the community," but it can never make them "more virtuous or more responsible."[33]

Professor Lunney also presents an alternative to progressive takings.[34] His interpretation of the Compensation Clause focuses on "whether the government has acted in a manner to deprive the very few of a property interest for the sake of the very many."[35] Requiring compensation in such instances would "eliminate the few's opposition to the measure and thereby improve the legislature's ability both to evaluate the proposed action's merits and to go forward should action prove desirable."[36] Thus, "a uniform few-many test, together with something closer to 'true loss' compensation awards, would achieve the same distributive justice goals if funded through progressive taxation" and it "would prove better able to overcome the efficiency concerns associated with takings."[37]

III. THE INCENTIVES OF PROGRESSIVE COMPENSATION

A. *Public Choice and Public Reason*

The crux of Professor Lunney's complaint about my progressive takings doctrine lies in his analysis of the incentive effects of our competing regimes on the behavior of public officials. If I read him cor-

30. *Id.* at 414.

31. *Id.* at 416.

32. *Id.* at 425.

33. *Id.*

34. Professor Lunney has presented this alternative earlier: Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892 (1992). I have criticized his scheme in Dagan, *supra* note 1, at 753-54.

35. Lunney, *supra* note 2, at 420.

36. *Id.* at 402.

37. *Id.* at 424.

rectly, Professor Lunney has no normative quarrel with social responsibility and equality (although he believes that social responsibility cannot be promoted by law). Moreover, we both agree that a proper regime should neutralize, as much as possible, any biased (non-planning) considerations from the planning authority's decision. We differ, however, as to which regime would do the job.

In discussing this question, I want to use Professor Lunney's helpful refinement of traditional public choice analysis. Most such analyses (including mine, in my original article) conceptualize interest groups' influence only in terms of their wealth, power, and comparative advantage in acting collectively (the "collective action comparative advantage"). Professor Lunney resists this reductionist strategy. He insists that political power is contextual and, more importantly, dependent upon one's position and one's arguments — that the plausibility, and even persuasiveness, of an interest group's lobbying efforts must be taken into account in considering its ultimate influence.[38]

Professor Lunney's refinement on this front seems to me persuasive. Injecting normativity into the public choice analysis is important and valuable. It (implicitly) helps mediate between two accounts of government action.[39] One account understands the government to act as a buffer between conflicting interests and to aggregate their respective pressures. Another, much more sanguine, account sees the government as a loyal servant of the public interest. Each of these accounts has been the subject of some criticism. The former account — public choice theory — is said to undervalue the constraints that public reason imposes on legislative (or administrative) action; thus, it is accused for being positively inaccurate and normatively nihilist.[40] The latter account — public interest theory — is criticized for disregarding the influence of parochial interest groups; thus, it is portrayed as romantic, naive, and frequently — given our non-ideal world in which such influence is prevalent — counterproductive.[41] As I understand it, Professor Lunney's framework transcends this divide. It acknowledges the reality of influences based on wealth, power, and collective action

38. Traditional public choice analysis may present this point as the need to consider the relative abilities of interest groups to mobilize votes. *See* ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 114 (2000). While this point is indeed familiar, I think that the way Professor Lunney recasts it is valuable. As the text below explains, Professor Lunney's formulation focuses the inquiry on the normative power of an interest group's reasons. Thus, the reformulation (implicitly) highlights the importance of the prevalent social meanings that ultimately determine this normative power.

39. On these two accounts of government action, see, e.g., JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 15-21, 32-40 (1997); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34-41, 65-70, 76-81 (1998).

40. *See, e.g.*, MASHAW, *supra* note 39, at 25-27; Croley, *supra* note 39, at 41-56.

41. *See, e.g.*, MASHAW, *supra* note 39, at 27-29; Croley, *supra* note 39, at 70-76, 81-86.

comparative advantage. It still insists, however, that reasons have their own weight.[42] Thus, both public choice and public interest are acknowledged.

I happily endorse this account, which ignores neither material incentives nor social meanings. I believe, however, that my takings theory, building on incentives and social meanings, is improved rather than challenged by using this richer understanding of government.

B. *"Act or Abstain" Planning Decisions*

I believe that the specific conclusion Professor Lunney draws from this framework to the takings context is misguided. Professor Lunney believes that, given the importance of reasons, an interest group's efforts to resist an undesirable public measure must be understood in the binary terms of success (blocking the measure) or failure. Therefore, in his view, there is (almost) no possibility of translating that group's political influence into any type of compensation because the group's justifications for blocking the measure are inapplicable to any other context. Thus, only a *legal* entitlement to full compensation can help neutralize the potentially distorting pressure of strong interest groups.

This conclusion is premised on the view that once an objection to a project is formulated as a commodified claim for a *quid pro quo*, it loses all value. This view, however, is implausible for two reasons. First, in order for Professor Lunney's conclusion to be correct, the persuasiveness of an interest group's reasons should *solely* determine its influence. But if there is *any* truth in the public choice insight of the impact of power, wealth, and collective action comparative advantage, this must be wrong. Even if a shift from an effort to block a measure to an attempt to extract compensation elsewhere detracts from the persuasive power of lobbyists' claims, their material influence does not simply evaporate. Second, even if we focus solely on the *normative* power of the interest group's opposition, it is not clear that such a shift would indeed have the devastating consequences Professor Lunney anticipates. He portrays the choice between blocking an action and requiring compensation as a choice between a (benign) "principled opposition" on the merits and an "attempted extortion" (necessarily invidious) of a *quid pro quo*.[43] But this characterization assumes what must be proven. While I appreciate the a priori advantage of an argument that presents a project as socially undesirable, this is by no means the only type of argument with normative power. In particular, an argument based on distributive distortion — a complaint of majori-

42. *Cf.* Don Herzog, *Externalities and Other Parasites*, 67 U. CHI. L. REV. 895 (2000) (reasons underlie preferences).

43. Lunney, *supra* note 2, at 418.

tarian exploitation — can be just as principled as one targeting the desirability of the proposed government action. Therefore, there is no reason to believe that such an argument would not gain, if perceived to be correct, at least as much sympathy and normative power.[44]

Because a complaint against the distribution of a project's costs can be just as normatively powerful as a complaint against the project's social desirability, and because the non-normative bases of the power of interest groups are, in any event, also significant, it is reasonable to conclude — contrary to Professor Lunney's objection — that power asserted (albeit unsuccessfully) to block a public measure can be translated into power to extract in-kind compensation if the proposed project does go forward.[45] Hence, Professor Lunney is wrong in claiming that only a legal entitlement to compensation can overcome interest group objections where the government's choice is imposing the cost on such a group or not acting at all.[46]

C. *Placement Planning Decisions*

Consider now the other type of case, in which the planning authority faces a choice of placement respecting a given public action. Professor Lunney believes that a progressive takings law tends to produce either regressive placement decisions or government inaction. But again his analysis is flawed.

Professor Lunney's first argument on this point is that, as the relative compensation to powerful contingents decreases, "their opposition . . . would likely grow stronger and even more strident."[47] He seems to be aware that — compared to the current state of the law — my theory would *not* decrease the absolute level of compensation

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44. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1216-17 (1967) (the key to demoralization — a pivotal concern in the utilitarian analysis of just compensation law — lies in the "risk of majoritarian exploitation").

45. *Cf.* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 376 n.89 (2000) ("Lunney fails to recognize that insofar as compensation is a useful way for legislatures to co-opt concentrated interest groups opposed to takings, they will pay compensation voluntarily.").

46. The main example Professor Lunney uses for the "act or abstain" planning decision scenario is *Penn Central v. New York City*, 438 U.S. 104 (1978). I discussed *Penn Central* at some length in my original article. Dagan, *supra* note 1, at 795-99. Following this discussion, Professor Lunney admits that Penn Central shows that progressive compensation does not invariably lead to a defeat of desirable projects. But he still resists progressive compensation because, in his view, progressive compensation generates heightened opposition costs of powerful claimants that are socially undesirable even when their lobbying efforts are ultimately unsuccessful. However, the claim that progressive compensation generates excessive opposition costs — a claim central to Professor Lunney's discussion of the placement planning decision cases, to which I now turn — is untenable. *See infra* text accompanying notes 47-49.

47. Lunney, *supra* note 2, at 409.

granted to affluent landowners, but rather (indirectly, via the proxy of diminution of value) increase the average level of compensation to powerless landowners. Nonetheless, he maintains that

> progressive compensation would still generate more strenuous opposition by the [affluent] contingent . . . [as they] would still have more to complain about because they would not be receiving as much as the [weaker] landowners would have. The perception of unfairness generated by the unequal compensation levels would lead the [affluent] contingent to demand "equal" (and hence fair) compensation.[48]

This statement seems to follow our shared premise regarding the impact of the justificatory power of reasons on an interest group's power. It assumes that a progressive takings law is unfair and thus concludes that the influence of an affluent contingency opposing a measure under such a regime would be stronger than its influence under current rules.

Professor Lunney's assumption, however, begs the question. I certainly agree that, other things being equal, opposition to a patently unfair measure is frequently more powerful than opposition to a fair measure. But a progressive takings regime is not patently unfair. On the contrary, this regime vindicates — better than Professor Lunney's uniform few-many test (as Part IV shows) — the values of social responsibility and equality. Hence, insofar as social responsibility and equality are — or will become — respectable public reasons under a progressive compensation regime, there is no reason to believe that a legal regime that relies on these values would be especially vulnerable to interest group fairness challenges.

Professor Lunney's second argument in support of the claim that a progressive takings law would generate regressive placement decisions is that such a regime would reduce the opposition of weaker landowners to placement decisions that hurt them. It may be true that the prospect of greater compensation would somewhat increase complacency among such groups, but this impact is likely to be rather minimal. As Professor Lunney himself admits, compensation under current law is far from being complete.[49] (It notably does not cover subjective losses.[50]) Thus, even when "just compensation" is granted, a claimant

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48. *Id.* at 409 n.20.

49. *Id.* at 406. Nevertheless, Professor Lunney "defines" just compensation as that level of compensation that makes landowners indifferent. *Id.* at 412 n.26.

50. Good economic reasons exist for the law's choice not to cover subjective (nonpecuniary) losses. Recall that compensation is a kind of insurance, for which all citizens pay (by a tax increase). Conventional economic wisdom says that people are generally not interested in purchasing insurance for nonpecuniary losses because the extra money they will get cannot, by definition, restore the irreplaceable good that they lost. Thus, taxpayers do not value the compensation for the nonpecuniary fraction of their losses in cases of takings more than the money lost in the tax increase. (Notice, however, that although potential takings victims do not want insurance-compensation ex ante, they will still — as the text below claims — want increased compensation ex post in order to minimize their nonpecuniary losses.) *See,*

can hardly be expected to remain indifferent between compensation and the loss inflicted by the public action at issue. Professor Lunney is aware of this difficulty and therefore advocates "something closer to 'true loss' compensation awards."[51] This response, however, is inadequate. The problem is not only with certain doctrinal faults that can be easily reformed. Rather, undercompensation is inherent in the takings scenario: "Both transaction costs and subjective preferences may lead landowners to prefer the status quo — which includes the possibility of voluntary realization — to the forced transfer of their proprietary rights against the fair market value thereof,"[52] however calculated. Therefore, no technical reform of the just compensation formula is likely to satisfy disgruntled landowners sufficiently that they lose interest in lobbying to shift the impact of a public project to other people's land.

Finally, Professor Lunney maintains that if we tried to force the proper placement of the public project through progressive compensation, the likely result would be governmental inaction because budgetary constraints would make placement on the land of weaker owners impossible, while political concerns would preclude building the project on the land of the more powerful landowners.[53] This conclusion is untenable: First, as I indicated above, progressive compensation would not make powerful landowners' resistance to disadvantageous siting decisions much more zealous and vociferous. Furthermore, Professor Lunney's conclusion discounts (or ignores) the fact that invariably, in such situations, some additional pressure will come from the community that needs the project at hand.[54] The community will also be able to marshal normatively powerful arguments in favor of the planning decision. Finally, because the compensation accorded to the less affluent is never higher than the diminution of the fair market value of their land, there is no basis for Professor Lunney's claim that progres-

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e.g., STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 228-31 (1987); Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 521 (1984). *But see* Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1914-16 (1995) (advocating nonpecuniary damages on basis of consumer demand).

51. Lunney, *supra* note 2, at 424.

52. Dagan, *supra* note 1, at 755.

53. Lunney, *supra* note 2, at 418-19.

54. This argument depends on the assumption that the community that needs the project can organize to support it. The extent or intensity of this additional pressure will obviously vary, depending in part on the ability of the benefited group to organize to support the project. Despite potential collective action problems, however, it would not be unreasonable to assume that this additional pressure would be considerable if the proposed project were indeed socially beneficial.

sive compensation will make project sitings on the land of the less affluent prohibitively expensive.[55]

* * *

In contrast to Professor Lunney's arguments, progressive compensation would *not* increase the effective opposition of strong interest groups, and it would *not* significantly decrease the opposition of weaker landowners. It *will* work — as intended — as a legal pressure that increases the cost of placing a project in a way that harms the powerless. Contrary to Professor Lunney's claim, the higher price tag on taking less affluent properties does *not* "introduce an artificial bias" that may distort unbiased siting decisions.[56] Rather, this mechanism works to counterbalance an already-extant bias in the system — the heightened political power of affluent groups — so that planning considerations can once again become the focus of the siting decision.

It is, admittedly, difficult to figure out how much legal pressure is required neatly and exactly to neutralize the non-planning lobbying pressures of such strong interest groups. Nonetheless, it is important to realize that the absence of countervailing legal pressure does not generate the "efficient, rather than the politically expedient, solution," as Professor Lunney implies.[57] Rather, any nonprogressive regime, including Professor Lunney's proposed few-many rule, generates placement decisions that are biased in favor of strong landowners and are

55. The main example Professor Lunney uses to show the inferiority of my progressive compensation proposal in the placement planning decisions scenario is the Watts Freeway Project. He claims that the unfortunate placement of the freeway resulted from the fact that Just Compensation law does not fully compensate, so the more affluent landowners' opposition simply drowned out the poorer landowners' objections due to their heightened political, economic, and social power. Lunney, *supra* note 2, at 404-06. However, the Watts Freeway case may actually illustrate that a uniform full compensation rule will invariably push the burdens of planning decisions on the less well-off simply because the price tag will always be lower. Pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act §§ 4601 *et seq.*, whenever a government project displaces a property owner, the head of the displacing agency must reimburse the displaced owner for the actual and reasonable moving expenses and loss of personal property. *See* 42 U.S.C.A. § 4622. In cases of residential displacement, the government must also pay the reasonable cost of replacement dwelling in cases where reimbursement alone is insufficient to cover this expense, any debt service costs required to finance replacement housing, and any reasonable expenses incurred for evidence of title, recording fees, and any other costs incident to the replacement housing purchase. *See* 42 U.S.C.A. § 4623(a). Subject to the inherent, unresolvable difficulties of any compensation scheme, discussed *supra* note 52 and accompanying text, this formula very nearly approximates "full compensation." And, following precisely the predictions of my theory, at least one of the reasons cited by the Los Angeles Community Redevelopment Agency for their decision to run the highway through Watts and Compton rather than nearer to downtown in the Beverly Hills area was that relocation in the former area was estimated to cost only $50,000 per unit, while relocation in the more expensive areas was estimated to cost almost twice that. *See* William Trombley & Ray Hebert, *Bold Housing Program Develops Big Problems*, L. A. TIMES, Dec. 28, 1987, at 1.

56. Lunney, *supra* note 2, at 415.

57. *Id.* at 412.

thus systematically both regressive and (from a purely planning viewpoint) sub-optimal. Only a progressive compensation scheme improves on — although imprecisely and probably still imperfectly[58] — these undesirable outcomes.[59]

IV. THE SOCIAL MEANING OF PROGRESSIVE COMPENSATION

In the conclusion of his response, Professor Lunney raises doubts as to the propriety of my attempt to promote social responsibility and civic virtue through law. Desirable they are, he admits, but he still claims that "these, like all virtues, come from within and cannot be forced by legal rules."[60] A progressive takings law may generate desirable material results, "[b]ut we should not make the mistake of thinking that we have thereby made [the affected] landowners more virtuous or more responsible. We have simply set the stage for them to make absolutely certain that someone else will have the pleasure of experiencing 'civic virtue' the next time."[61]

This response fails to appreciate the expressive role of rights — in our context, the right to property — in constitutional adjudication. It further undervalues the intricate ways in which legal discourse affects social meanings. Finally, it paradoxically undermines the importance of Professor Lunney's own insight regarding the interaction between power and reasons in the way interest groups influence outcomes.

In characterizing the expressive role of rights, Professor Pildes recently explained that "[r]ights are not general trumps against appeals to the common good,"[62] as they are sometimes mistakenly conceptualized. Rather, in actual constitutional practice, rights "serve as technical means for bringing into court these issues involving the constitutional conception of various common goods."[63] Properly understood,

58. Indeed, in some cases, as Professor Lunney claims, increased relative compensation to less well-off property owners may push the cost of imposing the planning decision on the less well-off higher than the cost of imposing it on the wealthy, even when choosing the land of the less well-off owners is more efficient. *Id.* at 414 n.29. But there is no reason to believe that this effect will be particularly frequent. And there is certainly no reason to think that this imperfection outweighs the regressive distortions of a uniform compensation scheme.

59. At one point, Professor Lunney almost concedes my claim that less compensation would ensure unbiased placement decisions. He admits that a reduced compensation scheme may be needed to compensate for disproportionately vocal lobbying groups. *Id.* at 412 n.27 (relating to "the road contractors' pro-road influence"). This concession admits that increased compensation to less affluent and powerful groups is appropriate to counterbalance the non-planning-related pressures that the affluent are able to bring to bear on planning decisions.

60. *Id.* at 425.

61. *Id.*

62. Richard H. Pildes, *Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 729 (1998).

63. *Id.* at 744.

rights discourse is a means to "constrain the *kind of reasons* that government can act on when it seeks to regulate or intervene in some sphere of activity."[64] Rights discourse enables courts "to attend to the expressive dimensions of governmental action," policing its correspondence to "collective interests and structural concerns."[65]

Takings and Distributive Justice fits within this expressive framework.[66] This interpretation suggests that the Compensation Clause is devoted to realizing not only the common good of individual liberty but also other common goods: social responsibility and equality. Incorporating this multitude of common goods into the meaning of the constitutional right to property redefines the scope of legitimate government intervention. I have already addressed in the previous Part the direct material consequences of this doctrine, but it is significant to appreciate its expressive dimension as well. A progressive takings law is a symbolic public expression of our bonds of concern and solidarity with others, a political reaffirmation of the importance that we attach to social responsibility and civic virtue.[67]

Moreover, this expressive dimension is likely to generate cultural consequences that may feed back into the direct material consequences of the doctrine. The social meaning of the right to property — the common goods we believe this right is meant to realize — defines the realm of normatively powerful objections to government action, as well as the realm of objections that we tend to perceive as merely self-centered, and thus publicly inconsequential. More precisely, as I claim in the remainder of this Part, incorporating a progressive conception of property into takings law is likely to affect the normative power of the claims raised by the parties in a way that reinforces the outcomes intended by the progressive takings doctrine.

It is important not to overstate the claim of the normative influence of takings law: I do not believe that the doctrinal details of takings law, or of any other branch of the law, for that matter, directly shape people's values and preferences — obviously not the preferences and values of those it immediately regulates. The possible cultural consequences of takings law are more subtle in at least two senses.

First, "what may affect people's preferences and values are not specific doctrinal rules (of which they are usually unaware), but rather, the more fundamental legal concepts and institutions. Thus, in our

64. *Id.* at 731 (emphasis added).

65. *Id.* at 761, 744.

66. For an elaborate exposition and defense of this expressive framework, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

67. *Cf.* ROBERT NOZICK, THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS 288-92 (1989).

case, I do not claim that the specific contours of the compensation regime of takings law have any expressive function."[68] Rather, I claim that, given its prominence and popular visibility, "takings doctrine may have significant ramifications on our conception of ownership, and that ownership — a concept of popular use that is legally constructed — may affect people's preferences and values."[69] In other words, my proposed theory expresses a progressive approach to ownership that internalizes civic virtues and egalitarian concerns about distribution into the concept of property. And it is by vindicating this progressive understanding of ownership that a progressive takings law may help reshape our vision of our responsibilities as owners, our expectations of owners, and the limits of what we perceive to be the legitimate interests of owners.[70]

Second, even the more fundamental legal concepts and institutions — in our case, ownership — do not directly affect the preferences and values of the people they regulate. Rather, because people's decisions are "based in part on their perception of the values, beliefs, and behavior of other individuals," doctrines that affect the social meaning of fundamental legal concepts and institutions — such as the rules that determine our understanding of ownership — exert social influences that eventually affect the regulated subjects.[71]

Even considering these two caveats, critics — such as Professor Lunney — may be alarmed by any reference to the value-shaping function of law. The concern is typically twofold. First, one should not "assume too readily that the government will exercise this [function] in a benign fashion."[72] Second, legal intervention "may weaken, rather than foster, an individual's capacity for moral choice" by converting moral action to one induced by "the individual's selfish desire to avoid law's sanction."[73]

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68. Dagan, *supra* note 1, at 791 n.177.

69. *Id.*

70. For the crucial importance of re-negotiating the meaning of the concept of property given its "normative resilience," see Jeremy Waldron, *The Normative Resilience of Property*, *in* PROPERTY AND THE CONSTITUTION 170, 190-91, 195 (Janet McLean ed., 1999). *See also*, *e.g.*, Kevin Gray & Susan Francis Gray, *Private Property and Public Propriety*, *in* PROPERTY AND THE CONSTITUTION 11, 15 (Janet McLean ed., 1999) ("[F]airly huge outcomes will turn on whether we attribute continued vitality to the unqualified exclusory function of 'property' or choose instead to fashion our property thinking to accord with more inclusive, more integrative visions of social relationship.").

71. *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 365 (1997); *see also* Hanoch Dagan, *In Defense of the Good Samaritan*, 97 MICH. L. REV. 1152, 1172 (1999); Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1065 (1998).

72. Lunney, *supra* note 2, at 424.

73. *Id.* at 425.

A cautious attitude toward governmental action is always warranted.[74] But notice that the caution about law's stance towards fundamental moral choices does not apply merely with respect to legal regimes that attempt to promote other-regarding values. Rather, it applies, and with identical force, with regard to libertarian legal regimes. As an important social institution, law cannot avoid affecting — in the modest sense described above — popular consciousness.[75] Therefore, the question is not whether law should be in the business of affecting values, but rather which values law should promote.[76]

To be sure, there are cases in which law's coerciveness indeed undermines its normativity. Where the goals or the means of a legal norm are overly ambitious *vis-à-vis* people's preexisting preferences, they are perceived as unreasonable, maybe even offensive.[77] In such cases, law is devoid of any normative impact. Its recipients, like Holmes' bad man, respond solely to its sanctions.[78]

But the progressive takings doctrine I propose does not fall into this trap. It is consciously modest respecting the disproportionality of the burden imposed in the name of social responsibility. Moreover, it justifies the denial of compensation only if such burden is likely to be offset by benefits of similar magnitude. Finally, the material impact of my proposed doctrine would be to increase the level of compensation granted to powerless landowners *without* decreasing the compensation afforded to affluent landowners. Thus, progressive takings law, as I understand it, does not eliminate people's capacity to make moral choices voluntarily. Consequently, it does not reduce the moral worth of human action.[79]

Having these refinements in mind, it is significant that Professor Lunney's developed understanding of interest group influence help-

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74. *See supra* text accompanying note 5.

75. *See, e.g.*, CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, *in* LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 218-19 (1983); Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, *in* LAW IN EVERYDAY LIFE 21, 27-32, 51-54 (Austin Sarat & Thomas R. Kearns eds., 1993).

76. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 171 (1921):

> Every time [judges] interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy....

77. Dagan, *supra* note 71, at 1172-73; Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

78. OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 171 (1920). *But cf.* Guido Calabresi, *Two Functions of Formalism*, 67 U. CHI. L. REV. 478, 485, 488 (2000) (discussing the Italian approach to the role of law as a propounder and protector of ideals and implying that, as such, it is bound to fail in practice).

79. I have discussed the relationship of law and altruism in more detail elsewhere. Dagan, *supra* note 71, at 1169-73.

fully highlights the importance of the social meaning of a progressive takings law. Insofar as takings law affects, to some extent, the meaning of ownership, it affects the normative power of various claims of owners and thus their actual influence. The persuasiveness of owners' complaints — on the importance of which Professor Lunney rightly insists — is thus, to an extent, endogenous to takings law and cannot be regarded, as Professor Lunney regards it, as an external, preexisting datum that guides takings law. Therefore, by reshaping the meaning of ownership to include concerns for distribution and civic virtues, a progressive takings law reshapes our understanding of what constitutes the appropriate distribution of a public action's costs. This result, in turn, affects the normative power of interest groups' opposition in a way that *reinforces* the material progressive outcomes I anticipated in my original article.[80]

V. TWO EXAMPLES

Before I conclude this Essay, I wish to turn to two examples. These examples help illustrate the practical differences between Professor Lunney's position and mine. They also demonstrate that — in contrast to Professor Lunney's insinuation[81] — my progressive takings theory, initially developed in the context of governmental interferences with land ownership, can easily be extended to other resources as well. These examples[82] further vindicate the predictability of a principled progressive takings law, contrary to Professor Lunney's opposite innuendo,[83] and in sharp contrast to the contemporary chaotic state of takings doctrine.[84] Finally, these examples show that Professor Lunney's admonitions regarding the insurmountable (*Lochner*-like) difficulties of judicial competence my theory generates are highly exaggerated.

Both examples involve cases in which the government settles a claim in a way that affects the rights of individual citizens. In the first example, the government's settlement with another sovereign limits a citizen's claim against that sovereign. While the Supreme Court in

80. Jeremy Bentham has already insisted on law's limited, but significant, ability to "manipulate expectations" regarding property. Jeremy Waldron, *Supply Without Burthen Revisited*, 82 IOWA L. REV. 1467, 1479-80 (1997).

81. Lunney, *supra* note 2, at 417 n.34. The examples Professor Lunney uses are also taken exclusively from the context of landownership.

82. As well as the three examples I used in *Takings and Distributive Justice*, *supra* note 1, at 792-801.

83. Lunney, *supra* note 2, at 422.

84. *See, e.g.*, Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I-A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1301-04 (1989).

Dames & Moore v. Regan[85] left open as unripe the question of whether such a settlement constituted a taking,[86] Justice Powell noted in concurrence that, "[t]he Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a [sic] relatively few persons and subject to the jurisdiction of our courts."[87] Lower courts have followed Justice Powell's theory that compensatory claims with which a government has interfered are "property interests" for takings purposes, and have accordingly scrutinized the constitutionality of such governmental interferences.[88]

The leading case in this context is *Shanghai Power v. United States*.[89] An American corporation sought compensation for its lost claim against China resulting from China's confiscation of the company's power plant in Shanghai. The President extinguished all outstanding claims against China in the process of establishing diplomatic relations, and the company's portion of the settlement, about $20 million, was far less than the company's claim of $144 million.[90] Judge Kozinski concluded that there was no compensable taking. First, although the company did bear a disproportionate loss in the short term, there was no radical disproportionality; the company did recover some amount of its losses. Second, the court noted that the President's ability to establish good relations with foreign nations was what made foreign trade and travel for Americans and American corporations possible.[91] In the long-term, the company stood to benefit as a long-term trader, and thus no compensation was necessary notwithstanding the short-term disproportionate loss.

This case vividly demonstrates the applicability of my progressive theory in a nonland context. The considerations raised by Judge Kozinski for denying compensation nicely mirror my proposed interpretation of the reciprocity of advantage test: Long-term reciprocity suffices to deny compensation, even where the immediate burden sustained by the claimant is clearly disproportionate. Moreover, because the company was a strong business entity able to fend for itself in negotiating with the government, this case does not present any egalitarian concerns that would have justified a stricter proportionality analysis.

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85. 453 U.S. 654 (1981).

86. *See id.* at 688-89.

87. *Id.* at 691.

88. *See, e.g.*, *In re* Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1310 (9th Cir. 1982); Langenegger v. United States, 756 F.2d 1565 (Fed. Cir. 1985).

89. 4 Cl. Ct. 237 (1983).

90. *Id.* at 239.

91. *Id.* at 244-46.

Furthermore, *Shanghai Power* is a classic example of a case in which Professor Lunney's "few-many test" would require compensation: Few claimants suffered substantial losses in the name of a public action benefiting the public as a whole. This type of case should have presented a conspicuous example for Professor Lunney's claim that compensation is needed in order to prevent concentrated interest groups from skewing the authorities' social calculus and blocking desirable public actions. As we see, however, this warning is ungrounded; the claimants did not block the settlement.[92] To be sure, as an effective interest group, these traders may well have succeeded in extracting some in-kind compensation from the pertinent governmental agency. But this, of course, only vindicates the redundancy of a legal entitlement to compensation, rather than its necessity.

Shanghai Power is a case in which Professor Lunney's few-many test requires compensation, whereas my progressive takings doctrine justifies Judge Kozinski's no-compensation ruling. My second example involves an inverse case, in which, according to my theory, compensation should be awarded, whereas Professor Lunney's approach would probably result in the denial of any compensation claim.

Consider the recent settlement between the tobacco industry and the States. In another article, Professor White and I demonstrate that this settlement is closely analogous to the *Dames & Moore* pattern of government settlements and extinguished claims.[93] More precisely, we show that the tobacco settlement may generate statutory limitations on the tobacco industry's future tort liability to private litigants.[94] We also show that, even absent such direct curtailment of citizens' claims, there may be some indirect evidence — the States' receipt of industry payments in excess of their preventive and ameliorative costs and their spending of such funds on causes that have nothing to do with the injured citizens' interests — that the tobacco settlement may sacrifice the interests of injured citizens.[95]

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92. Professor Lunney's discussion of *Penn Central* may imply this response to my analysis of *Shanghai Power*. Even if the beneficial public action was not blocked, progressive compensation may still have generated heightened opposition costs that are socially undesirable. However, as I explain above, the claim that progressive compensation generates excessive opposition costs is unconvincing. *See supra* text accompanying notes 47-49.

93. Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354 (2000).

94. This would reintroduce the McCain Bill that would have explicitly capped injured smokers' compensatory claims and barred punitive damages awards and class actions. *Id.* at 369-70.

95. *Id.* at 371-72. To clarify: the case would have been different if the funds were held in trust for use by injured citizens.

Can injured smokers invoke the Fifth and Fourteenth Amendments if these concerns turn out to be true?[96] Do such governmental interferences with citizens' compensatory claims justify compensation?[97] Professor Lunney's test seems to suggest a negative answer, since the potential claimants — the injured smokers — are many and dispersed.[98] They are of the "occasional individual" type, part of the nonorganized public. They have no specific political influence that poses a threat to beneficial public actions involving a curtailment of their interests. Hence, compensation is not required to buy their cooperation.

Professor White and I, however, give the exact opposite answer to this question. In our view, governmental interference with the legal claims of injured citizens in the name of the public good cannot be deemed just unless it is accompanied by compensation.

To see why, consider again the doctrine I advanced in *Takings and Distributive Justice*.[99] It is not sufficient, under the progressive approach to takings, to show disproportionality between the benefits accruing to the injured smokers through the tobacco settlement and the harm they suffer insofar as the settlement interferes with their compensatory claims against the industry. The key lies again in the requirement of long-term reciprocity. This requirement insists that probable, and not merely theoretical, reciprocity take place. The mere fact of the owner's membership in the benefited community cannot be of enough advantage to offset a tangible disproportionate loss. Long-term reciprocity further safeguards against too extreme a transient imbalance by disallowing overly excessive private burdens. In the case of the tobacco settlement, this requirement patently fails to obtain. It is hard to see what future probable benefits could offset the very significant harm (diminution of value) of injured smokers once the government interferes with their compensatory claims against the tobacco industry. Absent a *Shanghai Power*-like finding of long-term reciprocity, compensation should be — according to my proposed doctrine — required.

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96. Class actions advancing such claims have been recently filed. *See* Stephen Labaton, *Medicaid Smokers Seek to Gain Share of States' Settlement*, N.Y. TIMES, January 26, 2000, at 11.

97. Governmental interferences with citizens' punitive damages awards present complex questions that cannot be addressed here. *See* Dagan & White, *supra* note 93, at 416-24.

98. Glynn S. Lunney, Jr., *Responsibility, Causation, and the Harm-Benefit Line in Takings Jurisprudence*, 6 FORDHAM ENVTL. L.J. 433, 440-41 (1995) ("courts should focus on whether government has: (i) changed or restricted property rights that are (ii) of significant value *only* to a *very few* to benefit the very many. . . . If such singling out has not occurred, then a court should allow the government to impose the rights change without compensating the adversely affected property holders" (emphasis added)); *see also id.* at 497-98 (same).

99. Other approaches to takings also reach similar conclusions. Dagan & White, *supra* note 93, at 415.

The egalitarian concerns of my progressive takings doctrine further bolster this conclusion. In order to see why, we do not need to second guess the socially optimal decision or to separate legitimate from illegitimate political power, as Professor Lunney's *Lochner*-ism line of critique maintains. Rather, it is enough for us to evaluate the political power of the claimants, an evaluation which is surprisingly similar to the questions Professor Lunney's theory asks us to address.

Whereas the inquiry my theory requires is analogous to the inquiry needed under Professor Lunney's theory, our conclusions are strikingly contradictory. In my view, the fact that the (many and dispersed) injured smokers are devoid of any political clout supports — rather than undermines — the urgency of compensation. Without a strong constitutional guarantee, the interests of injured citizens may easily be disregarded, and public officials may use their compensatory damages for more politically-visible purposes. Neither distributive justice nor efficiency is promoted by inducing these perverse incentives.

CONCLUSION

Professor Lunney helpfully advances the public choice analysis of takings law by insisting that the social persuasiveness of interest groups' claims, and not only their wealth, power, and collective action comparative advantage, determines their impact on public decisions. This insight highlights the significance of the social meaning of the constitutional right to property, which is, in turn, affected by the way society shapes takings law. Hence, this refined public choice analysis requires us to interject the evaluation of these cultural consequences of takings law into the more directly material consequences of our doctrinal alternatives.

Taking these implications seriously bolsters, rather than frustrates, the progressive approach to takings. Professor Lunney's response emphasizes the significance of my proposal to graft social responsibility and equality onto takings law. It also reinforces, rather than undermines, my argument that takings doctrine must supply an effective counterbalance to the "natural" power disparity in society in order to ensure unbiased governmental decisions.