# VALUATION BLUNDERS IN THE LAW OF EMINENT DOMAIN

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## Introduction

Virtually all legal disputes can be divided into two separate phases. The first deals with entitlements, and the second with remedies. The distinction helps sort out the conceptual and practical difficulties in takings cases. Entitlement questions are in most instances capable of being answered with some degree of clarity, because they involve typically only the identification of property taken and justifications for the taking. But remedial questions, in the eminent domain context as elsewhere, do not lend themselves to that kind of precision for there is always a real valuation question of whether the compensation supplied is in fact just. On liability, the inquiry is disjunctive: the answer is either yes or no. On remedies, the inquiry lies on a spectrum: once the taking is found, the set of possibilities for compensation (like the level of damages in contracts or tort cases) takes the form of a smooth, monotonic, and continuous function. The more that is taken, the greater the compensation owed. These functions should be well behaved, without kinks or gaps.

Subject to that key constraint, the selection of the proper single point on that continuum can be troublesome. These difficulties are unavoidable no matter how perfect and impartial the decisionmaker. All valuation issues depend on some distribution of possible future values of the asset taken or destroyed that may, or may not, exhibit some kind of normal distribution. In market exchanges, public bodies do not have to resolve these difficult matters of valuation because they need only observe the price (typically in money) that the parties set for a particular asset.

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Any appeal to market prices conceals a lurking uncertainty in valuation that looms larger when voluntary transactions are not available to set pricing benchmarks. If each asset had the same unique value for all people, why engage in routine voluntary exchanges? The accurate way therefore to understand market transactions at a distinct price is that they only provide the illusion of a unique, agreed upon valuation. Some of these concealed issues relate to differences in value in use, as opposed to exchange: all other things being equal, tangible assets, like homes or businesses, will be sold if the buyer intends to make more intensive use of the asset than the seller. But in addition, every voluntary exchange of some real asset shifts the uncertainty about future and contingent asset values from the seller to the buyer. That risk transfer takes place in naked form in any contract of insurance, but it is also embedded in transfers of tangible assets that have (unlike insurance contracts) value in use as well as in exchange.

There is, of course, no reason whatsoever to set aside or even question any contract that moves any asset from one party to others, except on those grounds like duress, concealment, and maybe mistake. But there are of course many situations in which asset valuation takes place in the absence of the unique (or near unique) prices in competitive markets, such as during the dissolution of a marriage or a business partnership. Public valuations under the tort system are also necessary to determine compensation when property or human life is either taken or impaired, even (in the form of "clean-up" damages) where injunctions or specific performance are available for either the breach of contract or the commission of a tort. But by definition, no form of equitable relief is available in ordinary eminent domain cases where the government may force the exchange for just compensation in any transaction that meets today's capacious standard for public use.[1] The key term, "just compensation," is left undefined in the Constitution, but the necessity for its use is clear.[2] To say, as did John Locke, that the government should never take property without the consent of its owner, invites holdout problems of enormous potential that could easily make it impossible to assemble land for a railroad, highway, or even a public office building.[3]

Yet the alternative, which is to allow the taking without compensation so long as the new use is for the public benefit, will lead to excessive levels of condemnation because a dominant political faction can easily find, or manufacture, public reasons to claim that the property taken is worth more in public than in private hands. Accordingly, the just compensation measure imposes a pricing constraint on the government to increase the odds that the

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1 *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 480–83 (2005); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 239–40 (1984); Berman v. Parker, 348 U.S. 26, 31–36 (1954).

2 U.S. CONST. amend. V.

3 *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 71 (J.W. Gough ed., Basil Blackwell 1966) (1690) ("The supreme power cannot take from any man any part of his property without his own consent."). Locke misses the just compensation alternative entirely.

property taken will be indeed worth more in public hands than it is in private ones. Hence, functionally *just* compensation should be at a level that deters these unwise transactions while allowing socially beneficial transactions to go forward.

But how is that just level of compensation determined? Here the link between private and public law arises because fair market value of property sets the appropriate standard. There are several difficulties in the implementation of this standard. First, most property that is taken through condemnation is not for sale, because the property has greater value in the hands of its current owner than anyone else. To rely on the fair market value for a property that is not for sale necessarily eliminates the owner's surplus derived from his subjective enjoyment of the property. The resulting undercompensation thus leads to a distorted choice between public and private uses. Awarding compensation for subjective value, however, presents distinct valuation problems of its own. Hence, the gap between use and exchange value creates a constant crimp on any valuation system. The second glitch in valuation arises from an emphasis on the value of the "*property . . . taken*."[4] Although that formulation looks expansive, it is not. If literally followed, it removes compensation for incidental or consequential damages from government takings, including, for example, site-specific goodwill,[5] and litigation and appraisal fees, which now have become "legislative grace," not constitutional obligation.[6] To ignore these elements of consequential damages is to guarantee that the property owner will be left worse off after the taking than if it never took place at all.

This Essay does address these defects, which, though serious, are not fatal to the mission of the Takings Clause. Even these artificially low compensation levels, when coupled with the considerable expenses to the government to take property, often accomplish a key benefit of the Takings Clause that is *never* observed in litigation: that benefit is measured in the transactions that are *blocked, not executed*.

Yet even if we put all these difficulties aside, the valuation of real estate cases is fraught with gratuitous complexities that arise even after courts settle on the right abstract standard for just compensation, namely, that " 'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken,"[7] such that he receives "the full and per-

4 U.S. CONST. amend. V (emphasis added).

5 For more discussion, see Richard A. Epstein, *In and Out of Public Solution: The Hidden Perils of Forced and Unforced Property Transfer*, *in* PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 307, 315–20 (Terry L. Anderson & Fred S. McChesney eds., 2003). For the formula, see *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893). "There can, in view of the combination of those two words ["just" and "compensation"], be no doubt that the compensation must be a full and perfect equivalent for the property taken." *Id.* at 326.

6 United States v. Bodcaw Co., 440 U.S. 202, 204 (1979).

7 Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473–74 (1973) (quoting United States v. Reynolds, 397 U.S. 14, 16 (1970)).

fect equivalent in money of the property taken."[8] That standard asks courts to determine what counts as the fair market (or exchange) value of the property by looking to "[a]ll facts which would influence a person of ordinary prudence, desiring to purchase the property," such that "any evidence is admissible which might reasonably influence a willing seller and a willing buyer,"[9] including, of course, expert evidence from parties with knowledge of the relevant market.[10] In *Olson v. United States*,[11] Justice Butler wrote:

> The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.[12]

In addition, courts commonly caution that "[a]lthough mere speculative uses of the property should not be entertained by the factfinder, evidence of a potential use should not be excluded merely because it depends upon the existence of extrinsic conditions."[13]

These principles are well established, even if difficult to apply. In the context of the usual takings case, the inquiry is necessarily hypothetical precisely because of the absence of a willing private buyer for the condemned property. There are a number of standard techniques to fill that market gap, including using the discounted cashflow of future use, which seeks (at least for business assets) to determine the expected net profits for each particular period, say a year, and then apply some correct discount rate (usually around two percent after inflation) to determine asset value. Replacement cost (less depreciation) is a common alternative. Both formulas necessarily pose difficult estimation questions, which can raise honest differences of opinion.

In dealing with the valuation problem, I will bracket these estimation issues in order to look to different and disturbing types of difficulties in the valuation enterprise. The law of eminent domain starts with the implicit assumption that the government is in general a good actor whose motives and laudable and whose behavior does not need excessive judicial oversight. Hence the general norm of judicial deference often applies to valuation decisions. In the cases that I shall review, as well as others, a general pattern emerges, whereby all doubtful valuation questions that arise dealing with key problems are at best obliquely touched by the standard valuation formulas.

8 United States v. Miller, 317 U.S. 369, 373 (1943) (citing *Monongahela Navigation Co.*, 148 U.S. at 326).

9 United States v. 100 Acres of Land, 468 F.2d 1261, 1266–67 (9th Cir. 1972).

10 *See* United States v. 68.94 Acres of Land, 918 F.2d 389, 393 (3d Cir. 1990) ("Expert opinion testimony acquires special significance in an eminent domain proceeding where the sole issue is the value of condemned property.").

11 292 U.S. 246 (1934).

12 *Id.* at 255; *see also* Mitchell v. United States, 267 U.S. 341, 344–45 (1925).

13 *68.94 Acres of Land*, 918 F.2d at 393.

The problems that I shall talk about here involve three major issues. The first of these addresses the many technical mistakes in valuation that were made in *Penn Central Transportation Co. v. New York City*,[14] which badly misunderstood the correct rules for valuing air rights by making two serious valuation errors: the insistence that only "primary expectation[s]" matter, and further that transferable development rights are, in the context of a regulatory taking, just one factor to consider in deciding whether compensation is owing.[15] The second issue involves an examination of cases involving conditional valuation, in which various contingencies have been regarded as sufficient to block the inclusion of important elements of value into the compensation formula. And the third addresses the problem of bundling, whereby the government is able to avoid the valuation question altogether by tying the authorization of a permit to the surrender of some collateral right.

## I. *Penn Central* as a Valuation Problem

The initial challenge in *Penn Central* is whether the City's actions should be classified as a physical or regulatory taking. The inquiry exposes the weaknesses in this supposed dichotomy in connection with air rights over a well-established building. The basic rule in *Loretto v. Teleprompter Manhattan CATV Corp.*[16] is a per se rule for compensation for physical takings,[17] in contrast to the famous *Penn Central* balancing test for regulatory takings, which deal with restrictions on use, but not direct occupation by or on the authority of government.[18] The air rights in *Penn Central* do not fit neatly into either category, which is but one of many reasons to ask why the distinction is drawn at all.[19]

This purported distinction is made ever more problematic by the general constitutional law rule under which state law determines whether a property interest is at stake, reserving to federal law the constitutional protections afforded that interest. In the procedural context, *Board of Regents of State Colleges v. Roth*[20] holds that the Due Process Clause defines the level of protection given before the state can deprive someone of a right vested under state law.[21] By way of clear extension, the issue of just compensation, which has

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14 438 U.S. 104 (1978).

15 *Id.* at 123–24, 136.

16 458 U.S. 419 (1982).

17 *See id.* at 426.

18 *See Penn Cent.*, 438 U.S. at 123–24.

19 *See* Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 Stan. L. Rev. Online 99, 101, 104–05 (2012).

20 408 U.S. 564 (1972).

21 *See id.* at 570–71. The case held that state law determines what counts as property and liberty, but federal law determines the procedural protection given to the individual plaintiff. *See id.* at 570–77. Only the first stage was involved for the plaintiff who had been hired on a one-year contract and who therefore did not have a property interest in his potential renewal. *See id.* at 578. Questions of the applicable procedures were also raised. *See id.* at 578–79; *see also* Mathews v. Eldridge, 424 U.S. 319, 326 (1976) (no prior hearing

been read into the Due Process Clause of the Fourteenth Amendment, should exhibit the same structure. As noted in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*,[22] "The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation."[23]

These principles yield clear results in *Penn Central*. The most distinctive feature of private property is that the fee simple can be divided up into a rich variety of partial interests, each of which should receive as much protection from government confiscation as does the whole. Any other position creates the odd situation that the owner of the full fee simple interest will see the total sum of the rights diminish if they are parceled out between two or more individuals. Within the private law, any division of interests from a single owner cannot expand the rights that the owner (or his successors in title) has against the rest of the world; nor can that occasion be used to shrink those rights, by insisting, for example, that anyone who acquires property after the state has given notice that these rights will be limited has assumed the risk of the taking.[24]

Under this analysis, the separation of the air rights from the ground rights does not reduce the former to second-class status, given that under New York law, air rights are capable of being transferred by sale, mortgage, lease, and gift, just like the fee simple or any other partial interest in real property. The voluntary severance of air rights from the fee simple necessarily gives rise to a second question, which is the need to provide to the owner of the air rights a support easement from the owner of the retained fee. This entire transaction can be, and in ordinary practice is, organized in accordance with the ordinary rules of property and contract, where the government should never interfere with the pricing and other terms set by the parties. On all questions of legality, whether under zoning or private law, the correct approach unambiguously requires that the assignee of the air rights stands in the same position as the original owner vis-à-vis any third-party claims. Accordingly, in the takings context, if the government's taking of air rights allow for it to use them in their place, that may well require higher compensation than if the government's only action is to prohibit the landowner from using the air rights without allowing anyone else to do so. In the former case, the government will need both the use rights and relevant sup-

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required for termination of social security benefits); Goldberg v. Kelly, 397 U.S. 254, 261, 264 (1970) (prior hearing required for termination of welfare benefits).

22 166 U.S. 226 (1897).

23 *Id.* at 236.

24 For inconsistent views on this question, see *Palazzolo v. Rhode Island*, 533 U.S. 606, 626–27 (2001), rightly condemning the prospect that government notice could effectively undermine voluntary transfers. For the hasty retreat from that per se rule, see *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 342 (2002), treating notice as only one factor in deciding whether imposing a regulation was a compensable event. For a defense of the per se rule, see Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 466–70 (2010).

port rights. In practice, this scenario will virtually never happen, because the government has no motivation to take these convoluted steps to obtain usable rental space. Its sole motivation is to prevent anyone from developing the air rights to maintain the "character" of the neighborhood by preserving the light and air in the vicinity of the building.[25]

How then should just compensation be determined for an owner that has lost its air rights? As a first approximation, it should be the fair market value of the air rights in the relevant market. These calculations are similar to those made for a breach of a contract that is still fully executory. Take a construction contract: the innocent party should receive compensation to make him indifferent (as is true with the takings standard noted above) between the completion and noncompletion of the building. Hence the correct measure of recovery is anticipated gross revenues on sale, less the construction costs saved, plus the reliance costs that could not be recouped because the building has been taken.[26] When applied to air rights, that formula means that it is cheaper to condemn air rights before any plans for development have commenced.[27]

Under this analysis, the valuation issues presented by *Penn Central* can be answered by traditional techniques. But the case analysis, to put it mildly, did not proceed along these lines. The first unsound move by Justice Brennan was to treat this case not as a loss of air rights, but as a mere regulation that only restricted in part the use of the entire parcel.[28] To reach this conclusion, he had to distinguish an earlier partial takings case, *Armstrong v. United States*,[29] in which Justice Black had held that the owner of a materialman's lien on two naval vessels was owed just compensation when the U.S. Navy dissolved those liens by expediently sailing the vessels out of Maine state

25 *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 109–10, 118 (1978).

26 Accordingly, the innocent party has a duty to mitigate damages after breach. That inquiry is easy enough to calculate when all that needs to be done is to discontinue work, at which point the correct formula for damages is the contract price less the costs saved. *See, e.g.*, Rockingham Cnty. v. Luten Bridge Co., 35 F.2d 301, 307 (4th Cir. 1929). Matters are much more complicated if some alternative action need be taken once the breach is announced. *See, e.g.*, Parker v. Twentieth Century-Fox Film Corp., 474 P.2d 689, 692 (Cal. 1970) (considering what role if any Shirley MacLaine should undertake when the company refused to make the picture it signed her up for). For the best analysis of the case, see Victor P. Goldberg, *Bloomer Girl Revisited or How to Frame an Unmade Picture*, 1998 Wis. L. Rev. 1051, 1052–53, which noted that the court did not have to do any mitigation analysis because the parties had framed the transaction as a "pay-or-play" option contract, common in the movie industry, whereby Twentieth Century Fox agreed to pay the same fee whether or not they required her to make the film.

27 Note that typically these preparation costs are not included in compensation under current caselaw to the extent that they are not embedded in work already done on the property. For an illustration of a state with late vesting, see H.R.D.E., Inc., v. Zoning Officer of Romney, 430 S.E.2d 341 (W. Va. 1993); for an early vesting state, see Valley View Indus. Park v. City of Redmond, 733 P.2d 182 (Wash. 1987).

28 *See Penn Cent.*, 438 U.S. at 130.

29 364 U.S. 40 (1960).

waters.[30] The notable takeaway from that decision was that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[31] The impeccable logic of *Armstrong* was that the repairs of the two vessels were for the benefit of the public as a whole, and not to supply some unspecified and disproportionate benefit to the materialman.[32] Had the Court decided otherwise, a skewed outcome would arise because the materialman, who derives only the tiniest private benefit from the boat, would have to pay a huge fraction of the total cost of repairs.

There are only two possible differences between *Armstrong* and *Penn Central.* The first is that the relevant public in *Penn Central* is not the United States, but only the citizens of New York City (and perhaps not even all of them). The second is that the partial interest in the property taken was air rights, not a materialman's lien. But the logic of *Armstrong* carries over without missing a beat to the government actions in *Penn Central.* In both cases, the taking of property rights was intended to benefit the public as a whole, not the individual property owner singled out to bear a disproportionate burden. To avoid this simple conclusion, Justice Brennan consciously muddied the waters by arguing that ad hoc considerations are needed, without explaining why the same per se rule does not work in both cases.[33] Thereafter, he misstated every single case that he cited to support his chosen result in *Penn Central*,[34] none of which require treating investment-backed expectations—a term that has no constitutional pedigree—as the linchpin of the overall analysis.

His second mistake is every bit as critical. Justice Brennan held that the landmark preservation ordinance did not interfere with what "must be regarded as Penn Central's primary expectation concerning the use of the parcel," which was to obtain a "reasonable return" on its investment.[35] The passive voice ("must be regarded," without saying by whom) and the reference to reasonable rate of return treats Grand Central Terminal as though it were a public utility, even though the air rights taken bear no connection to the provision of standardized common carrier services.[36] Justice Brennan's next step was to identify what he regards as the primary expectation: the

30 *See id.* at 41–42, 48.

31 *Id.* at 49.

32 *See id.* at 48–49.

33 *See Penn Cent.*, 438 U.S. at 123–24.

34 For the dissection, see Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean up Takings Law in* Murr v. Wisconsin, 11 N.Y.U. J.L. & LIBERTY 151, 167–83, 202–15 (2017).

35 *Penn Cent.*, 438 U.S. at 136.

36 *See id.*

return from the continued operation of the terminal.[37] This implies that secondary expectations need not receive constitutional protection.

At every point, Justice Brennan's analysis deviates from the standard principles of valuation. The correct valuation procedure involves decomposition of a complex bundle of entitlements followed by their recombination. First, find the future cashflow from a particular asset for each relevant time period, then discount these cashflows to their present value. That standard method is indifferent to which particular asset is examined first. So long as asset *A* and asset *B* are given correct valuations, the sum of *A* plus *B* will equal the sum of *B* plus *A*. Thereafter, the complete analysis must also worry about synergies, both positive and negative, which often go under the name of severance gains or losses. The problem arises when part of a single asset is taken over, but some portion remains with the original owner. The rules for these situations were well set out in *Miller*, which corrects for "severance" value when some portion of the asset was left in the hands of the private owner.[38] Those severance values could be negative, for example, if the fraction of land retained is too small to qualify as a building plot. Similarly, compensation is reduced if the retained land increases in value, as commonly happens with the construction of an adjacent railroad, which allows farm goods produced on the retained lands to reach the market more quickly.

It is therefore utterly mistaken to insist that just compensation has been paid so long as the cash covers any loss of the primary source of wealth, because this allows all other interests to be valued at zero even when they may be worth millions. Just as one finds the value of an asset by summing its discounted value over all time periods, so in any given time period correct valuation is to sum the value of each of the constituent parts. Valuing any portion of the asset at zero is just a flat-out error that would never be tolerated in any private transaction for the sale or mortgage of the structure.

Indeed, the valuation rule in *Penn Central* gains a surface plausibility solely because the terminal operations were able to generate a return sufficient to cover operating costs.[39] But that approach too introduces yet another serious error. The question of valuation looks to the fair market *value* of an asset, not its original or adjusted *cost*, for market fluctuations, up or down, over time could make these poor proxies for current value. Under the Brennan rule, sharp discontinuities in valuation—always a no-no—could arise if revenues could no longer cover the costs of the terminal's operation, with or without an allowance for depreciation. At this point, it should be proper to take into account the value of the air rights. Once done, those rights should be valued at their full market value, and not just to the extent needed to put net income from operations into the black. The correct valuation procedure avoids these problems. The gain or loss on the terminal itself is utterly irrelevant to the takings issue because both its possession and use are left undisturbed. Hence, the air rights should be valued for what they

37 *See id.*

38 *See* United States v. Miller, 317 U.S. 369, 375–77 (1943).

39 *See Penn Cent.*, 438 U.S. at 121, 135.

are, whether sold or retained, wholly without regard to the value of the underlying terminal.

This identical issue has arisen in connection with rate-of-return regulation, which was Brennan's point of departure in *Penn Central.* The key precedent is *Brooks-Scanlon Co. v. Railway Commission.*[40] The regulated company owned two businesses: one a railroad subject to regulation, and the other a sawmill that was not.[41] The rate order of the Louisiana Commission forced the company to operate the railroad at a monthly loss of over $1500, which the Commission claimed was proper because it was more than offset by the profits from the unregulated lumber business.[42] Justice Holmes held that it was constitutionally impermissible to set off the losses of a regulated business against the profits of an unrelated business.[43] His result has to be right, for otherwise the railroad could receive zero in revenues so long as the other business was robust enough to cover the losses. Justice Holmes thus properly emphasized the separability of the two businesses:

> A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage. . . . The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it.[44]

The efficiency explanation for this result is evident, for why should the common owner have to sell to a third party or spin off its profitable business to a new corporation in order to reclaim the appropriate rate of return on its regulated assets? At the very least, a forced sale requirement could create collateral consequences such as a realization of taxable gain, a transfer tax, or further local regulatory approvals.

The *Brooks-Scanlon* analogy carries over to *Penn Central* without missing a beat. The two assets are the air rights and the terminal, which are the functional equivalent of the two separate businesses in *Brooks-Scanlon.* Here too it does not matter that the air rights were sold off prior to the particular transaction. Nor is there any need to figure out how changes in one business should alter the compensation owed for taking the other. One need only follow the standard valuation procedure of adding wasted reliance costs to the market value of the air rights, which can be done without any jarring discontinuities.

Nonetheless, Justice Brennan compounds his initial error by his mistaken treatment of the transferable development rights (TDRs) over Grand Central Terminal. Thus, in his view, one of the elements that goes into the balancing mix was that the preexisting air rights were transferable to other properties in the vicinity including the "Barclay, Biltmore, Commodore, Roosevelt, and Waldorf-Astoria Hotels, the Pan-American Building and other

40 251 U.S. 396 (1920).

41 *See id.* at 398–99.

42 *See id.* at 397, 399.

43 *See id.* at 399.

44 *Id.* at 399.

office buildings along Park Avenue, and the Yale Club."[45] To grapple with this issue, he divided the case into two stages. In the first, he asked whether the taking had occurred, and in the second, whether just compensation was required.[46] The correct procedure in this situation is to first conclude that the air rights were indeed taken and only thereafter to ask about the relevance of the transferable development rights to the compensation question. Justice Brennan, in contrast, introduced maximum confusion into the case by accepting that "[w]hile these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation."[47] Hence, he refused to address the second question by taking evidence on the amount of mitigation that occurred. No one here claims that these rights are worthless: in one subsequent private dispute the TDRs could have been worth perhaps as much as $1.1 billion.[48]

Yet the method of valuation really matters, and the correct principle is this: the only form of compensation that the government may use when property is taken is *cash*, estimated in the matter already mentioned. The reason is simple. The use of any financial instrument raises a second set of valuation problems of its own. For example, assume that the government decides to compensate a property owner by issuing a bond. At this point, one has to see whether its market value is equal to its par value, which is no easy task given that the interest rate can only be evaluated in light of all the collateral conditions contained in the bond. Why introduce a second valuation dispute in order to resolve the first? The argument here does not prevent the government from using borrowed capital to pay for these air rights. It only requires that it negotiate the bonds at arm's length with independent third parties who operate in a competitive market where no court has to oversee the valuations made.

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45 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 115 (1978).

46 *Id.* at 122.

> The issues presented by appellants are (1) whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a "taking" of appellants' property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment, and, (2), if so, whether the transferable development rights afforded appellants constitute "just compensation" within the meaning of the Fifth Amendment. We need only address the question whether a "taking" has occurred.

*Id.* (footnotes omitted) (citation omitted) (citing Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 239 (1897)).

47 *Id.* at 137.

48 See, for an account of the complex situation, Charles V. Bagli, *Owner of Grand Central Sues Developer and City for $1.1 Billion Over Air Rights*, N.Y. Times (Sept. 28, 2015), https://www.nytimes.com/2015/09/29/nyregion/owner-of-grand-central-sues-developer-and-city-for-1-1-billion-over-air-rights.html.

Hence the proper procedure is to pay cash for the air rights here, and thereafter allow the government to make whatever disposition of those TDRs it desires to meet its own business requirements. It can face the distinctive challenge of negotiating with any or all of the nearby property owners over the necessary support rights needed to utilize these air rights. Or it can sell the air rights off in a separate arm's length transaction that again keeps the courts out of the valuation business. Justice Brennan's solution unwisely bundled the takings and just compensation questions together so as to make both unintelligible.

Nor is this the only time that he has done so. In *Nollan v. California Coastal Commission*,[49] the California Coastal Commission told the Nollans that they could build a larger beach house on their plot of land only if they ceded to the Coastal Commission a lateral easement across the front of their land, so that users of the public beaches could walk from one local beach to the other.[50] The value of building rights to the Nollans far exceeded the cost to them of allowing the easement, so Justice Brennan, in his well-known dissent, treated the bargain as a win-win situation.[51] Justice Scalia had argued that the case involved coercion, but wrongly analogized the situation to yelling fire in a crowded theater.[52]

Justice Scalia was right that the deal was fishy, but he had no functional explanation as to why. The answer runs as follows. In order for eminent domain to create some social improvement, the government must pay sufficient compensation to ensure that the value of the property in public hands is greater than it is in private hands. The bundling of the permit with the lateral easement makes that determination impossible, for now the landowner compares the gain from the development rights to the loss of the easement. The government therefore is never put to the test, for the owner will always surrender if the easement costs it, say, $1000 in lost value, but is worth only $500 to the owner so long as the development rights are worth anything over $1000, which they invariably are.[53]

The difficulties in *Nollan* should remind us of the difficulties in dealing with these TDRs. Most critically, it is necessary to distinguish TDRs from the common situation with implicit in-kind compensation, where a general statutory scheme is sustained even when no cash compensation is offered, because the burden that it imposes is worth more to each participant than the loss that they suffer from the overall scheme.[54] One illustration of this relationship involves removing overflight restrictions that allow air transportation for all. In this case, the transfer of rights is automatic for all parties concerned,

49 483 U.S. 825 (1987).

50 *See id.* at 828.

51 *See id.* at 856–57 (Brennan, J., dissenting).

52 *See id.* at 837 (majority opinion).

53 For more detailed explanation, see Richard A. Epstein, *The Harms and Benefits of* Nollan *and* Dolan, 15 N. ILL. U. L. REV. 479, 481–87 (1995).

54 For a general discussion, see RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 195–215 (1985).

removing any risk of bargaining breakdown or opportunism that derives from the ad hoc use of separable TDRs as an offset against condemnation.[55] In contrast, the principle of implicit in-kind compensation is *not* dispositive in the case of low-overflights because there the heavy burden suffered by discrete subjacent landowners is not offset by their proportionate gains from air transportation, so their position is like that of the materialman in *Armstrong*.[56] *Penn Central* contains a set of unforced errors that could have been avoided if the standard issues of valuing air rights had been resolved in conventional fashion. The appeal to primary expectations and the misuse of transferable development rights add gratuitous complications that should be rejected.

## II. Conditional Valuations

The second portion of this Essay is devoted to another major issue of valuation that is often mangled in judicial decisions: how best to value income-producing assets that have yet to produce any income. The topic is one of special interest to me because I wrote about it in two amicus curiae briefs directed to what I thought were serious injustices in the valuation of two major works projects—but the United States Supreme Court denied certiorari in both. The first case involved the condemnation by the Dormitory Authority of the State of New York in *In re John Jay College of Criminal Justice of the City University of New York*.[57] The second involved the condemnation of two major gates at Love Field, owned by Love Terminal Partners, undertaken as part of a huge statutory deal that allowed Southwest Airlines to fly its large planes on long-distance flights out of Love Field to all parts of the country.[58] Earlier the Wright Amendment had limited the use of large planes (defined as those with fifty-six seats or more) on short-haul flights.[59] Both of these cases introduced serious distortions into real estate and aviation markets respectively, and for the same underlying reason: the systematic undervaluation of given projects under standard estimate principles led to serious resource misallocations.

55 *See* Hinman v. Pac. Air Transp., 84 F.2d 755, 757–58 (9th Cir. 1936); Swetland v. Curtiss Airports Corp., 55 F.2d 201, 203 (6th Cir. 1932). For the development of the implicit in-kind rationale, see Epstein, *supra* note 54, at 195–215.

56 *See* United States v. Causby, 328 U.S. 256, 266–67 (1946).

57 River Ctr. LLC v. Dormitory Auth. (*In re* John Jay Coll. of Crim. Just. of City Univ.), 905 N.Y.S.2d 18 (N.Y. App. Div. 2010), *cert. denied*, 566 U.S. 982 (2012). The excellent petition for certiorari was drafted by Laurence Tribe and Jonathan Massey. *See* Petition for Writ of Certiorari, *River Ctr. LLC*, 566 U.S. 982 (2012) (No. 11-922). My brief was written with Erik Jaffe on behalf of the Real Estate Board of New York, et al. *See* Motion for Leave to File Brief and Brief for Real Estate Board of New York, Inc. et al. as Amici Curiae Supporting Petitioner, *River Ctr. LLC*, 566 U.S. 982 (2012) (No. 11-922).

58 *See* Love Terminal Partners, L.P. v. United States (*LTP III*), 889 F.3d 1331, 1336–39 (Fed. Cir. 2018).

59 *See id.* at 1336; *see also infra* notes 73–84 and accompanying text.

In *John Jay*, the "Petitioner, River Center LLC ('River Center')," had acquired title in 1998, pursuant to a 1992 option, to "a large city-wide block of real estate in New York City located several blocks south of Lincoln Center."[60] Between 1992 and 2001, "River Center and its affiliated companies" invested much "in time and money to develop the site as a multi-purpose 1.4 million square foot shopping center, complete with extensive parking facilities."[61] On April 11, 2001, these efforts ended "when the Dormitory Authority of the State of New York ('DASNY') condemned the entire site for an entirely different use—building a new dormitory for John Jay Criminal College in New York City."[62] The state, not the city, undertook the condemnation, because it was relatively indifferent to the tax losses to the City of New York by putting low-value tax-exempt property on that site.

The success of this particular deal for the state depended on getting the property for a low valuation. In order to do so, DASNY's appraiser, Robert Von Ancken, evaluated the property as though it were "'vacant land' to which he assigned a value of [some] $82.2 million."[63] He did so by assigning a zero value to the activities River Center had undertaken between 1992 (when it acquired the option to purchase) and the April 2001 stop date.[64] These activities included the following: buying "out General Motors from its long term lease" so that the full site was now fully assembled under River Center ownership; obtaining a rezoning of the site; finishing "all appropriate physical inspections; hir[ing] key personnel"; doing marketing studies; completing preliminary design studies suitable to fast track construction; drafting preliminary plans; "and exchang[ing] term sheets with potential anchor tenants."[65] The project was on course for full development, as the remaining activities—including the negotiation of a construction loan and the leasing out of smaller spaces—were standard private market transactions and did not present any special market challenges.[66]

The progress between 1992 and 2001 did not go unacknowledged in the real estate market. "During this predevelopment phase, River Center [procured] two nonrecourse mortgages on its property" whose unpaid balances at the time of condemnation were $33.1 million on the first mortgage and $77.8 million on the second mortgage, for a total of $111 million, or close to $29 million higher than the DASNY's expert valuation.[67] At the same time, River Center received two firm offers to purchase the project in its entirety: one from the Metropolitan Development Group, backed by Lehman Brothers, and one from Forest City Ratner.[68] The Metropolitan bid for $175 million

60 Motion for Leave to File Brief, *supra* note 57, at 4.

61 *Id.*

62 *Id.*

63 *Id.* at 6.

64 *Id.* at 6–7.

65 *Id.* at 4–5.

66 *See id.* at 5.

67 *Id.*

68 *Id.*

"plus 50% of profits, cash flow and fees." [69] Forest City Ratner's letter of intention in April 2000 put the site value at $155 million, plus 50% of residual profits for the residential units.[70]

In addition to these external evaluations, River Center's expert, M. Theresa Nygard, valued the site at $227 million.[71] Because within New York City there was no comparable project in size to the project, she broke the larger project down into five components, which she separately valued and then summed.[72] The external bids and the expert valuations were relatively in sync after making these adjustments. First, the nonrecourse mortgages set a very accurate lower bound on the worth of the site, because the absence of any personal guarantees meant that the lender could only look to the property for payment. But in most cases the equity cushion over the loan value is substantial, as reflected in the bids from both Metropolitan and Forest City Ratner, which were clearly above the mortgage values. Their precise amount is unclear because the two equity kickers do not admit of a precise valuation for bids that set the $155–$175 million range as a lower bound. But here too the corrected values did not necessarily represent the full market value because both buyers had to anticipate some surplus from the deal and thus may have bid less than the full value to them. All of this does not guarantee that Nygard's $227 million estimate was correct, but DASNY's expert offered nothing to undermine it, so Nygard's expert estimate is in conformity with standard evaluation techniques.

The astonishing feature of this case is that the appellate court accepted the DASNY's view that the only value in the site was the raw value of the land. As is often the case, it started by correctly stating the general rule:

> While fair market value should be based on the highest and best use of the property even though the owner may not have been utilizing it to its fullest potential at the time of the taking, a use must be established as reasonably probable and not a "speculative or hypothetical arrangement in the mind of the claimant." The speculative nature of the proposed development was shown here by, among other things, the testimony of River Center's principal admitting that at the time of the taking he had yet to obtain any financing commitment or any signed leases for the proposed development or, in fact, any of the requirements that would bring the project to fruition in the near future. To the extent that the appraisal rejected by the court was based on capitalization of income, it too was speculative.
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> . . . .
>
> The amount of the mortgage loan, with interest at 18½%, did not necessarily reflect the value of the property. Evidence of offers for the property

69 *Id.*

70 *Id.*

71 *Id.* at 7.

72 *See id.*

> was properly excluded because, among other reasons, offers of such nature are inadmissible on the issue of value.[73]

The court's opinion was cavalier at best in confronting any of these serious issues of valuation. It is, of course, the case that the risks of leasing or financing could influence value, but in this case a well-understood leasing and mortgage market could help with those valuations should it become necessary. In any event, it is wholly incorrect to ignore the major steps that had been undertaken solely because further steps were still needed. Unfortunately, all of the cases that the court cited on the admissibility of some settlement agreement involved various self-dealing arrangements unlike the arm's length nonrecourse transaction here. For example, that was the case in *Farash v. Smith*,[74] a property tax valuation case, where the stakes are far lower, given that the real estate taxes are only a small value of the overall property. In the end, *River Center* replicates the *Penn Central* mistake. Any asserted development interest received a zero value because it could not be valued with perfect certainty.

The second of these cases, *Love Terminal Partners, L.P. v. United States*,[75] has a more complex history that weaves together takings and antitrust law, including the so-called *Noerr-Pennington* doctrine,[76] which allows parties to

73 River Ctr. LLC v. Dormitory Auth. (*In re* John Jay Coll. of Crim. Just. of City Univ.), 905 N.Y.S.2d 18, 19–20 (N.Y. App. Div. 2010) (citations omitted) (quoting City of New York v. Rudnick (*In re* Shorefront High School), 250 N.E.2d 333, 334 (N.Y. 1969)).

74 453 N.E.2d 537, 539 (N.Y. 1983) ("Mr. Farash is a prominent and successful developer in the Rochester area and the opportunity to capitalize upon his expertise and reputation for success may well have inflated the amounts that the other partners were willing to invest, thereby rendering their contributions of little evidentiary value for assessment purposes."); *see also In re* City of New York, 222 A.D. 554, 555 (N.Y. 1928) ("The contention by the claimant that the [eminent domain] award is much less than the purchase price of the property and less than the purchase-money mortgage, is of little weight, since it appears that the property came into the possession of the claimant through a dummy corporation, which it controlled, and only after it was known that the city was to take over the property as a site for a public school.").

75 *LTP III*, 889 F.3d 1331 (Fed. Cir. 2018).

76 *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669–70 (1965); E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 136–37 (1961). For explanation, see FED. TRADE COMM'N, ENFORCEMENT PERSPECTIVES ON THE *NOERR-PENNINGTON* DOCTRINE (2006), https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf. The chief author of the report, Maureen K. Ohlhausen, then Director, Office of Policy Planning, and later FTC Commissioner, observed:

> When challenging conduct that involves communications to government, however, an enforcement agency must take into account other considerations. As the Supreme Court has explained in a series of cases that has come to be known collectively as the *Noerr-Pennington* doctrine, courts must interpret the Sherman Act in a way that respects the ability of government to take and the rights of citizens to request government action—even when that government action limits or eliminates competition.

*Id.* at 3.

secure protection from the antitrust laws for their requests to Congress for explicit exemptions from the antitrust laws. The background of this case began in the late 1970s when the Civil Aeronautics Board was stripped of its power to set fares by the Airline Deregulation Act of 1978.[77] This change in regulatory policy had a decided free market orientation, and generated a notable backlash in the lucrative Dallas-Fort Worth market, in which American Airlines controlled about an eighty percent share.[78] The then-upstart Southwest Airlines operated out of Love Field, close to downtown Dallas.[79] To stop that potential competition, Representative Jim Wright, the Democratic representative from Fort Worth and Speaker of the House of Representatives, secured passage of the Wright Amendment to the 1978 Act.[80] The Amendment stated that while planes of any size could be used to fly from Love Field to contiguous states, only planes with fifty-six seats or fewer could fly from Love Field on any long-haul flight.[81] In practice, this regulation shut Love Field out of the national market, but the Amendment was never challenged on constitutional grounds right after its passage, and it survived a belated 1991 challenge.[82]

Southwest then mounted a "Free Love Field" campaign in the late 1990s, which eventually bore fruit as the absurd restrictions of the Wright Amendment took their toll.[83] But, as matters worked out, a simple repeal of the Amendment was not in order. In 2006, Congress passed the Wright Amendment Reform Act (WARA),[84] which involved the legislative blessing of a five-part deal among American, Southwest, the cities of Dallas and Fort Worth, and the Dallas-Fort Worth airport.[85] The basic deal was to replace the American Airlines monopoly over the Dallas-Fort Worth market with a duopoly between American and Southwest. For that division to work required that these five stakeholders eliminate all possible entry from third-party carriers that had the possibility of reducing the current fares to competitive levels.

77 For my history of this saga, see Richard A. Epstein, *The Wright Stuff: When Is Aviation Reform Not Really Reform?*, REGULULATION, Spring 2007, at 8, 8–13.

78 *See id.* at 8.

79 *See id.* at 8, 10; *see also* Eric A. Allen, *The Wright Amendment: The Constitutionality and Propriety of the Restrictions on Dallas Love Field*, 55 J. AIR L. & COM. 1011, 1013–18 (1990).

80 *See* Allen, *supra* note 79, at 1018–19.

81 *See* International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29(a), 94 Stat. 35, 48–49 (1980) (amended 2006).

82 For a discussion of this tangled history, see Allen, *supra* note 79, at 1013–19. The constitutional issues are discussed at pages 1023–49, which deal with both the relevant caselaw on similar issues, and possible theoretical challenges of the Wright Amendment, including the right of interstate travel. For the belated constitutional challenge, see *Cramer v. Skinner*, 931 F.2d 1020, 1029–35 (5th Cir. 1991), which rejected a challenge that the Wright Amendment blocked the right of interstate commerce, on the ground that the Amendment only made such "travel less convenient for such passengers." *Id.* at 1030. For discussion, see Barrett V. Armbruster, *Wright Is Still Wrong: The Wright Amendment Reform Act and Airline Competition at Dallas Love Field*, 81 J. AIR L. & COM. 501, 517–21 (2016).

83 *See* Epstein, *supra* note 77, at 10.

84 Wright Amendment Reform Act of 2006, Pub. L. No. 109-352, 120 Stat. 2011 (2006).

85 *See* Epstein, *supra* note 77, at 8, 10.

WARA achieved this scheme of maintaining these monopoly rates by ordering Dallas to "reduce as soon as practicable, the number of gates available for passenger air service at Love Field to no more than 20 gates," from the previous number of thirty-two gates.[86] On the face of the statute, nothing required destruction of the gates owned by Love Terminal Partners (LTP), but these gates were selected for physical destruction by the Dallas-Fort Worth officials.[87]

The gate owners then sued five participants to the master agreement for violation of the antitrust law, namely the division of markets.[88] Those claims came to nothing because the *Noerr-Pennington* doctrine was held to insulate all these parties from antitrust liability, given that they had successfully petitioned the United States Congress for relief, which they had obtained in the form of WARA.[89] But that antitrust decision left open the question of whether the physical destruction of the gates amounted to a taking for public use for which just compensation was owed under the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*[90] As a lawyer who worked on the case, I thought that this taking of gates from LTP was done for the exclusive benefit of American and Southwest, and hence was prohibited under *Kelo v. City of New London*,[91] which held that "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation."[92] Quite simply, the cartel could not shut down LTP and claim the protection of its position was for the public benefit. Nor in practice could it buy them out in the voluntary market, given the prospect of future entry by other parties, even if they could renegotiate this complex five-sided deal to include other parties.

Nonetheless, LTP opted only to seek just compensation for their losses. In the Court of Federal Claims, they succeeded in obtaining $133.5 million for the taking of their gates.[93] On appeal, the Federal Circuit reversed the award allowing *no* compensation[94] under a decision that relied on both *Lucas v. South Carolina Coastal Council*,[95] and *Penn Central Transportation Co. v. New York City*.[96] That opinion raises the obvious question—could state-of-the-art gates be worth nothing? The very fact that the cartel went to extreme

86 Wright Amendment Reform Act § 5(a).

87 *See* Epstein, *supra* note 77, at 8, 10.

88 *See* Love Terminal Partners, L.P. v. City of Dallas (*LTP I*), 527 F. Supp. 2d 538, 543 (N.D. Tex. 2007).

89 *Id.* at 556; *see also* Armbruster, *supra* note 82, at 519–20.

90 458 U.S. 419 (1982).

91 545 U.S. 469 (2005).

92 *Id.* at 477.

93 Love Terminal Partners v. United States (*LTP II*), 126 Fed. Cl. 389, 440 (2016).

94 Love Terminal Partners, L.P. v. United States (*LTP III*), 889 F.3d 1331, 1336, 1349 (Fed. Cir. 2018).

95 505 U.S. 1003 (1992).

96 438 U.S. 104 (1978). This case received extensive discussion from Judge Dyk, which I shall not comment on here. *See LTP III*, 889 F.3d at 1342–47.

political measures to remove them counts strongly against that view: Why would anyone want to blow up gates that offered no effective competition? And if these gates were worth nothing to LTP, presumably they were worth nothing to American and Southwest, their direct competitors.

So the question arises: How did Judge Dyk perform the analysis needed to reach this valuation? The first problem was whether or not the statute that was the *sine qua non* for these negotiations authorized the taking so as to make the federal government liable for the actions taken by Dallas. The point here is one of constant irritation because it is impossible to join in any one suit both the federal and state entity that is responsible for a taking. According to Judge Dyk, the legislation did not allow for compensation because "[a]cquisition of plaintiffs' property through negotiation could not constitute a taking because any property transfer would be voluntary. A physical taking only occurs where the government '*requires* the landowner to submit to the physical occupation of his land.'"[97] But the point has to be pure sophistry because it would mean that anytime any parties settle a takings case, the transaction would count as voluntary. So long as there is a threat to take that induces a settlement, that settlement is not voluntary. The private party who voluntarily surrenders his watch in order to save his wallet has not voluntarily parted with his watch. It is a clear case of coercion, which allows him to set aside the agreement. So here the threat of eminent domain authorized by the federal government taints the state action. And while the state is allowed to offer to pay fair value, the statutory authorization under WARA let it achieve its objective without compensation if it so desired. The effort of the federal government to distance itself from this transaction should fail. The correct response could well be that if it had to pay compensation, it could use a theory of restitution to recover that sum from the Dallas-Fort Worth airport that initiated the transaction and was its direct beneficiary.

But if the mode of acquisition is irrelevant, what about the valuation issues? The naïve view is that if the gates were worth zero, why wouldn't LTP just walk away? And would the effort to sell the gates, warts and all, have generated a price of $0.00? Note that on this point the variance is critical, for even if the gates were likely to be of value only ten percent of the time, both LTP and prospective buyers would attach a positive value to the simple fact that the gates would end up in the money ten percent of the time. And in dynamic markets, the variance is likely to be such that the high side would be even larger.

In a world in which market values dominate valuation, it is hard to see why other techniques of valuation could reduce that price to zero. Nonetheless, Judge Dyk sought to undercut the obvious by first arguing that LTP could not make a go at the Lemmon Avenue Terminal when it started operations in 2000, and that the company could not find a tenant for its property in 2003.[98] Those observations are relevant to value but hardly decisive

97 *LTP III*, 889 F.3d at 1348–49 (quoting Yee v. City of Escondido, 503 U.S. 519, 527 (1992)).

98 *See id.* at 1337.

because circumstances, including the passage of WARA, necessarily gave greater hope that operating the LTP gates would generate a positive return—especially if twelve other gates owned by Southwest were the ones ordered to be shut down. Hence, the entire convoluted proceedings ignored the market value of the gate at the time that the various machinations had taken place, which shows, sadly, that if local and federal governments throw enough sand in the gears, an asset that is worth something can be taken and destroyed for nothing. To be sure, airport gates do create problems of valuation, but those are just disputes over numbers, without this unnecessary and convoluted overlay.

## Conclusion

Matters of valuation are all-pervasive, but often they are treated as secondary matters to the questions of liability. But from a strict expected-value calculation, that omission is dangerous. Valuation questions come up in all cases, and when they are incorrectly decided, they attach a wrong set of prices to assets that are subject to condemnation, which in turn leads to serious resource misallocations. There are difficulties enough with valuation when consciously done, because different methods could yield different results, just as the same methods can yield different results, depending on the assumptions built into the model. These problems pose serious obstacles to private parties who wish to contest the government valuation. There is hardly any need to make their task even more difficult by adding in gratuitous conceptual complications that tend to reduce or eliminate the government obligation to pay just compensation.

In *Penn Central*, there was no need to take detours to address primary expectations or ad hoc balancing tests with TDRs. With *River Center*, there was no need to ignore all the increments in market value that were fully incorporated into valuation by lending and selling markets. In *Love Terminal Partners*, there was no reason to attach zero value to the willful destruction of gates on the ground that previously they could not be operated at a profit. There are surely many cases where valuation is done correctly, but others in which it is not. Getting the right principles will not stop all forms of abuse, but it is an indispensable step in untangling the mess that has become modern takings law.