Wyoming Law Review

Volume 14 | Number 1 Article 3

January 2014

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Comment

Unjust Compensation: Allowing a Revenue-Based Approach to Pipeline Takings

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I. INTRODUCTION

"[A]ny system of weak property rights will necessarily lead to political mischief."[1]

Since the United States Supreme Court decided *Kelo v. City of New London* in 2005, most scholarly criticism and state-level legislative reform regarding governmental takings has focused on narrowing the definition of "public use" for which land may be taken.[2] These reforms have been beneficial to landowners, but they represent only part of the solution.[3] Little reform has focused on "just compensation;" as a result, the concept remains substantially where it stood a hundred years ago.[4] Because the concept has not kept pace with the times, landowners generally do not receive just compensation for takings.[5] The problems are especially stark in natural resource-rich states.[6] Owners of a mineral estate benefit financially from partnering with extraction companies by negotiating to receive a percentage of production.[7] Landowners negotiating a pipeline easement,

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[1] Richard A. Epstein, *The Takings Clause and Partial Interests in Land: On Sharp Boundaries and Continuous Distributions*, 78 BROOK. L. REV. 589, 590 (2013) [hereinafter Epstein].

[2] Marisa Fegan, *Just Compensation Standards and Eminent Domain Injustices: An Underexamined Connection and Opportunity for Reform*, 6 CONN. PUB. INT. L.J. 269, 269 (2007) ("[J]ust compensation remains somewhat in the shadows of the takings debate.").

[3] *Id.*

[4] Fegan, *supra* note 2, at 269; Matthew Cory Williams, Note, *Restitution, Eminent Domain, and Economic Development: Moving to a Gains-Based Conception of the Takings Clause*, 41 URB. LAW. 183, 192 (2009) ("[W]hat needs to be fixed is not the interpretation of the 'public use' clause, but the amount of the 'just compensation' paid to condemnees.").

[5] *See* Amanda Buffington Niles, *Eminent Domain and Pipelines in Texas: It's as Easy as 1,2,3—Common Carriers, Gas Utilities, and Gas Corporations*, 16 TEX. WESLEYAN L. REV. 271, 280, 292 (2010) ("[L]andowners' rights have been chiseled down to almost none . . . ."); John A. Chalk, Sr. & Sadie Harrison-Fincher, *Eminent Domain Power Granted to Private Pipeline Companies Meets with Greater Resistance from Property Owners in Urban Rather than Rural Areas*, 16 TEX. WESLEYAN L. REV. 17, 21 (2009) ("Much of the litigation in eminent domain law deals with challenges to the amount of compensation paid to the property owner for the taking."); THOMAS J. MICELI, THE ECONOMIC THEORY OF EMINENT DOMAIN: PRIVATE PROPERTY; PUBLIC USE 153 (2011) (explaining the importance of price in eminent domain: forced sales increase efficiency by overcoming bargaining costs but result in too many sales when the price is set low).

[6] Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L. REV. 651, 651 (2008).

[7] *See* RICHARD W. HEMINGWAY, LAW OF OIL AND GAS § 2.5 (3d ed. 1991). Mineral owners receive a "royalty," or a portion of production, as compensation for allowing mineral development. *Id.*

however, are restricted in their negotiations by the threat of eminent domain.[8] This looming threat results in undercompensation.[9]

To provide context, the Background first briefly explains the oil and gas production process.[10] Second, the Background outlines the history of constitutional takings and current valuation methodology for determining just compensation.[11] Third, the Background explores the growing unrest with takings valuations and select psychological aspects of compensation.[12] Finally, the Background provides information on compensation structures under the Federal Telecommunications Act (FTA).[13]

By way of argument, the Analysis first demonstrates how current compensation for pipeline easements fails to fully compensate landowners and is therefore "unjust."[14] Next, the Analysis emphasizes how revenue-based payments—payments based on a percentage of the value of the material flowing through a pipeline—for pipeline easements represent a "just" alternative approximation of a landowner's loss in a condemnation situation.[15] Third, the Analysis explains the policy benefits to allowing revenue-based compensation.[16] Fourth, the Analysis demonstrates why critics' likely arguments against revenue-based payments fail.[17] Finally, the Analysis suggests avenues for implementation at the state level.[18]

II. BACKGROUND

A. Oil and Gas Production Process

Getting oil and gas to market involves more than just extraction. At the wellhead, raw oil and gas contains sediments, impurities, and water from the

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[8] *See* Chalk & Harrison-Fincher, *supra* note 5, at 21 ("Eminent domain law presently allows the landowner few choices when challenging the condemnor's right to take."); Douglas Ayer, *Allocating the Costs of Determining "Just Compensation,"* 21 STAN. L. REV. 693, 714 (1969) ("Many . . . condemnees may feel forced to accept an offer they regard as insufficient because they perceive an imbalance in bargaining weapons and conclude that they lack effective means of resisting.").

[9] Fegan, *supra* note 2, at 269 ("[I]nadequate compensation of property owners is greatly to blame for unjust or inefficient takings."); Williams, *supra* note 4, at 190.

[10] *See infra* notes 19–24 and accompanying text.

[11] *See infra* notes 25–76 and accompanying text.

[12] *See infra* notes 77–118 and accompanying text.

[13] *See infra* notes 119–130 and accompanying text.

[14] *See infra* notes 137–157 and accompanying text.

[15] *See infra* notes 158–189 and accompanying text.

[16] *See infra* notes 190–209 and accompanying text.

[17] *See infra* notes 210–216 and accompanying text.

[18] *See infra* notes 217–224 and accompanying text.

formation.[19] The oil and gas requires processing in order to become marketable.[20] First, the processing systems remove rock particles and water.[21] Next, the systems separate oil and gas, which are transported via "gathering" pipelines to central processing stations to be further processed for their separate markets.[22] From the "tailgate"—the end of these plants—"pipeline" quality gas flows through additional pipelines to be sold as a commodity for industrial, commercial, and residential applications.[23] To facilitate this lengthy process, pipelines must often cross multiple property lines, requiring oil and gas companies to negotiate easements with federal, state, and private landowners.[24]

B. History of Takings

The United States Constitution makes no guarantee that a person owning land will be free from the government taking that land.[25] Rather, the Fifth Amendment provides only that land must be taken for a "public use" and that the landowner will be paid "just compensation."[26]

1. Public Use

The Fifth Amendment provides that a taking must be for a public use, which historically meant actual use by the public.[27] Since the end of the nineteenth

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[19] BERNARD TAVERNE, PETROLEUM, INDUSTRY, AND GOVERNMENTS: A STUDY OF THE INVOLVEMENT OF INDUSTRY AND GOVERNMENTS IN THE PRODUCTION AND USE OF PETROLEUM 11 (2d ed. 2008); *see* NaturalGas.org, *Processing Natural Gas*, http://www.naturalgas.org/naturalgas/processing_ng.asp (last visited August 1, 2013).

[20] *See* TAVERNE, *supra* note 19, at 11; *Processing Natural Gas*, *supra* note 19.

[21] TAVERNE, *supra* note 19, at 11. "Heater treaters" separate oil and water at the wellhead. JOHN S. LOWE, OIL AND GAS LAW IN A NUTSHELL6 (4th ed. 2003). "Separators" separate oil and natural gas at the wellhead. *Id.* Hydraulic fracturing requires further processes for the water that flows back from the water-intensive injection procedures used ("flowback" or "produced water"). Wally Braul & Barclay Nicholson, *Shale Gas and Hydraulic Fracturing in the United States and Canada*, *in* SHALE GAS: A PRACTITIONER'S GUIDE TO SHALE GAS & OTHER UNCONVENTIONAL RESOURCES 41, 41 (Vivek Bakshi ed., 2012).

[22] TAVERNE, *supra* note 19, at 11.

[23] *Processing Natural Gas, supra* note 19.

[24] *See, e.g.*, Niles, *supra* note 5, at 271.

[25] *See* U.S. CONST. amend. V; JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 232 (1990) ("[T]he prohibition against takings for public use without just compensation . . . has been in practice almost unrecognizable as a barrier to governmental power.").

[26] *See* U.S. CONST. amend. V. The relevant portion states, "nor shall private property be taken for public use, without just compensation." *Id.* The Fourteenth Amendment applies the requirements of the Fifth Amendment to the states. *See Malloy v. Hogan,* 378 U.S. 1, 8 (1964).

[27] U.S. CONST. amend. V; Kelo v. City of New London, Conn., 545 U.S. 469, 479 (2005); *see also* Paul W. Tschetter, *Kelo v. New London: A Divided Court Affirms the Rational Basis Standard of Review in Evaluating Local Determinations of 'Public Use,'* 51 S.D. L. REV. 193, 210 (2006) (noting that early takings were uncontroversial, "as public uses were commonly recognized and accepted.").

century, however, the United States Supreme Court has defined public use as "public purpose."[28] This broader definition led to a key decision that sparked public outcry about the use of eminent domain.[29]

In 2000, the City of New London, Connecticut sought to condemn an area of waterfront property and revitalize it in a way that it hoped would increase jobs and tax revenue.[30] The unwilling sellers challenged whether the City's stated purpose for the taking was a "public use."[31] The relevant Connecticut statute determined economic development projects were a public use in the public interest.[32]

The City argued, and the Court agreed, that the new development would generate higher tax revenues, thus indirectly benefiting all New London citizens.[33] The Supreme Court gave broad latitude to the Connecticut state legislature's determination of what constituted public use.[34] The Court held the takings "unquestionably" satisfied the constitutional requirement of public use, but emphasized the state legislature's ability to define public use more narrowly.[35]

Because of the negative public response to *Kelo*, state legislatures around the country reformed their states' eminent domain legislation to more narrowly define "public use."[36] Within two years of the decision, forty-two states reformed their

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[28] *Kelo*, 545 U.S. at 478–79. (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158–64 (1896)); Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 244 (1984)); *see also* Tschetter, *supra* note 27, at 210–12 (correlating the changes in definition to the changing economic landscape of America); John M. Zuck, Kelo v. City of New London*: Despite the Outcry, The Decision is Firmly Supported by Precedent–However, Eminent Domain Critics Still Have Gained Ground*, 38 U. MEM. L. REV. 187, 194 (2007) (noting the mid-twentieth century change of including strictly economic purposes as "public use" and admitting these purposes have "an ostensibly less overt connection to the public as a whole."); Nedelsky, *supra* note 25, at 232 ("[I]n practice 'public use' has long been defined so broadly that it is almost no barrier [to government action] at all.").

[29] Zuck, *supra* note 28, at 194, 221. *But see* Frank Michelman, *Tutelary Jurisprudence and Constitutional Property in* LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 127, 127 (ed. Ellen Frankel Paul & Howard Dickman 1990) (stating the uncertainty of takings fifteen years before *Kelo*: "Uneasy lies the state of property rights in American constitutional law.").

[30] *Kelo*, 545 U.S. at 472.

[31] *Id.* at 475.

[32] *Id.* at 476 (citing CONN. GEN. STAT. §§ 8-186 to 8-200b (2005)).

[33] *Id.* at 472, 483.

[34] *Id.* at 480–83.

[35] *Id.* at 482–84; Tschetter, *supra* note 27, at 193; Zuck, *supra* note 28, at 193; *see also* Nedelsky, *supra* note 25, at 232.

[36] *See* Tschetter, *supra* note 27, at 194–96; Matt Micheli & Mike Smith, *The More Things Change, the More Things Stay the Same: A Practitioner's Guide to Recent Changes to Wyoming's Eminent Domain Act*, 8 WYO. L. REV. 1, 2 (2008); Klass, *supra* note 6, at 652 ("[T]he issue of what constituted a public use for purposes of eminent domain authority dominated the media, dinner conversations, state and federal legislative sessions, and highway billboards."); JOHN RYSKAMP, THE EMINENT DOMAIN REVOLT: CHANGING PERCEPTIONS IN A NEW CONSTITUTIONAL EPOCH 123–165

eminent domain statutes.[37] Most reforms, however, focused on the sovereign's exercise of eminent domain.[38] Accordingly, many states still allow certain private entities to exercise the right of eminent domain over private land.[39] This is especially true in western, natural resource-rich states.[40] For example, state constitutions grant utilities, railroads, and pipeline companies the power of eminent domain.[41] Private entities may only condemn property for public use.[42] But, as in *Kelo,* these natural resource-related takings are justified based on the economic benefit accruing to the public.[43] In addition, some state legislatures have categorically defined natural resource companies' takings as public.[44] Because statutes in many western states expressly provide that a natural gas pipeline is a public use, the only real battle becomes how much the landowner will receive in compensation.[45]

(2007) (discussing political, judicial, and public outcry); KYLE SCOTT, THE PRICE OF POLITICS: LESSONS FROM KELO V. CITY OF NEW LONDON 119 (2010) (noting that *Kelo* was the rare political issue that brought together the NAACP and the Goldwater Institute).

[37] Castlecoalition.org, *50 State Report Card*, (2007), *available at* http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf; Zuck, *supra* note 28, at 221.

[38] Klass, *supra* note 6, at 651, 653 ("[T]he public debate over economic development takings since Kelo has missed the opportunity for a more robust analysis of eminent domain because it . . . ignores private takings.").

[39] *See, e.g.*, WYO. CONST. art. I, §§ 32–33; ND CONST. art. I, § 16; COLO. CONST. art. 2, § 14; IDAHO CONST. art. I, § 14; A.R.S. CONST. art. 2, § 17; *also* Chalk & Harrison-Fincher, *supra* note 5, at 17 ("Most people associate the right of eminent domain with governmental entities."); Klass, *supra* note 6, at 651 (also noting that most reforms have been procedural); Stanley A. Leasure & Carol J. Miller, *Eminent Domain–Missouri's Response to Kelo*, 63 J. MO. B. 178, 186 (2007).

[40] Klass, *supra* note 6, at 652.

[41] *See, e.g.*, WYO. CONST. art. I, § 33; ND CONST. art. I, § 16; COLO. CONST. art. 2, § 14; IDAHO CONST. art. I, § 14; A.R.S. CONST. art. 2, § 17; Niles, *supra* note 5, at 280; Klass, *supra* note 6, at 651.

[42] *See, e.g.*, TEX. CONST. art. I, § 17; WYO. CONST. art. I, § 33; ND CONST. art. I, § 16; John S. Gray, *The Door Opens to Challenge Some Pipeline Claims of Eminent Domain*, 50 HOUS. LAW. 43, 43 (2012).

[43] *See* Kelo v. City of New London, Conn., 545 U.S. 469, 474 (2005); Asmara Tekle Johnson, *Correcting for Kelo: Social Capital Impact Assessments and the Re-Balancing of Power Between "Desperate" Cities, Corporate Interests, and the Average Joe*, 16 CORNELL J.L. & PUB. POL'Y 187, 198 (2006) (suggesting that powerful corporate interests gain the most from eminent domain); Klass, *supra* note 6, at 652. Specifically, western courts have cited their states' dependence on natural resources. *Id.* In Texas, the courts have determined the right of private entities to exercise eminent domain "reflects a legislative determination that [its exercise] serves the public interest." Chalk & Harrison-Fincher, *supra* note 5, at 18.

[44] TEX. NAT. RES. CODE ANN. § 111.019(a) (West 2012); ARIZ. REV. STAT. ANN. § 12-1111(14) (2012); COLO. REV. STAT. §§ 38-2-104, 38-1-201(1)(a) (2012); IDAHO CODE ANN. § 7-701(4) (2012); MONT. CODE ANN. § 70-30-102(31), (44) (2012); NEV. REV. STAT. § 37.010(5)-(6) (2012); N.D. CENT. CODE § 32-15-02(5),(10) (2012); OKLA. STAT. tit. 27, § 6 (2012); S.D. CODIFIED LAWS § 45-5-1 (2012); UTAH CODE ANN. § 78-34-1(5), (6) (LexisNexis 2012); WYO. STAT. ANN. § 1-26-815 (2012).

[45] Laura A. Hanley, *Judicial Battles Between Pipeline Companies and Landowners: It's Not Necessarily Who Wins, But by How Much*, 37 HOUS. L. REV. 125, 158–59 (2000).

2. *Just Compensation*

The Fifth Amendment omits a definition of "just compensation" for land the government takes.[46] The United States Supreme Court defined "just compensation" in 1893:

> The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that, if the adjective "just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. . . . [C]ompensation must be a full and perfect equivalent for the property taken. And this just compensation . . . is for the property, and not to the owner.[47]

The Court has further defined "just compensation" to be enough to put an owner "in as good a position pecuniarily as if his property had not been taken."[48] However, the Court "has refused to make a fetish out of . . . market value, since it may not be the best measure of value in some cases."[49]

State supreme courts have elaborated on the purpose of requiring just compensation. According to the North Dakota Supreme Court, the requirement protects property owners' possession and the rights "which render possession valuable."[50] Colorado's Supreme Court noted just compensation is designed to bar the state from forcing "some people alone to bear public burdens which, in fairness and justice, should be borne by the public as a whole."[51]

States also define the measure of just compensation through their Constitutions, statutes, and case law. New Mexico defines "just" as a "fair and reasonable amount of compensation," and "just compensation" as a balance between the

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[46] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 195 (1985) ("The Constitution speaks only of 'just' compensation, not of the form it must take.").

[47] Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

[48] Olson v. United States, 292 U.S. 246, 255 (1934).

[49] United States v. Cors, 337 U.S. 325, 332 (1949).

[50] Donaldson v. City of Bismarck, 3 N.W. 2d 808, 812 (N.D. 1942).

[51] Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 695 (Colo. 2001) (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

damages and benefits from the taking.[52] Some states specify compensation represents what the condemnee has lost rather than what the taker has gained.[53] However, just compensation generally excludes an owner's sentimental value, goodwill from a business, and relocation costs.[54]

C. *Fair Market Value*

Across jurisdictions, the definition of "just compensation" generally takes the form of "fair market value."[55] The idea of "fair market value" is to capture the price that would be reached in arm's length transactions.[56] That is, it is meant to be the price to which an informed, willing, but unobligated buyer and an informed, willing, but unobligated seller would agree.[57] These hypothetical buyers and sellers are imbued with knowledge of all the advantageous possibilities for the specific property.[58] This objective standard disregards the property owner's sentimental or personal valuations of the property.[59]

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[52] Bd. of Comm'rs of Dona Ana Cnty. v. Gardner, 260 P.2d 682, 685 (N.M. 1953) (citing N.M. CONST. art. 2, § 20) (*superseded on other grounds by statute*, 1968 N.M. Laws Ch. 30, § 1, *as recognized in* Yates Petroleum Corp. v. Kennedy, 775 P.2d 1281, 1284 (1989)).

[53] *See* City of Brighton v. Palizzi, 214 P.3d 470, 473 (Colo. App. 2008), *rev'd on other grounds,* 228 P.3d 957 (Colo. 2010) ("In an eminent domain proceeding, just compensation reflects the value of the landowner's lost interest, not the taker's gain; the owner must be put in as good a position pecuniarily as if the property had not been taken."); Fowler Irrevocable Trust 1992-1 v. City of Boulder, 17 P.3d 797 (Colo. 2001). "'[C]ompensation' suggests a reference to the damage to be caused the holder of the underlying property right." Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 DICK. L. REV. 209, 240–41 (2002).

[54] Steven J. Eagle & Lauren A. Perotti, *Coping with Kelo: A Potpourri of Legislative and Judicial Responses*, 42 REAL PROP. PROB. & TR. J. 799, 816 (2008).

[55] *See* WYO. STAT. ANN. § 1-26-702 (2012); CAL. CIV. PROC. CODE § 1263.310 (West 2012); 26 PA. CONS. STAT. § 702 (2012); N.C. GEN. STAT. ANN. § 136-112(2) (2012); Ayer, *supra* note 8, at 696 (1969) ("Fairness is equated with the open-market price."). *But see* City of Moorhead v. Red River Valley Co-op Power Ass'n, 830 N.W.2d 32, 37 (Minn. 2013) (requiring utilities to include other factors besides fair market value).

[56] *See* Boyce v. Soundview Tech. Group, Inc., 464 F.3d 376, 387 (2d Cir. 2006) (calling an arm's length transaction "the best evidence of (and often the easiest method to determine) fair market value.").

[57] CAL. CIV. PROC. CODE § 1263-320(a) (West 2012); WYO. STAT. ANN. § 1-26-704(a) (2012) (including a separate valuation method for property "for which there is no relevant market"); *Fowler*, 17 P.3d at 800–01.

[58] CAL. CIV. PROC. CODE § 1263-320(a) (West 2012) (defining the hypothetical buyer and seller as having "full knowledge of all the uses and purposes for which the property is reasonably adaptable and available."); *see Fowler*, 17 P.3d at 801.

[59] Ann. E. Gergen, *Why Fair Market Value Fails as Just Compensation*, 14 HAMLINE J. PUB. L. & POL'Y 181, 182 (1993) (citing Kimball Laundry Co. v. U.S., 338 U.S. 1, 4 (1949)). In *Kimball,* the United States Supreme Court searched for the value ascertained by general demand since personal standards for a particular piece of property would vary widely. *Kimball,* 338 U.S. at 5.

States have various statutory formulae for deriving fair market value in condemnation situations, but many considerations are similar across state lines.[60] These considerations include attempting to value property at its "highest and best use," valuing partial takings with the "before and after" test, and employing the "project influence rule."[61] Courts use these tests together to determine compensation owed to a condemnee.[62]

1. *"Highest and Best Use"*

Fair market valuation often considers the value of the land in its present use as well as the value of the land in its highest and best possible use.[63] "Highest and best use" is "the reasonably probable and legal use of vacant land or an improved property that is legally permissible, physically possible, appropriately supported, financially feasible, and that results in the highest economic value."[64] The valuation includes the hypothetical determination of the value of the land in the hands of its present owner if put to the most profitable use that is reasonably relevant and possible.[65] Therefore, the "highest and best use" of land is not necessarily the current use.[66] Further, potential for development is a factor in the property's value, even when the landowner has no plans to use the land for that particular use.[67] The "highest and best use" cannot be simply any use; it must be "reasonably probable" considering the property in question.[68]

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[60] *See infra* notes 61–76 and accompanying text.

[61] *See infra* notes 61–76 and accompanying text.

[62] *See, e.g.*, Alan T. Ackerman, *Principles of Compensation in Eminent Domain*, 73 MICH. B. J. 1300, 1301–04 (1994) (describing how Michigan courts use a property's "highest and best value" to determine fair market value).

[63] *See, e.g.*, 26 PA. CONS. STAT. § 703 (2012) (including machinery, equipment, fixtures, and "other evidence" as part of the fair market value of the land); MD CODE ANN., REAL PROPERTY, § 12-105(b) (LexisNexis 2012).

[64] Roger F. Tibble, *The Appraisal: What's it Worth?*, 32 FAM. ADVOC. 16 (2010). Importantly, the "highest and best use" relates only to the value of the property. Avery E. Carson, *Integrating Conservation Uses Into Takings Law: Why Courts Should View Conservation as a Possible Highest and Best Use*, 86 N.C. L. REV. 274, 279 (2007). For that reason, the valuation often becomes the "most intensive commercial use available." *Id.* Admittedly, this valuation may disregard other types of value, such as environmental or aesthetic value. *Id.*

[65] Baston v. Cnty. of Kenton *ex rel* Kenton Cnty. Airport Bd., 319 S.W.3d 401, 406 (Ky. 2010); *accord* United States v. Jaramillo, 190 F.2d 300, 302 (10th Cir. 1951).

[66] Yun-Chien Chang, *Economic Value or Fair Market Value: What Form of Takings Compensation is Efficient?*, 20 SUP. CT. ECON. REV. 35, 49 (2012).

[67] Dennis v. City Council of Greenville, 646 So.2d 1290, 1294 (Miss. 1994).

[68] City of Las Vegas v. Bustos, 75 P.3d 351, 362 (Nev. 2003). Two theories allow landowners to claim a pipeline easement is the highest and best use for the property and thereby claim higher compensation.

First, landowners use the "Pipeline Corridor Theory" to argue there is already a well-defined pipeline corridor which includes the land in question. Hanley, *supra* note 45, at 160. As evidence, landowners can "demonstrate the high value of neighboring land used as a pipeline corridor."

2. *Partial Takings and the "Before and After" Test*

Some condemnors, including pipeline companies, seek only a portion of a landowner's parcel. In these situations, the measure of compensation must include both the value of the land actually taken and the amount of injury to the remaining parcel.[69] To determine the value of land actually taken, most jurisdictions use a "before and after" test.[70] The "before and after" test determines the difference between the fair market value of the entire tract and the fair market value of the remaining tract after the taking.[71] The valuation still considers the "highest and best use" of the land and simply takes the mathematical difference between the "market value of the land free of the easement and the market value as burdened with the easement."[72]

Id. This theory can result in a valuation separate from the remaining parcel. *See* Bauer v. Lavaca-Navidad River Authority, 704 S.W.2d 107, 109 (Tex. Ct. App. 1985). For example, even if the intact land was agricultural, the land taken can be valued separately if a landowner successfully proves its highest and best use is for a pipeline. *See id.* It can be difficult, however, for courts to embrace severing the land from the original tract and its unified use unless the landowner can establish the existence of a distinct pipeline corridor. *See, e.g.*, United States v. 8.41 Acres of Land, 680 F.2d 388, 392 (5th Cir. 1982).

Second, under the "Assemblage Theory," a parcel has greater value when consolidated with other properties rather than being used by itself. Mark S. Dennison, *Probable Zoning Change as Bearing on Proof of Market Value in Eminent Domain Proceeding*, 40 AM. JUR. PROOF OF FACTS 3d 395, § 8 (2013). To use this theory, landowners attempt to show that "assemblage" of the property with multiple other parcels results in the land's "highest and best use." *Id.* The consolidation must be reasonably practical when considering the costs and time involved as well as the reaction of neighboring landowners. *Id.* The consolidation must also be reasonably probable to affect the value of the land in question. *Id.* Some jurisdictions require a condemnee to "establish unity of ownership and either contiguity or adaptability for integrated use" in order to show the assemblage is reasonably probable. *Id.* "Without at least substantial unity of ownership and some indication of unity of use, the proposed assemblage is entirely speculative." *Id.* The Assemblage theory may be expressly recognized by a court or indirectly included as part of the various other factors of compensation. Vitauts M. Gulbis, *Assemblage or Plottage as Factor Affecting Value in Eminent Domain Proceedings*, 8 A.L.R.4th 1202, §2[a] (1981).

[69] *See, e.g.*, MONT. CODE ANN. § 70-30-302 (2012); E-470 Public Hwy. Authority v. 455 Co., 3 P.3d 18, 23 (Colo. 2000); Dep't of Transp. of State v. Marilyn Hickey Ministries, 159 P.3d 111, 113 (Colo. 2007).

[70] *See* Chalk & Harrison-Fincher, *supra* note 5, at 21; Hanley, *supra* note 45, at 160 (quoting *8.41 Acres of Land,* 680 F.2d at 390–91; Leigh v. Village of Los Lunas, 205–NMCA–025, ¶¶ 9–13, 108 P.3d 525, 530–31 (N.M. Ct. App. 2004) ("The purpose of a before and after valuation when there is a partial taking of an easement or a restrictive covenant is to ensure that just compensation is provided for the diminution on value caused by the taking.").

[71] *See, e.g.*, 26 PA. CONS. STAT. § 702(a) (2012); N.C. GEN. STAT. § 136-112(1) (2012); WYO. STAT. ANN. § 1-26-702(b) (2012) (allowing the greater of either the "before and after" test of the "value of the property rights taken").

[72] Hanley, *supra* note 45, at 160 (quoting *8.41 Acres of Land,* 680 F.2d at 392).

3. *Project Influence Rule*

Many states disallow the value of the project for which the property is being condemned to influence the value of the property.[73] This is called the "project influence rule" or the "rule against enhanced value."[74] In essence, fair market value, as determined in a condemnation proceeding, "includes all uses other than the use to which the taker is planning to put the property."[75] Exclusions of the project's added value are justified in part based on the ideas that the public should not pay more than absolutely necessary for public goods, and that someone other than the landowner created the enhanced value on the land.[76]

D. *Growing Unrest with Takings Valuations*

"What individuals really want, even more than the right to keep their property, is fair proceedings and just compensation."[77]

Landowners and commentators are increasingly criticizing takings valuations.[78] As early as 1973, one scholar argued the project planning phase inevitably

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[73] *See* MD CODE ANN., REAL PROPERTY § 12-105(b) (LexisNexis 2012) (stating that fair market value does not include "any increment in value proximately caused by the public project for which the property condemned is needed."); ALA. CODE 18-1A-173(a) (2012) ("The fair market value of the property does not include an increase or decrease in value before the date of valuation that is caused by (1) The proposed improvement or project for which the property is taken."); 26 PA. CONS. STAT. § 704 (2012) ("Any change in the fair market value . . . substantially due to the general knowledge of the imminence of condemnation . . . shall be disregarded."); State Dept. of Health v. The Mill, 887 P.2d 993, 1003 (Colo. 1994). Some states, however, expressly allow the project to influence the valuation of the property. *See* CAL. CIV. PROC. CODE § 1263-320(a) (West 2012) (stating that fair market value is reached when two people, "deal[] with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available."); LA. REV. STAT. ANN. 19:9 (2012) (determining the basis of compensation "without deducting therefrom any general or specific benefits derived by the owner from the contemplate improvement or work."); 26 PA. CONS. STAT. §704 (2012) (considering the project's influence on the property remaining after the taking, but disallowing consideration of benefits or damages which affect the entire community equally); N.C. GEN. STAT. ANN. § 136-112(1) (2012) (allowing consideration of special and general benefits resulting from the taking).

[74] *See* State Dep't. of Health v. The Mill, 887 P.2d 993, 1003 (Colo. 1994); Spanbauer v. State Dep't of Transp., 2009 WI App 83, ¶ 21, 769 N.W.2d 137, 143 (Wis. Ct. App. 2009).

[75] Williams, *supra* note 4, at 190.

[76] *Id.* at 190–92.

[77] Nadia E. Nedzel, *Reviving Protection for Private Property: A Practical Approach to Blight Takings*, 2008 MICH. ST. L. REV. 995, 1017 (2008).

[78] *See, e.g.*, Eagle & Perotti, *supra* note 54, at 829–45 (enumerating post-*Kelo* laws by state); Nedzel, *supra* note 777, at 1018 ("The market value method undervalues the property taken and is a poorly-defined fiction. It is confusing, circular, and based on unsound economic theory."); Fegan, *supra* note 2, at 269; Gideon Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 NOTRE DAME L. REV. 765, 767 (1973); Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 593 (2013).

depresses the value of the property.[79] Others claim the definition of "public use" has expanded to fit modern society, but the concept of "just compensation" has not kept pace.[80] Some further argue that eminent domain law is inconsistent with general property law.[81] For example, general property law emphasizes free markets and values the individual, while eminent domain law disallows landowners from negotiating true arm's length transactions and emphasizes the public interest at the expense of the individual.[82] Another concern is that because people are more attached to certain kinds of property—such as wedding rings, heirlooms, and land—just compensation for their loss may have to include more than fair market value.[83] Some argue just compensation is especially important for minority "scapegoat" groups who often face the burden of condemnation from the influence of more powerful majorities.[84]

Scholars have suggested various reforms.[85] Some suggest setting compensation to exceed fair market value by some set proportion, such as 125% or 150%.[86] Indiana and Michigan provide different amounts of compensation for differing types of land.[87] For example, a residence requires higher compensation than agricultural land, and agricultural land requires more compensation than other undeveloped land.[88] This tiered valuation accounts for additional subjective value

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[79] Kanner, *supra* note 78, at 767–70 ("[F]ew people are willing to buy or lease property which will be taken from them in the foreseeable future.").

[80] *See, e.g.*, Fegan, *supra* note 2, at 273.

[81] *Id.* at 279 (citing Kanner, *supra* note 78, at 776–81).

[82] *Id.* (citing Kanner, *supra* note 78, at 776–81).

[83] Margaret Jane Radin, *Property and Personhood*, 34 STAN. L REV. 957, 959 (1982); *see also* Eagle & Perotti, *supra* note 54, at 817–18 (describing Michigan's "heritage value" premium added for property owned by the same family for over 50 years).

[84] *See, e.g.*, Clynn S. Lunney, Jr., *Compensation for Takings: How Much is Just?*, 42 CATH. U. L. REV. 721, 757 (1993); Niles, *supra* note 5, at 280 (discussing how private oil and gas companies' influence over the Texas state legislature has resulted in their ability to condemn land for pipelines "with almost no resistance at all.").

[85] *See infra* notes 86–99 and accompanying text.

[86] Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. OF EMPIRICAL LEGAL STUDIES 713, 724 (2008); *see* Nedelsky, *supra* note 25, at 234 ("It is true that the requirement of compensation can serve as a practical limit if the costs are seen as prohibitive."). A 10% "bonus" was used for many years in England. Epstein, *supra* note 46, at 184, n. 10.

[87] *See* IND. STAT. § 32-24-4.5-8 (requiring 125% of fair market value for agricultural land; 150% for residential land, and 100% for all other land); MICH. CONST. ART. X, § 2.

[88] *Id*; *see also* Chang, *supra* note 66, at 85 (arguing to valuate residential property at fair market value plus a bonus for length of tenure in residential property).

a landowner has for different types of property.[89] Other scholars suggest that compensation should account for the length of time a condemnee has owned the land.[90]

Scholars have made various other suggestions to improve valuations in takings.[91] One scholar suggests requiring a "Social Capital Impact Assessment" for takings, analogous to the environmental analysis required for new projects under the National Environmental Policy Act of 1969.[92] Others suggest adjusting compensation according to the degree the purpose for the taking departs from a traditionally public one.[93] Another suggestion is to allow the condemnee to set the price of compensation.[94] Finally, some have suggested a revenue-based approach, allowing the landowner to participate in the profits generated by the project for which their land was condemned.[95]

On the other hand, some scholars think compensation is currently too high.[96] One suggestion is to align takings compensation more closely with tort compensation principles by considering the behavior of the condemnee to potentially lower any award, similar to a comparative negligence standard.[97]

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[89] *See* Nadler & Diamond, *supra* note 86, at 726. Justice Scalia seemed to acknowledge the significance of a landowner's subjective valuation of land in the City of New London's oral argument. *Id.* He grilled the New London attorney, "Yes, you're paying for it, but you're giving the money to somebody who doesn't want the money, who wants to live in the house that she's lived in her whole life. That counts for nothing?" *Id.* (quoting Oral Argument transcript, p. 39). Other commentators have argued for a strict scrutiny standard in takings analyses that concern a person's home because of the fundamental right of having a home. Johnson, *supra* note 43, at 213–14. *But see* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1093 (2009) (arguing a landowner's tie to "home" is actually only a tie to the social ties there rather than to the land). Scholars do not specify whether a landowner should also be able to include the tenure of his or her ancestors on the land, but doing so would seem consistent with the theory. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897) ("A thing which you have enjoyed and used as your own for a long time . . . takes root in your being and cannot be torn away without your trying to defend yourself . . . .").

[90] Nadler & Diamond, *supra* note 86, at 724; Johnson, *supra* note 43, at 214–15; Lee, *supra* note 78, at 648 (arguing, however, that the premium must be "a fixed dollar amount given to every condemnee who has an equivalent amount of sentimental value in the condemned property" rather than a percentage of the land's value).

[91] *See infra* notes 92–95 and accompanying text.

[92] Johnson, *supra* note 43, at 217–18.

[93] Nadler & Diamond, *supra* note 86, at 724, 726 ("[T]akings are viewed as more unjust when the purpose of the taking differs substantially from the public use archetypes like schools, highways, and post offices.").

[94] *Id.* at 724; Johnson, *supra* note 43, at 215; Ayer, *supra* note 8, at 694–95 (noting that if windfall-seeking condemnees price themselves out of the windfall, society's only loss is the fact that the land may be used less productively).

[95] Johnson, *supra* note 43, at 215.

[96] *See infra* notes 97–99 and accompanying text.

[97] Abraham Bell, *Not Just Compensation*, 13 J. CONTEMP. LEGAL ISSUES 29, 35 (2003).

Some scholars suggest eliminating takings compensation altogether and instead mandating private takings insurance.[98] Similarly, some scholars worry "[t]he ultimate victims of any excessive 'compensation'" are consumers.[99]

Private landowners have had some success securing more palatable remedies in the courts. For example, the Wyoming Supreme Court upheld a trial court's authority to enforce annual payments set in relation to similar easements rather than a separate valuation.[100] In that case, the court noted, "part of the impetus for [amending the state's eminent domain laws] was the fact that one-time payments as compensation for takings were not satisfactory."[101] A New Mexico court has also awarded "annual access fees" as compensation for a taking.[102]

E. Psychology of Compensation

The assumption inherent in a takings analysis is that the condemnor will only force the sale of the property if the benefit to the condemnor is higher than the cost of compensating the owner.[103] When the owner is fully compensated and society is directly or indirectly benefited by the project for which the land was taken, condemnation results in overall social improvement.[104] However, deep concerns remain about the eminent domain power.[105]

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[98] *See, e.g.*, Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?*, 64 OHIO ST. L.J 451, 499–500 (2003). Under this theory, individuals would purchase "takings insurance" with money that previously went toward taxes for the payment of just compensation. *Id.* at 500–04.

[99] Steven D. McGrew, *Selected Issues in Federal Condemnations for Underground Natural Gas Storage Rights: Valuation Methods, Inverse Condemnation, and Trespass*, 51 CASE W. RES. L. REV. 131, 155 n.176 (2000); *see also* Note, *Condemnations, Implicit Benefits, and Collective Losses: Achieving Just Compensation Through "Community,"* 107 HARV. L. REV. 696, 697 (1994) ("The denial of monetary compensation for certain losses may thus be justified on the ground that property owners should be compensated only for their actual net losses.").

[100] *See* Barlow Ranch, Ltd. P'ship v. Greencore Pipeline Co., LLC, 2013 WY 34, ¶ 94, 301 P.3d 75, 103–04 (Wyo. 2013).

[101] *Id.* at ¶¶ 90–96, 103–104 (citing R. Lang, *Wyoming Eminent Domain Act: Comment on the Act and Rule 71.1 of the Wyoming Rules of Civil Procedure*, 18 LAND & WATER L. REV. 739, 739 (1983)). In Wyoming, valuation by looking at similar easements is also available by statute. *See* WYO. STAT. ANN. § 1-26-704(a)(iii)(B), (C) (2012) (describing appropriate appraisal methods for determining fair market value).

[102] *See* El Paso Field Servs. Co., v. Montoya Sheep & Cattle Co., Inc., 2003–NMCA–113, ¶¶ 17–18, 77 P.3d 279, 283 (Ct. App. N.M. 2003).

[103] Nadler & Diamond, *supra* note 86, at 714. *But see* Ayer, *supra* note 8, at 694 (noting that while some "hold-outs" may be sentimentally attached to land, others' reluctance may be due to replacement and relocation costs that exceed the compensation award).

[104] Nadler & Diamond, *supra* note 86, at 714.

[105] *Id.* at 715; *accord* Ayer, *supra* note 8, at 694–95 (demonstrating how disparate subjective valuations can lead to a reduction in overall societal welfare).

Subjective value and dignitary harms matter more to a condemnee than the purpose for which the land was taken.[106] Further, subjective attachment is a determining factor in a condemnee's perceived justice of a taking.[107] Most reform efforts, however, have focused on limiting the purposes for which land can be taken rather than on whether compensation for the taking is just.[108]

Additionally, "[p]eople tend to derive greater utility from a relief that is of the same type as the injury inflicted."[109] Money certainly enables a landowner to restore his or her previous total net worth, but an in-kind remedy works to restore the value of the injured asset itself.[110] Further, the landowner usually cannot use money to repair the land affected by the taking.[111] Property rights make people feel secure, independent, and autonomous.[112] Therefore, infringing on those rights will have a psychological effect a financial award may not fully resolve.[113] Landowners often just prefer to have their land back.[114]

Indiana has included in-kind redress for takings of agricultural land in its state code.[115] There, a landowner may elect to receive, in lieu of money, an equivalent parcel of real property to replace the land taken.[116] Other compensation schemes, while not technically involving property of the same type, can approximate in-kind redress more closely than a lump sum payment of fair market value. One example is for the government to provide greater development rights to the condemnee for

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[106] Nadler & Diamond, *supra* note 86, at 715–16.

[107] *Id.* at 713.

[108] *See, e.g.*, CastleCoalition.org, *supra* note 37.

[109] Daphna Lewisohn-Zamir, *Can't Buy Me Love: Monetary Versus In-Kind Remedies*, 2013 U. ILL. L. REV. 151, 187 (2013) [hereinafter Can't Buy Me Love].

[110] Can't Buy Me Love, *supra* note 109, at 186; *see id.* at 187; Lee, *supra* note 78, at 639 (2013) (questioning whether payments of money can ever fully compensate landowners). *But see* Nedelsky, *supra* note 25, at 224 ("[I]t is the *myth* of property—its rhetorical power combined with the illusory nature of the image of property—that has been crucial to our system.").

[111] Can't Buy Me Love, *supra* note 109, at 186. *But see* Lee, *supra* note 78, at 639 (arguing that money increases the landowner's options, even though the options are of a different type than he or she would have had with land).

[112] Nedelsky, *supra* note 25, at 249.

[113] Can't Buy Me Love, *supra* note 109, at 187; *accord* Lee, *supra* note 78, at 640–42 ("The taking can express disrespect or cause reasonably felt psychological harm," especially in takings by private entities.).

[114] Can't Buy Me Love, *supra* note 109, at 186. Landowners also prefer to have the remedy come from the original party. *Id.*; Daphna Lewisohn-Zamir, *Taking Outcomes Seriously*, 2012 UTAH L. REV. 861, 861 (2012). In governmental takings, in-kind compensation may consist of greater development rights for the remaining parcel. Can't Buy Me Love, *supra* note 109, at 186.

[115] *See* IND. CODE § 32-24-4.5-8 (2012).

[116] *Id.* The landowner and condemnor must agree to this option. *Id.* The new ownership interest must be agricultural and equal in acreage to the land lost. *Id.* Unfortunately, as of this publication there is no case law interpreting this interesting Indiana statute.

any remaining parcels.[117] Another example relevant to pipeline takings is revenue-based payments, which tie compensation to the value of material flowing through the pipeline across the condemnee's land.[118]

F. Parallel Compensation Structures in Communications Infrastructure

Cases interpreting another area of law have found that "fair and reasonable" compensation includes compensation based on a percentage of revenues. The Federal Telecommunications Act (FTA) allows state and local governments to "require fair and reasonable compensation from telecommunications providers" for use of their rights of way.[119] Compensation in these instances "may be deemed 'fair and reasonable' even if based on a percentage of revenue and clearly exceeding the municipality's costs."[120] One commentator, however, has argued that allowing only direct cost-recovery potentially results in a taking without just compensation.[121]

In *T.C.G. Detroit v. City of Dearborn,* T.C.G. Detroit sought to place fiber optic cables along the City of Dearborn's right of way.[122] The City imposed an annual rental fee of four percent of T.C.G.'s gross revenue as compensation.[123] The United States District Court for the Eastern District of Michigan held the compensation was reasonable, and noted that "there is nothing inappropriate with the city charging compensation, or 'rent', for the City-owned property that the Plaintiff seeks to appropriate for its private use."[124] The court justified its holding in part on what other telecommunications providers would be willing to pay.[125] The court also noted the fees would not impact the profitability of T.C.G.'s business.[126]

In affirming the decision, the United States Court of Appeals for the Sixth Circuit determined that "compensation" could include more than the costs of accommodating additional cable.[127] The court used a broad "totality of the

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[117] Can't Buy Me Love, *supra* note 109, at 186.

[118] *See infra* notes 158–189 and accompanying text.

[119] *See* 47 U.S.C. § 253(c) (2012); Gillespie, *supra* note 53, at 231.

[120] Gillespie, *supra* note 53, at 235; Jennifer Amanda Krebs, *Fair and Reasonable Compensation Means Just That: How § 253 of the Telecommunications Act Preserves Local Government Authority over Public Rights-of Way*, 78 WASH. L. REV. 901, 920 (2003) ("[C]ompensation can be related to actual use of public rights-of-way without being cost-based.").

[121] *See* Krebs, *supra* note 120, at 926.

[122] 16 F. Supp. 2d 785, 790–91 (E.D. Mich. 1998).

[123] *Id.* at 790–91.

[124] *Id.* at 789.

[125] Gillespie, *supra* note 53, at 238; *see Dearborn,* 16 F. Supp. 2d at 790.

[126] *Dearborn,* 16 F. Supp. 2d at 791.

[127] T.C.G. Detroit v. City of Dearborn, 206 F.3d 618, 625 (6th Cir. 2000) (*Dearborn II*).

circumstances" model to determine whether compensation is fair and reasonable under the FTA.[128] Some of the factors include: (1) local government's authority under state law; (2) what other providers are willing to pay for similar use of the public rights-of-way; and (3) whether the telecommunications provider previously had agreed to pay similar compensation.[129] Some courts, however, have limited compensation under the FTA to directly relate to costs.[130]

III. Analysis

Many of the deep concerns with eminent domain in natural resource pipeline cases would be alleviated if landowners were compensated based on revenue generated by the product moving through the pipeline. This analysis first demonstrates that current fair market valuation undercompensates landowners.[131] Second, this analysis describes how revenue-based compensation better compensates landowners by more closely approaching in-kind redress and by better approximating owners' lost opportunity costs.[132] Third, this analysis demonstrates the existence of revenue-based compensation under the FTA to justify similar compensation for pipeline takings.[133] Fourth, this analysis argues revenue-based payments provide policy benefits in addition to correcting undercompensation.[134] Fifth, this analysis demonstrates the flaws in critics' likely arguments against revenue-based compensation.[135] Finally, this analysis suggests how states can implement revenue-based compensation.[136]

A. Fair Market Value Undercompensates Condemnees

"[T]here is something about land that makes you think that when you own it, it is really, really yours."[137] Condemnation violates this assumption.[138]

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[128] Krebs, *supra* note 120, at 919 (citing, *e.g.*, Qwest Corp v. City of Santa Fe, 224 F. Supp. 2d 1305, 1318, 1329 (D. N. M. 2002); *Dearborn,* 16 F. Supp. 2d at 790).

[129] *Id.* (citing, *e.g.*, *Qwest Corp,* 224 F. Supp. 2d at 1318, 1329; *Dearborn,* 16 F. Supp. 2d at 790).

[130] Gillespie, *supra* note 53, at 240.

[131] *See infra* notes 137–157 and accompanying text.

[132] *See infra* notes 158–179 and accompanying text.

[133] *See infra* notes 180–189 and accompanying text.

[134] *See infra* notes 188–209 and accompanying text.

[135] *See infra* notes 200–216 and accompanying text.

[136] *See infra* notes 217–224 and accompanying text.

[137] Nadler & Diamond, *supra* note 86, at 723; *accord* Nedelsky, *supra* note 25, at 247 ("[T]he popularly held idea that 'government can't take what's mine' seems to be holding fast.").

[138] *See* Lee, *supra* note 78, at 639 (analogizing takings to dethroning a king); Ayer, *supra* note 8, at 705. ("The psychological shock, the emotional protest, the symbolic threat to all property and security, may be expected to reach their highest pitch when government is an unabashed invader.").

The condemnation process both forces the sale and sets the price.[139] Current undercompensation devalues landowners' interest in their lands and forces them to bear an undue share of takings costs.[140] One commentator notes, "the shortfall yielded by the fair market value standard is nothing short of an open secret."[141]

While the definition of public use has evolved to include uses not traditionally considered public—like economic development in *Kelo*—the definition of just compensation has not kept pace.[142] The current definition of just compensation relies on fair market value, but fair market value denies compensation for "real but subjective values."[143] One cannot determine compensation without considering the personal desires of both the buyer and the seller.[144] However, the subjective value of property to the owner often exceeds its market value.[145] Fair market value fails, therefore, to capture the value of property to an owner who has not voluntarily chosen to sell.[146] By definition, one who has not attempted to sell his or her land values the land higher than its market price.[147] "Otherwise, [he or she] would have accepted the market price and sold the property previously."[148]

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139 Nadler & Diamond, *supra* note 86, at 723.

140 Johnson, *supra* note 43, at 217. Without just compensation, the condemnee bears a larger proportion of the cost in comparison to the larger public, when the public as a whole is meant to bear the burden. *See id.*; *supra* note 51 and accompanying text.

141 Alberto B. Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post-Kelo*, 41 WAKE FOREST L. REV. 237, 292 (2006).

142 *See, e.g.*, Kelo v. City of New London, Conn., 545 U.S. 469, 479 (2005); Fegan, *supra* note 2, at 272–73. Fegan opines that early takings were not controversial because "the costs borne by property owners in takings cases were far lower than they are today." *Id.* at 272. Further, much of the land taken had little significant value. *Id.* Finally, takings were less common when the Supreme Court first articulated its definition of just compensation. *Id.* Regardless, the definition has remained substantially unchanged for a century. *Id.*

143 Epstein, *supra* note 46, at 183; *See* Chang, *supra* note 66, at 36–37 (employing the term "economic value" for fair market value plus a bonus for a landowner's subjective value).

144 Fegan, *supra* note 2, at 279 (citing Kanner, *supra* note 78, at 780).

145 Nadler & Diamond, *supra* note 86, at 715, 721 (calling these owners "hold-ins" rather than "hold-outs"); RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY 91 (2008) [hereinafter Supreme Neglect] (separating the "exchange value" of land with its "use value"—"the distinctive subjective value an owner attaches to holding and using property."); Miceli, *supra* note 5, at 153 ("[M]arket value reflects what someone else is willing to pay for a particular piece of property . . . , not what the current owner would ask in a consensual exchange."). Subjective value is also generally higher the longer a person has owned the property. Can't Buy Me Love, *supra* note 109, at 158.

146 *See* Nadler & Diamond, *supra* note 86, at 715.

147 Nadler & Diamond, *supra* note 86, at 715; Miceli, *supra* note 5, at 57–58. The difference between the market value and the price a landowner would accept is variously termed the "'offer-ask' disparity, the difference between the 'willingness-to-accept' and 'willingness-to-pay' measures of value, and the 'endowment effect.'" *Id.* (illustrating the "well known" theory of subjective value with a supply and demand diagram).

148 Nadler & Diamond, *supra* note 86, at 715.

The seller's inability to choose whether to sell fundamentally alters the relationship of the parties and their ability to reach fair market value for the property.[149] Effectively, sellers are barred from conjecturing what the buyer might actually pay for the land.[150] Although this can prevent "hold-outs" who would seek to artificially drive up the price, it also excludes the genuine subjective value a landowner may have.[151]

Fair market value also fails to consider "dignitary harms," or the perception of being unfairly targeted for condemnation.[152] Landowners may resent their perception that a private entity is receiving a windfall resulting from deliberate government action—the exercise of eminent domain.[153] This resentment is amplified if a landowner perceives the windfall is channeled to politically powerful parties—such as big energy companies—at the landowner's expense.[154] Such resentment may be well placed—less powerful social groups often experience condemnation at the hands of more powerful entities.[155] Additionally, many states disallow the project for which the land was taken to influence the price of compensation.[156] However, "the increased use of eminent domain by . . . energy related industries," abuse of the right by private entities, and appreciation in land values makes paltry, one-time payments unsatisfactory because they fail to take account of these factors.[157]

B. Revenue-Based Payments Better Compensate Condemnees

Compensation does not have to be tied to fair market value.[158] "A higher standard for what constitutes 'just compensation' is both possible and desirable."[159] Pipeline companies require access to private rights-of-way in order to transport

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[149] *Id.* at 715, 723–24 ("[C]ompensation for a taking pegged to fair market value almost inevitably will undercompensate the owner of the property."); McGrew, *supra* note 99, at 155 ("[N]o matter how the argument is cast, the market has only one buyer, when that buyer possesses the power of eminent domain, and when no one really knows what the right to be sold would be worth in an open market, there is no way that even a 'voluntary' sale can be characterized . . . as a truly voluntary sale between a willing seller and a willing buyer.").

[150] Nadler & Diamond, *supra* note 86, at 715, 723–24.

[151] *Id.*; *see* TIMOTHY SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST-CENTURY AMERICA 91 (2006) (arguing the "holdout" problem is greatly exaggerated).

[152] Nadler & Diamond, *supra* note 86, at 721.

[153] *Id.* at 722.

[154] *Id.*

[155] *See* Lunney, *supra* note 84, at 757.

[156] *See supra* notes 73–76 and accompanying text.

[157] Micheli & Smith, *supra* note 36, at 1.

[158] Kanner, *supra* note 78, at 774 ("[M]arket value is essentially a rule of convenience, not a conceptual straitjacket."); Krebs, *supra* note 120, at 925 ("[C]ompensation can take many forms . . . and still be reasonable.").

[159] Fegan, *supra* note 2, at 270.

product.[160] Private landowners can offer this access in exchange for payment. The method of compensation should not be limited if it is reasonable.[161] Revenue-based payments better compensate condemnees by allowing landowners to share in the value the land contributes to a project, by approximating the benefits of in-kind redress, and by accounting for landowners' lost opportunities in regards to their land.[162]

Awarding revenue-based payments would allow landowners to share in the value the land contributes to the project. The project influence rule—which disallows using the project for which land is taken to influence its price—should be a floor, but not a ceiling.[163] That is, a landowner should not be penalized for the use to which the condemnor will put the land, but he or she may be allowed to share in the financial benefits for which the land was taken. One possible counterargument is that the landowner should have no part in value he or she did not help create, and therefore should not receive revenue-based payments as compensation.[164] However, "awarding after value makes the taking more like a market-based transaction."[165] If condemnation were unavailable, parties would likely reach just compensation through negotiations including revenue-based compensation because the pipeline companies would not have the failsafe of condemnation looming over the transaction.[166]

For example, state trust land administrators in Wyoming have been developing revenue-based compensation models for pipeline easements crossing state lands, where eminent domain by private entities is not available.[167] Progress has slowed,

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[160] *See, e.g.*, Niles, *supra* note 5, at 271.

[161] *See* City of St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 104 (1893) (discussing how revenue based fee is appropriate but must be reasonable); Krebs, *supra* note 120, at 933.

[162] *See infra notes* 163–179 and accompanying text.

[163] *See* Miceli, *supra* note 5, at 71 (arguing that allowing compensation to be reduced by the value received from a project is unfair because other members of the public who receive the benefit are not similarly charged).

[164] *See* Lopez, *supra* note 141, at 292 (arguing that "gain-based" compensation—referencing the gain inherent to assembling the land required for a project—fails to account for the individual harm suffered by each condemnee).

[165] Williams, *supra* note 4, at 184 (defining "after value" as an "award [of] some of the benefit of the reaggregation and development of the land").

[166] Interview, Jim Magagna, Executive Vice President, Wyoming Stock Growers Association, October 23, 2012.

[167] Ryan Lance, Don Threewitt, & Tina Vigil, Wyoming Office of State Lands and Investments, *Pipeline Easements on State Trust Lands*, Presentation, University of Wyoming College of Law, November 2012; *See* United States v. Carmack, 329 U.S. 230, 240 (1946). A state has "the eminent domain or highest dominion" within its limits, subject only to the federal government. *Id.* at 240; *accord* United States v. 32.42 Acres of Land, 683 F.3d 1030, 1034 (9th Cir. 2012). Private entities only have the right to exercise eminent domain if given by the state. Chalk & Harrison-Fincher, *supra* note 5, at 17. States giving private entities the right to eminent domain specify it is the right to take private land rather than public land. *See supra* note 39 and accompanying text.

however, as the administrators acknowledge the arrangement would push more development onto private land, where private landowners cannot yet enter into similar arrangements.[168]

Revenue-based payments approximate the benefits of in-kind redress.[169] Compensation should try to get as close as possible to repairing the asset itself, restoring the landowner to her pre-condemnation position.[170] "Setting cash compensation correctly . . . is critical to the sound functioning of our condemnation system."[171] This is especially true because financial awards may never make a landowner feel fully compensated.[172] Although revenue-based payments are still not "in-kind," they approximate a repair of the injured property by making landowners feel that they share in the benefits of the taking.[173] In this way, revenue-based payments share the inclusionary and participatory aspects of in-kind redress.[174]

Revenue-based compensation best accounts for landowners' lost opportunities. Owners have myriad opportunities with their lands.[175] Implementing the project influence rule to foreclose valuation based on the very option for which land is actually used deprives condemnees of fair compensation. Hypothetically, a landowner owns the possibility of placing a pipeline on her land and charging a revenue-based rate for other companies to use it.[176] Valuing all possible opportunities of which the landowner has been deprived would be too speculative and therefore unfair to the condemnor.[177] Instead, tying compensation to its

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[168] Ryan Lance, Don Threewitt, & Tina Vigil, Wyoming Office of State Lands and Investments, *Pipeline Easements on State Trust Lands*, Presentation, University of Wyoming College of Law, November 2012.

[169] For a discussion of other forms of compensation approximating in-kind redress, see *supra* notes 109–114 and accompanying text.

[170] Olson v. United States, 292 U.S. 246, 255 (1934) ("[The landowner] is entitled to be put in as good a position pecuniarily as if his property had not been taken."); *See* Can't Buy Me Love, *supra* note 109, at 186.

[171] Supreme Neglect, *supra* note 145, at 89.

[172] *See* Can't Buy Me Love, *supra* note 109, at 187.

[173] *See id.*

[174] *Id.*

[175] *See* Nedelsky, *supra* note 25, at 223, 231 (explaining how property has been the "quintessential instance of individual rights as limits to governmental power," but is now turning into "a primary subject of it."). Property rights are often referred to as a "bundle" of rights—an aggregate of opportunities in relation to land. *See id.* at 234; Epstein, *supra* note 46, at 59.

[176] *See id.*

[177] *See id.* One reason courts have hesitated to include subjective valuations of property in compensation is because of the difficulty in measuring it. Supreme Neglect, *supra* note 145, at 91; Miceli, *supra* note 5, at 84 (noting the "lack of a workable method for measuring owners' true valuations, . . . [is] the unavoidable cost of substituting a court-ordered transaction for a consensual one.").

actual use acts as the best substitute for the full measure of lost opportunities.[178] Like all compensation methods, revenue-based compensation will be imperfect, but it will help "correct . . . for the persistent bias of the [fair] market value test."[179]

C. Revenue-Based Payments in FTA Cases Justify Revenue-Based Payments for Pipeline Takings

The FTA allows local governments to require "fair and reasonable compensation" from telecommunications companies for the use of their rights-of-way for telecommunications infrastructure.[180] Some courts have held that "fair and reasonable compensation" under the Act includes revenue-based compensation.[181] For example, the United States Court of Appeals for the Eleventh Circuit upheld revenue-based compensation for telecommunications rights-of-way based on Florida state law.[182] Additionally, the United States District Court for the Eastern District of Michigan upheld revenue-based compensation for telecommunications rights-of-way based on statutory interpretation of the FTA, the general right of the city to seek rent for the right-of-way, and similar agreements with other telecommunications companies.[183]

FTA compensation is determined under the statutory language of "fair and reasonable compensation," and it is only imposed at the city's option.[184] On the contrary, takings compensation is determined under the constitutional "just compensation" standard and is imposed every time there has been a taking.[185] The situations, however, are analogous.[186] In each situation, a private entity seeks rights-of-way over the property of another in order to achieve goals deemed beneficial to society. In each case, the private entity pays for the use of property as a cost of doing business.[187] Neither the FTA nor the Federal Constitution

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[178] Epstein, *supra* note 46, at 183 (explaining there are two imperfect options for valuation: the highest and best use in the hands of the landowner or in the hands of another individual).

[179] Supreme Neglect, *supra* note 145, at 91; Epstein, *supra* note 46, at 184 ("The bonus could correct, however, for the persistent bias of the market value test, even as it generates overcompensation in some cases while tolerating undercompensation in others.").

[180] 47 U.S.C. § 253(c) (2012).

[181] *See* T.C.G. Detroit v. City of Dearborn, 16 F. Supp. 2d 785, 790–91 (E.D. Mich. 1998); *supra* notes 119–130 and accompanying text.

[182] See BellSouth Telecommunications, Inc. v. Town of Palm Beach, 252 F.3d 1169, 1183 (11th Cir. 2001) (discussing FLA. STAT. ANN. § 337.401(3)(e) (2012)).

[183] *See Dearborn,* 16 F. Supp. 2d at 788–91.

[184] *See* 47 U.S.C. § 253(c) (2012); *Dearborn,* 16 F. Supp. 2d at 788.

[185] U.S. CONST. amend. V.

[186] One commentator has aligned this "fair and reasonable" standard to the constitutional "just compensation" standard by arguing that courts allowing "only direct-cost recovery [under the FTA] potentially permit . . . a taking of local government property without just compensation." Krebs, *supra* note 120, at 926.

[187] *See id.*, at 933.

expressly limit condemnees to direct costs involved with an easement or right-of-way.[188] Because of these similarities, the presence of revenue-based payments in the telecommunications area signifies a willingness on the part of courts to acknowledge the role revenue-based payments can play in easements required for important industries.[189]

D. Revenue-Based Payments Will Result in Policy Benefits

Revenue-based payments provide more efficient use of land.[190] Some scholars have argued the only reason for the requirement of just compensation is to restrain excessive takings.[191] That is, the "price" of taking land affects the demand for takings.[192] A low price will lead to more takings, and a higher price will require potential condemnors to explore alternative avenues for their projects.[193] Therefore, because current valuation undervalues the actual cost of the taking, takings are over-incentivized.[194]

Revenue-based payments will avoid subsidizing private development. Fair market value compensation should not be used to subsidize private development.[195] Any subsidy should be direct and charged to all members of the public who receive the benefit, not just the owner giving up land.[196] Reforming just compensation would bring landowner protection back into balance with the public benefit.[197] This renewed balance would comport with the purpose of the requirement for

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[188] *See* U.S. CONST. amend. V; 47 U.S.C. § 253(c) (2012).

[189] TCG Detroit v. City of Dearborn, 16 F. Supp. 2d 785, 789 (1998).

[190] *See* Nedelsky, *supra* note 25, at 259 (referencing the general notion that a free market distributes resources efficiently).

[191] Miceli, *supra* note 5, at 68.

[192] Supreme Neglect, *supra* note 145, at 89; Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997 (1999) (quoting Richard Posner as writing, "The simplest economic explanation for the requirement of just compensation . . . is that it prevents the government from overusing the taking power."). *But see* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 354–55 (2000) (arguing that market-based justifications for behavior cannot apply to the government because the government does not behave in the same manner as a private firm).

[193] *Id.*; *see also* Chang, *supra* note 66, at 59–61 (explaining a general purpose of takings compensation is to reduce inefficient takings and arguing that further efficiency would result from requiring a cost-benefit analysis before a taking could occur).

[194] *See* Miceli, *supra* note 5, at 69.

[195] *Id.* at 70; Sandefur, *supra* note 151, at 96 (equating the "Military-Industrial Complex" coined by Eisenhower to the "Costco-Ikea-Home Depot-Government Complex" coined by Dana Berliner of the Institute for Justice).

[196] Miceli, *supra* note 5, at 71.

[197] Fegan, *supra* note 2, at 269 ("[R]eforming just compensation would have a more positive and balanced impact on property owners and the public than would restricting public use.").

just compensation, which is to "bar the state from forcing some people alone to bear public burdens that, in fairness and justice, should be borne by the public as a whole."[198]

Revenue-based payments will relieve burdens on private landowners. First, the payments may incentivize more use of public lands for pipelines.[199] Because eminent domain is not available on federal and state lands, pipeline companies seeking easements across those lands must acquiesce to the terms of the government.[200] Even with the recent, post-*Kelo* eminent domain reforms, it is still often easier for pipeline companies to locate a pipeline on private land, where the company will have more bargaining power than the landowner over the terms.[201] However, if pipelines truly constitute a "public use" in bringing natural resources to market, the public should bear the burden.[202] While just compensation ensures one landowner does not suffer alone for the public benefit,[203] encouraging placement of pipelines on public land more directly puts the burden on the public and results in a lower burden on individual landowners.[204]

Second, even if a pipeline company chooses to exercise condemnation on private property, revenue-based payments will relieve the burden on private landowners by awarding just compensation.[205] Additionally, when landowners feel they have an equal bargaining position, they may welcome opportunities to negotiate with pipeline companies.[206] In this way, pipeline easements could become a valuable part of a ranching enterprise.[207]

Third, allowing revenue-based payments may incentivize term limits on easements. With lump sum payments, there is no incentive for a company to abandon the easement or allow it to revert to the fee owner.[208] With revenue-based

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

[199] Lance, et al., *supra* note 167.

[200] *Id.*

[201] *Id.*

[202] *See Armstrong,* 364 U.S. at 49. When the public directly bears the burden rather than engaging in valuation and compensation, it results in higher efficiency. *See* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 602–06 (1986) (arguing that compensation for takings is inefficient).

[203] *See Armstrong,* 364 U.S. at 49.

[204] As a side benefit, allowing private landowners to negotiate revenue-based payments may allow public land administrators to implement revenue-based payments without pushing more development onto private lands. Lance, et al, *supra* note 167.

[205] Magagna, *supra* note 166.

[206] *Id.*

[207] *Id.*

[208] In Wyoming, the easement reverts back to the condemnee after the condemnor has abandoned the easements. WYO. STAT. ANN. § 1-26-515 (2012).

annual payments, failure to make payments over a certain period of time would provide evidence of abandonment. With this balance in place, landowners would more easily be able to negotiate an end date for the easement.[209]

E. Critics' Likely Arguments Against Revenue-Based Compensation Fail

A chief concern among critics of revenue-based compensation is likely to be that it will overcompensate condemnees.[210] Revenue-based payments will not overcompensate condemnees for two reasons. First, rather than creating overcompensation, revenue-based payments will serve to correct undercompensation currently based on fair market valuation.[211] Second, the percentage of revenue allocated a condemnee in revenue-based compensation can be calculated to ensure a condemnor receives the full benefit of its enterprise, less only the amount to which a condemnee is constitutionally entitled.[212]

Critics may also argue it is unfair for a condemnee to participate in benefits she did not create. It is fair for condemnees to share in the benefit of the project to which their land is being put for two reasons. First, their land is necessary for that project.[213] Pipeline companies rely on the use of property to get natural gas from point A to point B.[214] Second, it is difficult, if not impossible, to arrive at a fair price through appraisals conducted under threat of condemnation.[215] Revenue-based payments acknowledge the importance of the condemnee's land to the project and the impossibility of reaching a fair price through appraisals conducted in an eminent domain proceeding.[216]

F. How to Implement Revenue-Based Payments

States could implement revenue-based payment options by statute or by judicial decision. State legislatures could expressly allow revenue-based payments, either as a generally allowed form of compensation or through an explicit statutory

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[209] In states with reversions after abandonment, it may also give the landowner leverage to argue for compensation for a reduction in retained interest. Supreme Neglect, *supra* note 145, at 93.

[210] *See, e.g.*, Jonathan Remy Nash & Stephanie M. Stern, *Property Frames*, 87 WASH. U. L. REV. 449, 449, 458 (2010).

[211] *See supra* notes 137–155 and accompanying text.

[212] This calculation can be negotiated or imposed by a legislature or court. Additionally, they can be calculated so as to add little or no cost to ultimate consumers. Lance, et al., *supra* note 167.

[213] *See supra* notes 19–24 and accompanying text.

[214] *See supra* notes 19–24 and accompanying text.

[215] *See supra* notes 137–155 and accompanying text.

[216] *See supra* notes 19–24, 134–154 and accompanying text.

framework.[217] In order to incentivize use of revenue-based payments, states could require a set premium over fair market value for non-revenue based payments.[218] Such a premium would also serve to correct fair market valuations computed under threat of condemnation.[219] Finally, many states must modify their "project influence rules": compensation must include the positive after-value of a project in order to fully capture the land's "highest and best" use as well as the price the landowner would be able to receive in private negotiations.[220]

Courts could uphold revenue-based compensation agreements based on similar fee agreements arrived at through negotiation.[221] For example, in *Barlow Ranch Limited Partnership v. Greencore Pipeline Company, LLC,* the Wyoming Supreme Court upheld annual payments over a lump sum award based on evidence of similar easements in the area.[222] Similarly, in *T.C.G. Detroit v. City of Dearborn,* the United States District Court for the Eastern District of Michigan upheld revenue-based annual payments based on similar arrangements in the telecommunications industry.[223] Alternatively, a court could uphold a revenue-based payment based on a determination that "just" compensation requires more than a lump sum payment arrived at under the threat of condemnation.[224]

IV. Conclusion

Compensation in current condemnation proceedings grossly under-compensates landowners for pipeline easements.[225] Fair market valuation is not "just" because approaching a true fair market value under threat of condemnation

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217 Williams, *supra* note 4, at 195–98. For example, in a "Process-Based" framework, the condemnee receives a percentage of the benefits or expected benefits, allowing the condemnee to share in the upside potential of a project. *See id.* at 195–96. Although perhaps less desirable (and realistic) because it involves a pipeline company relinquishing control of operations, a state could also implement a Special-Purpose Development Corporation or a Resident Equity Shares framework, allowing a condemnee to obtain an ownership interest in the project and to receive benefits as dividends. *See id.* at 196–98; *see also* Chang, *supra* note 66, at 77 (explaining the Special-Purpose Development Corporation).

218 *See supra* notes 86–89 and accompanying text for an example of a premium over fair market value for various different types of property.

219 Miceli, *supra* note 5, at 69; *see supra* notes 137–157 and accompanying text.

220 *See supra* notes 175–179 and accompanying text. Because the interest would be a right to payment rather than an ownership in the property, the landowner would not share in the risk of the venture. *But see supra* note 217 (outlining revenue-based compensation schemes wherein the landowner is a part owner of the venture and therefore subject to risk).

221 Bellsouth Telecommunications, Inc. v. City of Orangeburg, 522 S.E. 2d 804, 807 (S.C. 1999).

222 2013 WY 34, ¶ 94, 301 P.3d 75, 103 (Wyo. 2013).

223 T.C.G. Detroit v. City of Dearborn, 16 F. Supp. 2d 785, 790–91 (E.D. Mich. 1998).

224 *See supra* notes 137–157 and accompanying text.

225 *See supra* notes 137–157 and accompanying text.

is impossible.[226] Accordingly, revenue-based payments should be allowed for pipeline easements.[227] Revenue-based payments better approximate the loss landowners suffer when their land is taken.[228] They represent the best substitute for landowners' lost opportunity costs.[229] Instituting revenue-based payments incentivizes the use of public lands and adherence to a term limit on the easement.[230] States may implement revenue-based payments through various frameworks to fit the individual states' needs.[231] The concept of "public use" in takings analyses has expanded dramatically to fit modern needs.[232] Concepts of compensation must also expand to ensure condemnees are provided "just" compensation as required by law.

[226] *See supra* notes 137–157 and accompanying text.

[227] *See supra* notes 158–189 and accompanying text.

[228] *See supra* notes 169–174 and accompanying text.

[229] *See supra* notes 175–179 and accompanying text.

[230] *See supra* notes 199–204; 198–209 and accompanying text.

[231] *See supra* notes 217–224 and accompanying text.

[232] *See supra* notes 27–45 and accompanying text.