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Louis M. Russo
Fordham University School of Law

FROM RAILROADS TO SAND DUNES: AN EXAMINATION OF THE OFFSETTING DOCTRINE IN PARTIAL TAKINGS

*Louis M. Russo**

Called "shadowy at best," the offsetting doctrine in partial takings has confused "even trained legal minds" and generated inconsistent decision after inconsistent decision. The offsetting doctrine allows certain benefits, termed special, to offset condemnation awards, while general benefits may not be offset. Courts blindly adhere to the doctrine despite its underpinnings rooted in eighteenth-century public policy, which was based on concerns of overly speculative valuation and arguably erroneous fairness, as well as incorrect interpretations of Takings Clause jurisprudence. Such adherence dramatically increases the cost of financing a takings project.

In the face of blind adherence to the doctrine, municipalities are forced to balance the needs of their citizens against the needs of eighteenth-century courts, often resulting in the failure of municipalities to engage in takings for the public benefit. This Note argues that new public policy concerns warrant rejection of the doctrine in favor of a rule that allows all nonspeculative benefits to offset a condemnation award. This rule would take into account modern advances in evidence, promote fairness, simplify the judicial process, and allow municipalities to respond to twentieth-century problems while landowners receive just compensation for taken land.

* J.D. Candidate, 2015, Fordham University School of Law; B.A., 2012, Wagner College. In memory of my mother, Pamela J. Russo (2/11/53–11/11/13).

INTRODUCTION

Imagine for just a moment that you are the mayor of a coastal city that was just ravaged by the devastating effects of a major hurricane.[1] Climate scientists tell you that such storms will become more prevalent, and although you are unsure of the science, you decide that action must be taken.[2]

After consulting with scientists, engineers, and city planners, you decide that the most prudent course of action is to build sand dunes.[3] Sand dunes are often considered a first line of defense against coastal flooding.[4] Unfortunately, private landowners, who cherish their views of the usually peaceful Atlantic, own most of the beachfront land in your city.

You consult with a city attorney, who counsels that you may use the power of eminent domain to take a portion of the landowner's property, so long as you provide "just compensation."[5] Delighted, you respond that this should not be a problem—after all, the owners will receive implicit compensation in the form of protection from further storms, right? Maybe. The homeowners will almost certainly argue that they must be financially compensated—that is,monetarily—and that it is unjust to force them to bear the costs of a project that the entire community benefits from.

Determining who is correct hinges on a body of law where "[c]onfusion abounds."[6] That body of law, the subject of this Note, is the offsetting doctrine in partial takings.[7]

This scenario bears much similarity to the facts that were before the Supreme Court of New Jersey in *Borough of Harvey Cedars v. Karan*.[8] Harvey Cedars, a municipality on Long Beach Island in New Jersey, exercised the power of eminent domain to facilitate a dune construction project that restored beaches, protecting residents from erosion and storms.[9]

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1. It is estimated that Hurricane Sandy caused $19 billion worth of damage to New York City alone. Eric S. Blake et al., *Tropical Cyclone Report Hurricane Sandy*, NAT'L HURRICANE CTR. 18 (Feb. 12, 2013), http://www.nhc.noaa.gov/data/tcr/AL182012_Sandy.pdf.

2. Scientists disagree about the increased likelihood of major tropical storms in the mid-Atlantic region. *Compare* THOMAS C. PETERSON ET AL., EXPLAINING EXTREME EVENTS OF 2012 FROM A CLIMATE PERSPECTIVE S20 (2013) (suggesting "increased frequency of Sandy-like inundation disasters in the coming decades along the mid-Atlantic and elsewhere"), *with* Elizabeth A. Barnes et al., *Model Projections of Atmospheric Steering of Sandy-Like Superstorms*, 110 PNAS 15,211–215 (2013) (noting that "climate models consistently project a decrease in the frequency and persistence of the westward flow that led to Sandy's unprecedented track").

3. Sand dunes protected properties in New York and New Jersey from flooding during Hurricane Sandy. *See* Mireya Navarro & Rachel Nuwer, *Resisted for Blocking the View, Dunes Prove They Blunt Storms*, N.Y. TIMES, Dec. 4, 2012, at A1.

4. *Sand Dunes*, FEMA (Sept. 4, 2013, 5:04 AM), http://www.fema.gov/floodplain-management/sand-dunes.

5. For a basic discussion of the power of eminent domain, see *infra* Part I.A.

6. 8A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § G16.04 (Matthew Bender 3d ed. 2013).

7. *Id.*

8. 70 A.3d 524 (N.J. 2013).

9. *Id.* at 526.

The municipality acquired an easement on the Karans' property, but the Karans rejected an eminent domain award issued by three appointed commissioners and demanded a jury trial on the issue of compensation.[10]

At a preliminary hearing, the trial court needed to determine if the borough could present evidence to the jury that "[w]ithout the dune project, the Karans' property had only a 27 [percent] chance of surviving fifty years without any storm damage."[11] The lower court determined that the benefit of the storm-protection project was "shared . . . by the larger community," or put differently, a "general benefit."[12]

By classifying the benefits of the project as general, the trial court determined that New Jersey's "traditional offsetting doctrine"[13] prohibited the jury from reducing, or offsetting, the eminent domain award; only special benefits could offset an award.[14] Thus, Harvey Cedars was precluded from introducing any evidence concerning the protection provided by the sand dunes. At trial, the Karans received a jury award of $375,000.[15] Harvey Cedars appealed, and the case made its way to the Supreme Court of New Jersey.[16]

On appeal, the New Jersey high court was tasked with determining "how to calculate 'just compensation' when the taking of a portion of . . . property . . . enhance[d] in part the value of the remaining property."[17] The court could have: (1) reaffirmed the application of the traditional offsetting doctrine, upholding the ruling of the trial court; (2) maintained the traditional offsetting doctrine but characterized the dune project as creating a special benefit;[18] (3) eliminated offsetting entirely; or (4) allowed the offsetting of all nonspeculative benefits—the course the court ultimately took.[19]

This Note examines the merits of each of the routes that New Jersey could have taken and other states can take regarding the calculation of just compensation in partial takings cases. It pays particular attention to the justifications for maintaining a distinction between general and special benefits and the counter-justifications for permitting the offsetting of any benefit. Part I provides an overview of the law of eminent domain in the United States and introduces the basic concepts and justifications of the offsetting doctrine. Part II discusses the constitutionality of offsetting. Part III examines the conflict between states that maintain a distinction

10. *Id.* at 528.
11. *Id.* at 529.
12. *Id.*
13. E.H. Schopflocher, Annotation, *Deduction of Benefits in Determining Compensation or Damages in Eminent Domain*, 145 A.L.R. 7, 40 (1943) ("The principal rule, for purposes of the distinction between deductible and nondeductible benefits, is that general benefits cannot be deducted, but that special benefits are deductible." (footnotes omitted)).
14. *See Karan*, 70 A.3d at 529–30. The trial judge relied on *Sullivan v. North Hudson County Railroad Co.*, 18 A. 689 (N.J. 1889).
15. *Karan*, 70 A.3d at 531.
16. *Id.* at 532.
17. *Id.* at 526.
18. The borough argued for this approach. *See id.* at 532.
19. *Id.* at 543–44.

between general and special benefits and states that do not. Lastly, Part IV contends that the arguments for maintaining a distinction between general and special benefits do not provide a persuasive justification for the traditional offsetting doctrine.

I. THE LAW OF EMINENT DOMAIN

Part I provides a broad overview of key concepts in eminent domain and introduces the offsetting doctrine. Part I.A considers the source of eminent domain power, the constitutional limitations on the exercise of eminent domain power, and the authority to delegate eminent domain power. Part I.B provides a brief overview of the condemnation process, principally under the Uniform Eminent Domain Code. Part I.C explores the concept of a giving and discusses how benefits are treated when an entire property is taken. Part I.D introduces the concept of a partial taking and explores the methods that courts use to calculate just compensation in partial takings cases. Part I.E introduces the offsetting doctrine, defines general and special benefits, and discusses the justifications for the offsetting doctrine. Part I.F discusses the historical context of the offsetting doctrine. Part I.G discusses the modern need to offset and the evidence used in contemporary condemnation cases. Lastly, Part I.H discusses special assessment taxes in the context of partial condemnation.

A. The Source of the Power of Eminent Domain

This section discusses the power of eminent domain. It begins by discussing the historical roots of eminent domain, and it then analyzes eminent domain under the federal and state constitutions. Finally, this section examines the authority to delegate eminent domain to local governments, public service corporations, private corporations, and individuals.

1. Historical Roots of the Eminent Domain

As put by a leading real property treatise: "'Eminent Domain' is the power of the sovereign to take private property for the public use *without the owner's consent*."[20] Some scholars have argued that the power of eminent domain is as old as the Bible,[21] and the historical record reveals at least some power to compel an individual to relinquish his property under Roman law.[22] However, the legal framework that surrounds the modern exercise of eminent domain in the United States is not rooted in ancient

20. 4 HERBERT T. TIFFANY & BASIL JONES, TIFFANY REAL PROPERTY § 1252 (3d ed. 2014) (citing United States v. 0.95 Acres of Land, 994 F.2d 696 (9th Cir. 1993)) (emphasis added).

21. 1 SACKMAN, *supra* note 6, § 1.2[1] (noting that a jurist "claimed that the earliest known exercise of the power of eminent domain was alluded to in the Bible").

22. For an excellent discussion of the exercise of eminent domain under Roman law, see J. Walter Jones, *Expropriation in Roman Law*, 45 L.Q. REV. 512 (1929). Additionally, the leading authority on the historical development of eminent domain is William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972).

law[23] but instead finds at least some of its theoretical underpinnings in early English law.[24] William Blackstone's conceptualization of the power of eminent domain as the ability to "oblige the owner to alienate his possessions for a reasonable price" still holds true today.[25] Despite these theoretical underpinnings, American eminent domain law was largely developed in the American colonies.[26] Early colonial statutes provided that land owners were to receive "due satisfaction," "due justification," or "true [v]alue]."[27]

2. Eminent Domain Under the Fifth Amendment

At the ratification of the U.S. Constitution, it was effectively assumed that sovereign governments, including the federal government, maintained the power of eminent domain.[28] This power is limited by the Fifth Amendment Takings Clause, which states that property shall not "be taken for public use, without just compensation."[29]

In a recent case, *Kelo v. City of New London*,[30] the U.S. Supreme Court adopted a broad interpretation of the public use requirement, permitting a taking for a "public purpose"—including privately owned economic development.[31] After *Kelo*, sovereigns vested with the power of eminent domain have broad powers to take private property, at least under the Constitution, so long as there is "sufficient indicia of meeting public use/public purpose requirements."[32]

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23. Nathan Matthews, *The Valuation of Property in the Roman Law*, 34 HARV. L. REV. 229, 230 (1921) (noting that "[t]he law of valuation, as applied by the American and English courts . . . has no roots in [Roman law]").

24. *See* Stoebuck, *supra* note 22, at 554, 561–67 (discussing the influential role in the development of eminent domain shared by the Magna Carta, English statutes, and the writings of Lord Coke, Blackstone, and John Locke). Significantly, a number of chapters of the Magna Carta foreshadow the modern conception of the power of eminent domain. For example, Chapter 39 provides that "[n]o freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." MAGNA CARTA, CH. 39 (1225). Additionally, Chapter 28 provides that "[n]o constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefore . . . ." *Id.* at CH. 28. For a thorough discussion of the provisions of the Magna Carta that are relevant to the power of eminent domain, see KYLE SCOTT, THE PRICE OF POLITICS: LESSONS FROM KELO V. CITY OF NEW LONDON 1–17 (2010).

25. 1 WILLIAM BLACKSTONE, COMMENTARIES *135.

26. *See generally* James W. Ely, Jr., *That Due Satisfaction May Be Made: The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1 (1992).

27. *Id.* at 8–11.

28. 13 RICHARD J. POWELL, POWELL ON REAL PROPERTY § 79F.01 (Michael Allan Wolf, ed., Matthew Bender 2013) (noting that the Fifth Amendment "assumes that a governmental power to take private property exists"). Despite this assumption, the U.S. Supreme Court did not officially recognize the power of the federal government to take property until 1875. Kohl v. United States, 91 U.S. 367 (1875).

29. U.S. CONST. amend. V.

30. 545 U.S. 469 (2005).

31. *See id.* at 484–86.

32. 2A SACKMAN, *supra* note 6, § 7.09[2].

This broad conception of "public use" is tempered by the second constitutional requirement—just compensation.[33] Just compensation, which is the primary issue under the offsetting doctrine,[34] at its most general level requires the payment of fair market value.[35] The Supreme Court has generally required that this value be determined at the "highest and most profitable use for which the land is likely to be needed in the reasonably near future."[36]

3. Eminent Domain Under State Constitutions

In addition to the U.S. Constitution, forty-nine states have an eminent domain provision in their state constitutions.[37] Despite often using near identical language,[38] states are free to interpret their constitutions as providing greater protection to private property.[39] As a result, eminent domain cases "brought under a state constitutional provision may require a different analysis and lead to different results."[40] This is especially true in the realm of partial takings and the offsetting doctrine because states frequently disagree about the classification of benefits as general or special.[41]

4. Delegation of the Power of Eminent Domain

Although the eminent domain power is originally vested in the federal and state governments, it is unquestioned that this power can be delegated to local governments,[42] public service corporations,[43] private corporations,[44] and even individuals.[45] Once eminent domain power is

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33. *See Kelo*, 545 U.S. at 497 (acknowledging the second requirement of just compensation).

34. *See supra* note 17 and accompanying text.

35. *See* United States v. Miller, 317 U.S. 369, 374 (1943) (noting that landowners are entitled to fair market value).

36. Olson v. United States, 292 U.S. 246, 255 (1934).

37. 1 SACKMAN, *supra* note 6, § 1.3. North Carolina is the only state without an eminent domain provision. *See id.*

38. For example, the Washington Constitution provides that "[p]rivate property shall not be taken for private use . . . . No private property shall be taken or damaged for public or private use without just compensation having been first made." WASH. CONST. art. I, § 16.

39. *See, e.g.*, Manufactured Hous. Cmtys. v. State, 13 P.3d 183, 189 (Wash. 2000) ("Washington state courts . . . provide Washington citizens with enhanced protections against taking private property for private use.").

40. 1 SACKMAN, *supra* note 6, § 1.3.

41. *Compare* Blankenburg v. City of Northfield, 462 N.W.2d 417, 418 (Minn. Ct. App. 1990) (finding that a connection to a public sewer is a special benefit), *with* City of Wichita v. May's Co., 510 P.2d 184, 187–88 (Kan. 1973) (concluding that the building of a sewer line confers no special benefit).

42. *See, e.g.*, State v. Mayor of Newark, 23 A. 129, 129 (N.J. 1891) (noting the authority to delegate eminent domain power to a city).

43. *See, e.g.*, N.C. Pub. Serv. Co. v. S. Power Co., 282 F. 837, 841 (4th Cir. 1922) ("The right of eminent domain is conferred by statute on electric power and light companies.").

44. *See, e.g.*, Gradison v. Ohio Oil Co., 156 N.E.2d 80, 82 (Ind. 1959) (permitting the affirmative grant of eminent domain power to both domestic and foreign corporations).

45. *See, e.g.*, United States v. 243.22 Acres of Land, 43 F. Supp. 561, 565 (E.D.N.Y. 1942) ("Congress may properly delegate to individuals . . . [the] power to condemn.").

granted, judicial review of the grantees' authority is limited to whether they complied with the public use and just compensation restrictions.[46] In other words, when the power of eminent domain is exercised by a grantee or the state itself, the scope of judicial review does not reach questions like whether the project is necessary or prudent.[47]

The delegation of eminent domain power to railroads played an extremely important role in their development.[48] Legislatures and courts were apprehensive about granting the power of eminent domain to railroads.[49] As a result of this apprehension, eighteenth-century state supreme courts developed a variety of protective doctrines,[50]including the offsetting doctrine.[51]

B. Eminent Domain Explored: The Condemnation Process

Each state and the federal government have procedures to exercise the power of eminent domain—or in other words, condemn the land.[52] The particular procedures vary "widely in different jurisdictions."[53]

At a general level, when an entity desires to exercise the power of eminent domain, there are two questions: the validity of the taking and the calculation of just compensation.[54] The apparatus to answer these questions can be either administrative or judicial.[55]

The administrative approach typically consists of a vote on an ordinance or resolution to take a certain property.[56] Concurrent with this vote is an "award . . . of compensation to each individual whose land is taken."[57] If the landowners wish to challenge the award of compensation, they must institute a challenge, which would be tried before a jury or judge like any other action at common law.[58]

Under the judicial approach, when an entity invested with the power of eminent domain wants to exercise that power, "it institutes a suit or proceeding in court against the persons whose land it desires to take."[59] In that proceeding, the judicial body will first determine if the entity has the

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46. 1A SACKMAN, *supra* note 6, § 3.03[3][c].
47. *See id.*
48. CHRISTIAN WOLMAR, THE GREAT RAILROAD REVOLUTION: THE HISTORY OF TRAINS IN AMERICA 26 (2012) (noting that eminent domain power was crucial for railroads).
49. *See id.* at 26–27 (noting the battles and the "uphill struggle" railroads faced in persuading legislatures and courts to grant and uphold the power of eminent domain executed by railroads).
50. WILLIAM A FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 81 (1995).
51. For a discussion of the role railroads played in the development of the offsetting doctrine, see *infra* notes 120–26 and accompanying text.
52. BLACK'S LAW DICTIONARY 353 (10th ed. 2014).
53. 6 SACKMAN, *supra* note 6, § 24.01[1].
54. *Id.* § 24.01[2].
55. *Id.* § 24.02.
56. *See id.* § 24.04.
57. *Id.*
58. *See id.*
59. *Id.* § 24.05[1].

power to condemn.[60] This is ordinarily a question of law determined at a hearing.[61] If the entity is determined to have the power to condemn, a proceeding will be held to determine the value of just compensation.[62]

Under either approach, judicial or administrative, once the amount of compensation has been challenged and the parties end up in court, a jury will likely be presented with evidence concerning the value of the property that is the subject of the action.[63] Litigation concerning the offsetting doctrine typically arises when appealing the admissibility of particular evidence—like testimony regarding the value of a general or special benefit.[64]

C. Givings and the Treatment of Benefits During a Total Taking

When an entire property is taken, the government must compensate the property owner for the value.[65] However, the effect of any taking will almost always benefit neighboring property owners.[66] For example, if a municipality condemns tall buildings along the shore, neighboring property owners will receive a benefit—a view of the ocean.[67] Commentators call this benefit a giving.[68] The law does not recognize givings, however, and recipients are not "charged" for the benefits.[69] In the above example, the neighboring property owners will not have to pay the government for their new view.[70]

The concept of a giving has played an important role in increased coastal floodplain development.[71] Professor Daniel D. Barnhizer argues that government givings, including the construction of flood control measures, have increased coastal property values.[72] Professor Barnhizer argues that public policy necessitates a change in the law that would permit the government to offset these "givings" to finance property acquisition programs to remove landowners from coastal areas.[73]

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60. *See id.*
61. *See id.*
62. *See id.*
63. For a discussion of the presentation of valuation evidence to juries, see 7 SACKMAN, *supra* note 6, § G3.01–.12.
64. *See, e.g.*, Borough of Harvey Cedars v. Karan, 70 A.3d 524, 544 (N.J. 2013) (ordering a new trial because the condemning entity was "barred from presenting evidence that is admissible").
65. *See supra* notes 27–39 and accompanying text.
66. *See* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 549–50 (2001) (discussing that givings occur "in almost every . . . government endeavor related to property").
67. For a similar example, in the context of rezoning ordinance, see *id.* at 566.
68. *See id.* at 550–51.
69. *See id.* at 564 ("Currently, givings are not a recognized category of law.").
70. *See id.*
71. *See* Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 HARV. ENVTL. L. REV. 295, 295 (2003).
72. *See id.* at 296–97.
73. *See id.* at 298.

It is important to note that the recipients of these "givings" are the property owners whose lands are not taken.[74] In fact, when an entire property is taken, the general rule is that landowners are not to be compensated for the "effect of the proposed project upon the value of property taken."[75] The Supreme Court has held that under the Fifth Amendment, landowners are not entitled to receive an increased condemnation award because of the prior likelihood that the land would be taken.[76]

D. An Introduction to Partial Takings

A partial taking, in contrast with a total taking, occurs when only a portion of land is taken or damaged by the government or entity condemning the land.[77] Partial takings cases present "far more complex [issues] than total takings," because the property owner "not only experiences a loss of a portion of his or her property but also suffers damage to the portion not taken," and indeed can receive a benefit to his retained land from the project undertaken on the condemned land.[78]

To calculate just compensation in partial takings cases, courts apply one of two approaches—the "before and after" rule or the "severance damage" rule.[79] The before and after rule, which is used in the overwhelming majority of jurisdictions,[80] "compares the fair market value of the entire tract of land before the taking with the fair market value of the land remaining after the taking."[81] Under the severance damage rule, the market value of property condemned is calculated, and then additional "damages" are calculated to determine what "the landowner is entitled to receive."[82]

Each of these formulas presupposes that the remaining property will decrease in value, but the complexities of partial takings cases arise when courts need to determine how the remaining property may *increase* in value or how the diminishment in value may be reduced as a result of the taking.[83]

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74. *See* Bell & Parchomovsky, *supra* note 66, at 552 (noting that the state takes from "Jane Smith" and gives to everyone).

75. *See* 4 SACKMAN, *supra* note 6, § 12.03.

76. *See* United States v. Miller, 317 U.S. 369, 377–78 (1943) (citing Shoemaker v. United States, 147 U.S. 282 (1893)).

77. *See* 4A SACKMAN, *supra* note 6, § 14.01.

78. *See id.*

79. *See id.*; *see also* Village of South Orange v. Alden Corp., 365 A.2d 469, 472 (N.J. 1976) (noting that "the compensation due the landowner may be expressed and may be determined in either of two ways").

80. *See* 4A SACKMAN, *supra* note 6, § 14.02[1] ("Virtually all jurisdictions allow the use of the before and after methodology.").

81. *Id.*

82. *See id.* § 14.02[2].

83. *See* Schopflocher, *supra* note 13, at 16.

E. The Offsetting Doctrine and the Justifications for Its Limitations

In order to address this problem, the majority of courts follow a complex offsetting doctrine.[84] Under the majority formulation of the doctrine, "a condemnor may offset the amount of compensation it owes a landowner by any 'special benefits' to the remaining property," but general benefits may not offset.[85]

Courts have struggled to cohesively define general and special benefits.[86] In fact, some courts have argued, "it is often impossible to distinguish between [general and special benefits]."[87] At least in definitional terms, a general benefit is typically referred to as a benefit held in common with neighboring lands.[88] In contrast, special benefits are roughly defined as benefits that "are direct and peculiar to the particular property."[89] For example, most courts would consider the widening of a road in a large city a general benefit, but building a highway along an isolated property would likely be considered a special benefit.[90] However, despite these definitions, courts reach different classifications regarding near identical projects.[91] For example, faced with classifying the construction of a railroad that improved travel, the Court of Appeals of Maryland defined the benefit as "general,"[92] whereas the Massachusetts Supreme Judicial Court reached the opposite conclusion.[93] Courts have also struggled to classify highways,[94] river channels,[95] and telephone lines.[96] Despite these difficulties, the offsetting

84. *See* 4A SACKMAN, *supra* note 6, § 14.03[3] ("[M]ost states allow offsets for special benefits."). This offsetting doctrine has some analogy to the general/special benefits dichotomy in special assessment taxes. A special assessment is "a tax on property that benefits in some important way from a public improvement." BLACK'S LAW DICTIONARY 139 (10th ed. 2014) (defining "assessment"). For further discussion of the interaction between condemnation and special assessments, see *infra* Part I.H.

85. 4A SACKMAN, *supra* note 6, § 14.03[3].

86. *See* Schopflocher, *supra* note 13, at 48–49.

87. Bramlett v. City Council of Greenville, 70 S.E. 450, 452 (S.C. 1911).

88. *See, e.g.*, United States v. River Rouge Improvement Co., 269 U.S. 411, 416 (1926) (defining a general benefit as "sharing in the common advantage and convenience of increased public facilities, and the general advance in value of real estate in the vicinity by reason thereof"); Hendler v. United States, 175 F.3d 1374, 1380 (Fed. Cir. 1999) ("[B]enefits that inure to the community at large are considered general."); *see also* 4A SACKMAN, *supra* note 6, § 14.03[3].

89. United States v. Trout, 386 F.2d 216, 221–22 (5th Cir. 1967) (quoting United States v. 2477.79 Acres of Land, More or Less, Situate in Bell Cnty., 259 F.2d 23, 28 (5th Cir. 1958)); *see also* 4A SACKMAN, *supra* note 6, § 14.03[3].

90. Deposition of Stephen J. Matonis at 32–33, Koontz v. St. Johns River Water Mgmt. Dist., No. CI-94-5673, 2006 WL 6912444 (Fla. Cir. Ct. Feb. 21, 2006), 2006 WL 6931483.

91. *See supra* notes 38–39 and accompanying text.

92. Lake Roland El. Ry. Co. v. Frick, 37 A. 650, 652 (Md. 1897).

93. Peabody v. Bos. Elevated Ry., 78 N.E. 392, 393 (Mass. 1906).

94. *See* Schopflocher, *supra* note 13, at 101–08.

95. *See id.* at 108.

96. *See id.*

doctrine is followed at the federal level[97] and in the overwhelming majority of states.[98]

In contrast to a "giving,"[99] a partial taking allows an owner to receive a benefit from the taking: he or she owns the remaining land, which has increased in value.[100] The condemnee will receive this value if he sells the property.[101]

A number of justifications exist for limiting offsetting to special benefits.[102] A significant number of courts have limited offsetting to special benefits on a theory that "every citizen, as a taxpayer, should share the common benefits of a government whose common burden he is required to bear."[103] Under this line of reasoning, the owner suffers a peculiar damage and is thereby entitled to compensation for only that peculiar damage.[104] A general benefit,[105] as opposed to a special benefit, is not peculiar to that single landowner and therefore cannot fairly reduce the landowner's unique harm.[106] In these courts' view, the landowner is entitled to benefit from the taking project.[107] The courts suggest that the general benefits offered already "belong to the public, and the parties . . . [whose land is taken] are . . . entitled to their equal share."[108]

A similar line of reasoning suggests that the expense of public works should be borne by the public.[109] These courts hold that offsetting an eminent domain award by a general benefit effectively requires the landowner to "bear a portion of the expense of the [project]."[110] If a general benefit offsets a condemnation award, the landowner, in effect, double pays by virtue of their payment of public taxes.[111]

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97. *See, e.g.*, City of Van Buren v. United States, 697 F.2d 1058, 1062 (Fed. Cir. 1983) (noting that only special and direct benefits may offset a condemnation award).

98. *See* 4A SACKMAN, *supra* note 6, § 14.03[3]; *see also* Schopflocher, *supra* note 13, at 156–293.

99. For a discussion of givings, see *infra* Part I.C.

100. *See* Paul Sinnitt, *Offsetting Special Benefits and the Larger Parcel Test in Eminent Domain*, 1 GONZ. L. REV. 77, 80–81 (1966).

101. *See id.*

102. *See* Schopflocher, *supra* note 13, at 40.

103. *Id.*

104. *See* Hickman v. City of Kansas, 25 S.W. 225, 229 (Mo. 1894) (noting that compensation for land damaged for the public use is limited to those "peculiar to his property").

105. *See supra* note 86 and accompanying text.

106. *See Hickman*, 25 S.W. at 229.

107. *See* Meacham v. Fitchburg R.R. Co., 58 Mass. (1 Cush.) 291, 297 (1849) ("The party, whose land has been taken . . . has a right, in common with his other fellow-citizens, to the benefit arising from the [project]."); Woodfolk v. Nashville & Chattanooga R.R. Co., 32 Tenn. (2 Swan) 422, 436 (1852) ("[T]hese are benefits to which he is entitled with the community in general."); Blair v. City of Charleston, 26 S.E. 341, 345 (W. Va. 1896) (noting landowners "pay[] taxes along with others" for general benefits).

108. City of Cincinnati v. Williams, 8 Ohio Dec. Reprint 718, 722 (C.P. 1883).

109. *See* Adden v. White Mountains, N.H. R.R., 55 N.H. 413, 414 (1875).

110. *Id.*; *see also Meacham*, 58 Mass. (1 Cush.) at 297 (noting the "great inequality" in charging a landowner for the "incidental benefits" of a taking).

111. Carpenter v. Landaff, 42 N.H. 218, 221 (1860).

An analogous argument is that by requiring a landowner to "pay" through an offset of his condemnation award, neighboring landowners receive the benefits of the project for free.[112] A leading case suggests that allowing such a result "would operate with great inequality."[113]

A final justification, well discussed in the literature,[114] is that while arguably constitutionally permissible to offset,[115] general benefits should not be offset because they are "speculative and remote."[116] Recently, courts have questioned this justification, arguing that such reasoning should serve to bar any speculative benefit, but not general benefits as a class.[117]

F. The Historical Development of the Offsetting Doctrine

As Justice Oliver Wendell Holmes said, "'a page of history' is sometimes 'worth a volume of logic.'"[118] A survey of early partial takings cases does not necessarily reveal a clear starting point for the doctrine.[119] What is clear, however, is that courts originally did not employ any distinction between general and special benefits.[120] Additionally, the principle of offsetting is not found in the early English laws on expropriation of property.[121]

Instead, state legislatures and courts began to permit the offsetting of *all* benefits in an effort to support nineteenth-century roadway and railroad

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112. Keithsburg & E. R.R. Co. v. Henry, 79 Ill. 290, 294 (1875) (noting the injustice in other landowners receiving the benefits of a project for free); *see also* Beveridge v. Lewis, 70 P. 1083, 1086 (Cal. 1902), *overruled by* L.A. Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809 (Cal. 1997).

113. *Meacham*, 58 Mass. (1 Cush.) at 297.

114. *See, e.g.*, Weston L. Johnson, Note, *Benefits and Just Compensation in California*, 20 HASTINGS L.J. 764, 766–67 (1969); P. Dexter Peacock, Note, *The Offset of Benefits Against Losses in Eminent Domain Cases in Texas: A Critical Appraisal*, 44 TEX. L. REV. 1564, 1566–67 (1966).

115. For a discussion of the constitutionality of offsetting, see *infra* Part II.A–B. *See also infra* Part IV.A–B (arguing that offsetting is constitutional).

116. Hempstead v. Salt Lake City, 90 P. 397, 401 (Utah 1907); *see also* Ill. State Toll Highway Auth. v. Heritage Standard Bank & Trust Co., 552 N.E.2d 1151, 1158 (Ill. 1990) (citing Sanitary Dist. of Chi. v. Boening, 107 N.E. 810 (Ill. 1915)); Brand v. Union Elevated R. Co., 101 N.E. 247, 250 (Ill. 1913) (characterizing special benefits as any benefit not "conjectural or speculative").

117. *See Cont'l Dev. Corp.*, 941 P.2d at 824 (permitting fact-finders to consider evidence that is not conjectural or speculative); *see also* Borough of Harvey Cedars v. Karan, 70 A.3d 524, 543 (N.J. 2013) (permitting presentation on "all non-speculative, reasonably calculable benefits").

118. *Karan*, 70 A.3d at 535 (quoting N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).

119. For example, neither LEWIS ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN (1936), nor JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN (Matthew Bender 3d ed. 2013)—both leading treatises—identify a first case that articulated the doctrine.

120. This is evident from an analysis of early eminent domain statutes. *See* 3 THEODORE SEDGWICK ET AL., A TREATISE ON THE MEASURE OF DAMAGES 2305 (8th ed. 1891).

121. *See* Senior v. Metro. Ry. Co., (1863) 159 Eng. Rep. 107 (Ex.); 2 H & C 258 (rejecting the "novel" idea that compensation can be offset by benefits); *see also* 2 PHILLIP NICHOLAS, NICHOLAS ON EMINENT DOMAIN § 246 (Matthew Bender 2d ed. 1917) ("The notion that, if the construction of a public improvement will effect a benefit upon adjoining land, the owner is under an obligation to compensate the public for his good fortune has never received favor in English eyes.").

development.[122] One scholar referred to the practice as a "very large involuntary private subsidy of state undertakings."[123] Indeed, railroads made extensive use of the ability to offset and effectively paid for property with "benefits rather than . . . cash."[124]

The historical context in which this practice arose provides support for this view. As the United States was undergoing a "wave of internal improvements" in the early nineteenth century,[125] the first opinions considering offsetting began to appear in the state reporters.[126] By the 1830s, America entered "an era of railroad enthusiasm and noisy railroad fever."[127] Many purchased railroad-related paraphernalia as the nation "dreamed and planned ambitious rail lines that were to cross-unsettled territory, span rivers, and reach distant cities."[128]

The early nineteenth century opinions made no effort to classify benefits as general or special, and the New York high court went so far as to suggest that a landowner could be entirely compensated with benefits.[129] As private companies, invested with the power of eminent domain,[130] took advantage of the ability to offset, some began to compensate landowners entirely in benefits. One scholar reported that railroad takings in Illinois frequently resulted in an award of $1.[131] The problem became so pervasive that California passed a constitutional amendment banning the consideration of benefits entirely.[132]

As a result, courts began to develop doctrines to limit the viability of this strategy—including the offsetting doctrine.[133] In fact, it is no surprise that the first commonly discussed case creating a distinction between general

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122. Harry N. Scheiber, *The Road to* Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts*, *in* LAW IN AMERICAN HISTORY 328, 363–64 (Donald Fleming & Bernard Bailyn eds., 1971).

123. *Id.* at 364.

124. Johnson, *supra* note 114, at 766.

125. Borough of Harvey Cedars v. Karan, 70 A.3d 524, 536 (N.J. 2013) (citing JOHN F. STOVER, AMERICAN RAILROADS 2–8 (2d ed. 1997)).

126. *See, e.g.*, Chesapeake & Ohio Canal Co. v. Key, 5 F. Cas. 563, 564 (C.C.D.D.C. 1829) (finding it proper to offset benefits); Commonwealth v. Coombs, 2 Mass. (1 Tyng) 489, 492 (1807) (permitting offsetting); Livingston v. City of New York, 8 Wend. 85, 85 (N.Y. 1831) ("The benefit accruing to a person whose land is taken . . . may be set off against the loss or damage sustained by him by the taking of his property . . . .").

127. THE OXFORD COMPANION TO UNITED STATES HISTORY 648–49 (Paul S. Boyer & Melvyn Dubofsky eds., 2001).

128. *Id.* at 649.

129. *See Livingston*, 8 Wend. at 85 (suggesting that a benefit can equal just compensation).

130. *See supra* note 42 and accompanying text.

131. FISCHEL, *supra* note 50, at 80–84.

132. *See* Johnson, *supra* note 114, at 766. The amended constitution provides:

> Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner, and no right of way . . . shall be appropriated to the use of any corporation . . . other than municipal until *full compensation* therefore be *first made in money* or ascertained and paid into Court for the owner, *irrespective of any benefits* from any improvement proposed by such corporation . . . .

CAL. CONST. art. I, § 14 (1879) (emphasis added).

133. *See* FISCHEL, *supra* note 50, at 80–84.

and special benefits involved a taking of property by a railroad.[134] Indeed, the leading general-special benefit authorities in most states involve either railroads or road builders as the taking entity.[135] The concern of courts was that jurors, especially in rural communities, would be overly optimistic when estimating the benefits of new municipal projects like highways and railroads.[136]

G. Offsetting in the Twenty-First Century: Needs and Evidence

This section brings the offsetting doctrine into the twenty-first century. First, it discusses the need of modern communities to exercise the power of eminent domain as a protective measure. Second, this section reviews the evidentiary tools available to modern courts.

1. Needs

Modern large municipal projects often endeavor to directly benefit the entire community.[137] For example, scholars have written about the need to employ eminent domain to help protect communities from rising seas and coastal erosion.[138] The rate of sea level rise since the turn of the millennium is twice the average rise during the twentieth century.[139] Rising sea levels have forced homeowners to raise their houses, flooded cities, and magnified the damage created by coastal storms.[140] Any solution to these problems is likely to incorporate some use of the power of eminent domain.[141]

These concerns are present in *Karan*, a case concerning a joint federal and state beach restoration project.[142] The dilemma of beach erosion and

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134. *See* Meacham v. Fitchburg R.R. Co., 58 Mass. (1 Cush.) 291, 292 (1849).

135. *See, e.g.*, Beveridge v. Lewis, 70 P. 1083, 1084 (Cal. 1902), *overruled by* L.A. Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809 (Cal. 1997); Adden v. White Mountains, N.H. R.R., 55 N.H. 413, 414–15 (1875); State v. Hudson Cnty. Bd. of Chosen Freeholders, 25 A. 322, 323 (N.J. Sup. Ct. 1892).

136. *See* Peacock, *supra* note 114, at 1567–69 (suggesting that the majority rule offsetting only special benefits arose out of concern about overly optimistic jury estimates); *see also* Johnson, *supra* note 114 (suggesting that California adopted the rule to address overly speculative assessments concerning the benefit of railroads).

137. *See* Daniel John Granatell, Sand Dunes: Friend or Foe? 19–25 (May 1, 2013) (unpublished manuscript) (on file with the Seton Hall Law eRepository) (discussing general and special benefits in the context of Sand Dunes).

138. *See generally* James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. REV. 1279 (1998).

139. *See* Anny Cazenave & Gonéri Le Cozannet, Sea Level Rise and its Coastal Impacts, 1 EARTH'S FUTURE (forthcoming 2014) (manuscript at 6), *available at* http://onlinelibrary.wiley.com/doi/10.1002/2013EF000188/pdf.

140. Wendy Koch, *Rising Sea Levels Torment Norfolk, Va., and Coastal United States*, USA TODAY (Dec. 18, 2013), *available at* http://www.usatoday.com/story/news/nation/2013/12/17/sea-level-rise-swamps-norfolk-us-coasts/3893825/.

141. *See* Titus, *supra* note 138, at 1388–89 (suggesting that set-backs, used in a comprehensive shore plan, require the landowner to be compensated).

142. *Borough of Harvey Cedars v. Karan,* 70 A.3d 524 (N.J. 2013); *see supra* notes 8–9 and accompanying text.

rising seas presents coastal municipalities with three choices: "(1) relocation, (2) construction of shore protection structures, or (3) beach replenishment."[143] Homeowners are rarely agreeable to relocation,[144] and both shore protection structures and beach replenishment will typically require the condemnation of some land.[145] With this in mind, state lawmakers and courts must determine how to respond to offsetting after facing "billions of dollars of land, building, and personal damage" caused by coastal flooding.[146]

To address this problem, one author argues that the federal government should remove development from the floodplains by public acquisition of floodplain property.[147] To pay for the repurchasing programs, the author argues that the government should offset the value of past-givings, including beach restoration projects, federal flood insurance, and even the construction of bridges.[148] Specifically, the author proposes a "givings recapture mechanism," whereby an owner's just compensation is reduced by the value of an increase that is attributable to government action.[149] In the author's view, just compensation only entitles the owner to receive the value of the condemned property, excluding any givings.[150] Providing any further compensation would effectively require "the public as a whole to subsidize . . . preferential treatment."[151]

The inability of municipalities to offset the benefits of a partial taking often results in abandonment of a beach restoration project.[152] Imagine that the cost of condemning a portion of coastal beach front to build a sand dune is approximately $375,000 per property, without offsetting any benefits from the project.[153] Multiplying this value by "the homes that line the coastline and the cost to municipalities would be prohibitive."[154]

This problem arises in a time when the need for sand dunes and other flood protection is at its highest.[155] Numerous scholarly sources discuss both the need and effectiveness of sea walls and sand dunes protecting

143. Granatell, *supra* note 137, at 3.
144. *See id.* at 4.
145. *See id.* at 14–15.
146. *Id.* at 8–9.
147. *See* Barnhizer, *supra* note 71, at 342.
148. *See id.* at 317, 325, 328.
149. *See id.* at 356–57.
150. *See id.* at 355.
151. *See id.* at 355 n.259 (citing Bell & Parchomovsky, *supra* note 66, at 544).
152. *See* Granatell, *supra* note 137, at 25.
153. For a discussion of a similar hypothetical, see James Osborne, *Shore Towns Near Showdown with Dune-Building Foes*, PHILA. INQUIRER (Dec. 3, 2012), *available at* http://articles.philly.com/2012-12-03/news/35550241_1_dune-sandy-damage-barrier-islands.
154. *Id.*
155. *See, e.g.*, Glenn Blain, *Cuomo Announces $50M Project to Protect Sandy-Battered Queens Coast from Storms*, N.Y DAILY NEWS (Nov. 30, 2013), *available at* http://www.nydailynews.com/new-york/queens/cuomo-announces-50m-project-protect-queens-storms-article-1.1533270; Jacqueline L. Urgo, *Sandy-Battered Shore Town Awaits $40 Million Seawall*, PHILA. INQUIRER (Dec. 10, 2012), *available at* http://articles.philly.com/2013-12-10/news/44993514_1_hurricane-sandy-sand-dunes-seawall.

against flooding.[156] For example, civil engineering professors were able to show that during Hurricane Sandy, the presence of a sea wall in one New Jersey town limited damage to largely flooding homes, whereas 56 percent of homes were destroyed in a nearby town that was not protected by a seawall.[157] Additionally, during Hurricane Sandy, some Long Island towns were spared catastrophic damage because of the presence of fifteen-foot-high dunes, while a neighboring town that voted against building dunes "suffered at least $200 million in property damage and infrastructure loss."[158]

Seeing the benefits of these projects, many political leaders and property owners are hopeful that changes to partial takings law, namely permitting general benefits to offset, will help facilitate the construction of protections against natural hazards. New Jersey Governor Christopher Christie called New Jersey's rejection of the general/special benefits dichotomy "a 'decisive victory' for towns," and hoped it would prompt homeowners that were holding out to settle.[159] Some have suggested that repealing the general/special benefits dichotomy will bring fairness to partial takings cases and allow for the construction of protections against natural hazards.[160]

2. Evidence

Contemporary legal systems have expanded the evidence that is available to prove valuation in any takings case.[161] Litigants now have extensive data available concerning the sale of the property and the price paid for similar properties.[162] Additionally, the court can often allow the jury to conduct a physical inspection of the property called, "the View."[163] The jury can use "the View" to evaluate "the physical characteristics of the property, [and] the improvement constructed on the part taken."[164] In *Karan*, the jury inspected the Karans' property and home before deliberations began.[165] Presumably, if the court had allowed the jury to

156. *See, e.g.*, Jennifer L. Irish et al., *Buried Relic Seawall Mitigates Hurricane Sandy's Impacts*, 80 COASTAL ENG'G 79, 82 (2013) (discussing the "need for multiple levels of protection against natural hazards"); *supra* notes 3–4 and accompanying text (discussing the use and effectiveness of sand dunes).

157. *See* Irish et al., *supra* note 156, at 81.

158. Navarro & Nuwer, *supra* note 3.

159. *See* MaryAnn Spoto, *Supreme Court Rejects $375,000 'Windfall' for Harvey Cedars Couple Who Didn't Want Dune Built*, STAR-LEDGER (N.J.), July 9, 2013, *available at* http://www.nj.com/news/index.ssf/2013/07/harvey_cedars_dunes_karans.html. For a discussion of New Jersey's rejection of the general/special benefits dichotomy, see *infra* Part III.C.2.

160. *See* Lawrence H. Shapiro & Heather L. Garleb, *New Jersey Modernizes Partial Takings Compensation*, 65 PLAN. & ENVTL. 8, 11 (2013).

161. *See* 5 SACKMAN, *supra* note 6, § 18.01–.19 (discussing the use of evidence in condemnation proceedings).

162. *See id.* § 18.05[4].

163. *See id.* § 18.08.

164. *Id.* § 18.08[4].

165. *See* Borough of Harvey Cedars v. Karan, 70 A.3d 524, 531 (N.J. 2013).

consider the benefits of the sand dune project,[166] the jurors could have assessed the proximity of the house to the ocean.

Modern condemnation litigation also makes extensive use of expert testimony.[167] The modern approach is that qualified witnesses may testify to both the damage suffered and the value of the property after the taking.[168] Expert witnesses inform the jury of their valuation of a particular property and provide their reasoning.[169] On cross examination, the expert witness can be questioned on past appraisals of the property, past appraisals of other properties in the area, consistency of the appraisal with past statements, and the qualifications of the expert to testify.[170] Courts also have the option of resorting to court-appointed experts in the event that the "adversary experts are shockingly irreconcilable."[171]

H. Partial Condemnation and Special Assessments

When government entities engage in public improvements, these projects are often financed through special assessments.[172] A special assessment is a tax on the property to pay for the benefits of a project.[173] A government entity may levy a special assessment when the local improvement is public in nature and confers a special benefit on the property.[174]

Courts have nearly universally held that special assessments cannot augment an award of severance damages when the condemnor did not seek to offset a condemnation award.[175] However, the result is different when "the condemnor is permitted to set off against severance damages special benefits which have accrued to the remaining land by reason of the improvement."[176] In these cases, courts generally hold that a special assessment may reduce any set off for special benefits.[177]

In *City of Jackson v. Barks*,[178] the city of Jackson condemned a portion of the Barks' land to extend the city's sewer system.[179] The city argued

166. *But see id.* at 529–30.

167. *See* 5 SACKMAN, *supra* note 6, § 23.06–.11 (discussing the use of expert evidence in condemnation cases).

168. *See, e.g.*, Am. La. Pipe Line Co. v. Kennerk, 144 N.E.2d 660, 665–66 (Ohio Ct. App. 1957).

169. *See* 5 SACKMAN, *supra* note 6, § 23.08[1] (discussing direct examination).

170. *See id.* § 23.08[2] (discussing cross-examination).

171. *See id.* § 23.11.

172. *See* Annotation, *Eminent Domain: Consideration of Fact That Landowner's Remaining Land Will Be Subject to Special Assessment in Fixing Severance Damages*, 59 A.L.R.3d 534, § 1[a] (1974).

173. *See supra* note 82; *see also* 89 AM. JUR. 3D *Proof of Facts* § 2, at 421 (2006).

174. *See* 89 AM. JUR. 3D *Proof of Facts* § 2, at 421 (2006).

175. *See, e.g.*, City of Tucson v. Rickles, 505 P.2d 253, 257 (Ariz. 1973); City of Baldwin Park v. Stoskus, 503 P.2d 1333, 1336 (Cal. 1972) ("[I]t is the general rule that 'where a part of a tract of land is taken for a public use, the mere fact that the remainder may thereafter be subject to assessment does not constitute an element of damages in condemnation proceedings.'").

176. *See* Annotation, *supra* note 172.

177. *See, e.g.*, Bd. of Cnty. Rd. Comm'rs v. Vermander, 219 N.W. 74, 75–76 (Mich. 1928); City of Jackson v. Barks, 476 S.W.2d 162, 165 (Mo. Ct. App. 1972).

178. 476 S.W.2d 162 (Mo. Ct. App. 1972).

that as a result of the sewer connection, the Barks' land was specially benefited, increasing in value by $22,000.[180]

The trial court admitted evidence that the Barks had paid $7606 in "special sewer" taxes, and the city appealed.[181] The appellant court held that it was appropriate for the trial court to consider the appreciation in value due to the sewer project.[182] The court stressed that this amount must be the "net appreciation."[183] The city could not require the Barks "to pay twice for the sewer line."[184] The Barks were permitted to show what they paid for the sewer line to reduce the increased value claimed by the city.[185] In a similar case involving the construction of a highway,[186] the Supreme Court of Michigan held that a special assessment must act as a credit against any benefits considered when awarding compensation.[187] The court found that failing to credit the assessment would result in the landowner being charged twice.[188]

II. THE CONSTITUTIONAL VALIDITY OF OFFSETTING

Part II presents the leading authorities on the question of whether it is constitutionally permissible to offset condemnation awards under both the federal and state constitutions. Part II.A discusses the major challenges to the constitutionality of offsetting under the federal Constitution. Part II.B presents the major arguments that state courts have articulated when holding that offsetting general benefits violates their respective constitutions.

A. Federal Constitutional Challenges to Offsetting

As soon as legislatures and courts began offsetting, landowners brought challenges asserting that the practice violated the Takings Clause.[189] Presented in this section is an early challenge, *Chesapeake & Ohio Canal Co. v. Key*,[190] the most significant Supreme Court authority on the subject, *Bauman v. Ross*,[191] and the last Supreme Court case discussing offsetting, *United States v. Miller*.[192]

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179. *See id.* at 163.
180. *See id.*
181. *See id.*
182. *See id.* at 165.
183. *Id.*
184. *Id.* at 164.
185. *See id.* at 165.
186. *See* Bd. of Cnty. Rd. Comm'rs v. Vermander, 219 N.W. 74, 74–75 (Mich. 1928).
187. *See id.* at 76.
188. *See id.* at 75 ("[I]f awarded damages, less his benefits, and there is also imposed a special assessment for benefits, which he must pay in full, then just compensation is not awarded, for, in such case, he is twice charged with benefits.").
189. For a discussion of the Takings Clause, see *supra* Part I.A.2.
190. 5 F. Cas. 563 (C.C.D.D.C. 1829); *see also* Scheiber, *supra* note 122, at 364 (noting that Chesapeake & Ohio Canal Co. v. Key was an early constitutional challenge to offsetting).
191. 167 U.S. 548 (1897).
192. 317 U.S. 369 (1943).

1. *Chesapeake & Ohio Canal Co. v. Key*

In *Key*, the Circuit Court for the District of Columbia was faced with a constitutional challenge to a Virginia state charter that granted the Chesapeake & Ohio Canal Co. the power of eminent domain.[193] Pursuant to the charter, the Chesapeake & Ohio Canal Co. condemned F.S. Key's land to construct a canal along the Potomac River.[194]

Key claimed that the charter, which required the jury to consider the benefits that would accrue to landowners, was unconstitutional because "no provision [was] made for just compensation."[195] The court further noted the position that the Takings Clause provides for "positive, not . . . conjectural composition."[196] Under such a view, the charter would have been unconstitutional because after considering the benefits, the jurors might have concluded that the landowner was entitled to no compensation.[197]

Instead of adopting a "positive" view of the Takings Clause, the court reasoned that the clause adopts only a "general principle" for compensation.[198] Even if the charter had not required the jurors to consider benefits, they would have been constitutionally free to do so.[199] The Takings Clause requires compensation to be given, *not paid*,[200] and such compensation should be "just *in regard to the public*, as well as in regard to the individual."[201]

2. *Bauman v. Ross*

In *Bauman*, the Supreme Court considered a challenge to takings conducted by the District of Columbia.[202] The commissioners of the District of Columbia condemned a "permanent right of way for the public."[203] The right of way was needed to create a permanent system of highways to connect suburban subdivisions near the capital area.[204] The District of Columbia—authorized by Congress[205] and bolstered by *Key*[206]—set benefits off against the value of land taken.[207]

In deciding the case, the Court surveyed the decisions of a number of state high courts including Massachusetts,[208] New York,[209] New Jersey,[210]

193. *Key*, 5 F. Cas. at 563.
194. *See id.* at 563, 565.
195. *Id.* at 564.
196. *Id.*
197. *See id.*
198. *Id.*
199. *See id.*
200. *See id.* ("[T]he constitution does not require that the value should be paid.").
201. *Id.* (emphasis added).
202. Bauman v. Ross, 167 U.S. 548, 571 (1897).
203. *Id.* at 561.
204. *See id.*
205. *Id.* at 570.
206. *Id.* (referencing *Key*, 5 F. Cas. at 563).
207. *See id.*
208. *See id.* at 577 (citing Meacham v. Fitchburg R. Co., 58 Mass. (1 Cush.) 291 (1849)).

Pennsylvania,[211] and Ohio.[212] Justice Gray found that most states permitted special benefits to be set off, and that in many states, set offs for general benefits were also permitted.[213] The Court then explicitly stated, "[t]he Constitution of the United States contains *no express prohibition* against considering benefits in estimating the just compensation to be paid for private property taken for the public use."[214] This statement, which the Court bolstered with citations to authorities permitting offsets of both general and special benefits,[215] seemingly suggests that all offsets are constitutionally permissible.

However, the Court also treated the exclusion of general benefits as obvious.[216] The Court excluded the consideration of general benefits on the grounds that the landowner already paid for those benefits through taxation.[217] Despite this exclusion, the Court never said that the consideration of general benefits would be unconstitutional nor characterized the States that do so as violating a constitutional provision.[218] The failure to characterize the state practices as unconstitutional is especially noteworthy because in the same term the Court held that the Takings Clause applied to the states through the Due Process Clause of the Fourteenth Amendment.[219]

Many federal and state courts cited *Bauman* for the proposition that only special benefits could constitutionally offset an eminent domain award.[220] The Supreme Court clarified the meaning of *Bauman* in 1918, noting that the Court could not say if the consideration of "actual benefits" violated a fundamental right.[221] The Supreme Court of Alabama has cited *McCoy* for the proposition that states have a "constitutional right . . . to permit a deduction for general benefits."[222] This is a proposition that litigants seem to have accepted, as none of the major cases permitting the offsetting of

209. *See id.* at 578 (citing Livingston v. City of New York, 8 Wend. 85 (N.Y. 1831)).

210. *See id.* at 592 (citing State v. Hudson Cnty. Bd. of Chosen Freeholders, 25 A. 322 (N.J. 1892)).

211. *See id.* at 579–80 (citing Watson v. Pittsburgh & Connelsville R.R. Co., 37 Pa. 469 (1861)).

212. *See id.* at 581 (citing Symonds v. City of Cincinnati, 14 Ohio 147 (1846) (en banc)).

213. *See id.* at 583–84. The Court also references JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES (1888), a preeminent treatise on American eminent domain.

214. *Bauman*, 167 U.S. at 584 (emphasis added).

215. *See id.* ("[U]pon the authorities above stated, no such prohibition can be implied.").

216. *See id.* at 581 ("We of course exclude the indirect and general benefits.").

217. *See id.*

218. *See id.*

219. *See* Chi. Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897).

220. *See, e.g.*, United States v. Trout, 386 F.2d 216, 221–22 (5th Cir. 1967); Campbell v. Bd. of Rd. Comm'rs of Davie Cnty., 92 S.E. 323, 323 (N.C. 1917).

221. McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 366 (1918); *see also* 8A SACKMAN, *supra* note 6, § G16.04 ("It is up to each state to determine the measure of 'just compensation' and whether, and under what circumstances, benefits may be deducted from an award of 'just compensation.'").

222. McRea v. Marion County, 133 So. 278, 279 (Ala. 1931).

general benefits have been appealed to the Supreme Court.[223] Additionally, the Supreme Court recently denied certiorari in a case where the Supreme Court of North Carolina found that offsetting general benefits did not violate either the Fifth Amendment or the North Carolina Constitution.[224]

3. *United States v. Miller*

Following *Bauman*, the Supreme Court did not revisit the offsetting doctrine in detail until *United States v. Miller*.[225] In *Miller*, a portion of land was needed to construct a right of way for the Central Pacific Railroad.[226] The taking was pursuant to a federal project.[227] The project authorized land reclamation, which was required because the railways old right of way was susceptible to flooding.[228]

At a jury trial to determine compensation, disputes concerning the relevance of testimony relating to the impact of the future government project resulted in significant litigation, which eventually made its way to the Supreme Court.[229] The Court held that "if [a] taking has in fact benefited the remainder the benefit may be set off against the value of the land taken."[230] Despite citing *Bauman*,[231] the Court did not use the terms general or special benefit in the opinion at all.[232]

Miller has been cited four times for the proposition that offsetting is permissible.[233] None of the courts citing *Miller* have suggested that offsetting general benefits would be unconstitutional, and only two of the courts have even noted a distinction between general and special benefits.[234]

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223. *See, e.g.*, MaryAnn Spoto, *Harvey Cedars Couple Receives $1 Settlement For Dune Blocking Ocean View*, STAR-LEDGER (N.J.) (Sept. 25, 2013), *available at* http://www.nj.com/ocean/index.ssf/2013/09/harvey_cedars_sand_dune_dispute_settled.html (noting that litigants settled rather than pursuing further appeal).

224. *See* Dep't of Transp. v. Rowe, 549 S.E.2d 203, 209 (N.C. 2001).

225. 317 U.S. 369 (1943).

226. *See id.* at 370.

227. *See id.*

228. *See id.* Land reclamation is "[t]he act or an instance of improving the value of economically useless land by physically changing the land." BLACK'S LAW DICTIONARY 1463 (10th ed. 2014) (defining "reclamation"). An example would be a project to convert a former landfill into park land. *See* Allie Goolrick, *Once World's Largest Landfill, NYC's Freshkills Park to Add a Solar Energy Plant*, WEATHER CHANNEL (Dec. 3, 2013, 1:41 PM), http://www.weather.com/news/science/environment/freshkills-park-solar-power-20131203.

229. *See Miller*, 317 U.S. at 372–73.

230. *See id.* at 376 (citing Bauman v Ross, 167 U.S. 548 (1897)).

231. *See id.* at 376 n.21 (citing *Bauman*, 167 U.S. 548).

232. *See id.* at 369–82.

233. United States v. 4.0 Acres of Land, 175 F.3d 1133, 1139 (9th Cir. 1999); United States v. 3,317.39 Acres of Land, More or Less, in Jefferson Cnty., 443 F.2d 104, 105 (8th Cir. 1971); United States v. 901.89 Acres of Land in Davidson & Rutherford Cntys., 436 F.2d 395, 398 (6th Cir. 1970); 6816.5 Acres of Land, More or Less, in Rio Arriba Cnty. v. United States, 411 F.2d 834, 837 (10th Cir. 1969).

234. *6816.5 Acres of Land*, 411 F.2d at 837 (discussing "'direct,' 'indirect,' 'general,' and 'special,' benefits"); *901.89 Acres of Land*, 436 F.2d at 398 (noting a difference between general and special benefits).

B. State Constitutional Challenges to Offsetting

In the beginning of the twentieth century, a number of states considered whether offsetting general benefits would violate their own state constitutions. For example, in *Beveridge v. Lewis*,[235] the California Supreme Court determined that reducing compensation for general benefits violated the California Constitution.[236] Philo Beveridge had condemned a thirty-five-foot right of way on Mary Lewis's land for the construction of a Los Angeles Pacific Railway line.[237] In finding that offsetting general benefits was constitutionally impermissible, the California Supreme Court relied largely on policy justifications.[238] Specifically, the court found that all general benefits were "conjectural, and incapable of estimation."[239] On these grounds, the court found that it would violate the California Constitution to force a property owner to accept "compensation in such vague speculations."[240]

Many other state courts have at one time held "that the deduction of general benefits would violate the just compensation requirements" of their respective state constitutions.[241] These courts largely relied on the perceived "remote, hypothetical, or speculative" nature of general benefits, finding that such benefits did not adequately ensure the payment of "just compensation."[242] Some states have simply followed the majority, without any interpretation of their own state constitutions.[243]

III. THE CURRENT STATE OF THE OFFSETTING DOCTRINE

Part III discusses the current status of the offsetting doctrine at both the federal and state levels. This part focuses on the offsetting doctrine as a policy option rather than a constitutional question. Specifically, Part III.A provides an overview on the particular approaches jurisdictions follow. Part III.B presents the justifications for continuing the traditional offsetting doctrine—particularly, the justifications offered in recent opinions reaffirming the rule. Part III.C explores the justifications offered by California and New Jersey for eliminating the distinction between general and special benefits.

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235. 70 P. 1083 (Cal. 1902).
236. *See id.* at 1084–85.
237. *See id.* at 1084.
238. *See id.* at 1085–86. For a further discussion of the policy justifications for prohibiting the offsetting of general benefits, see *supra* notes 101–04 and accompanying text.
239. *Beveridge*, 70 P. at 1085.
240. *Id.* at 1086.
241. Schopflocher, *supra* note 13, at 47.
242. *See id.*; *see also* Wash. Ice Co. v. City of Chicago, 35 N.E. 378, 379 (Ill. 1893) (finding that constitutional safeguards would be of no avail if "chimerical" or imaginative benefits could offset a condemnation award).
243. *See, e.g.*, Daniels v. State Rd. Dep't, 170 So. 2d 846, 853–54 (Fla. 1964) (discussing opinions from Pennsylvania and Virginia to establish that offsetting general benefits is impermissible).

A. State and Federal Positions on Offsetting

The rule applied in federal courts is that only special benefits can offset a condemnation award.[244] This is a default rule, which applies regardless of whether the governing statute defines "the nature of the benefits to be deducted."[245] It is somewhat peculiar that federal courts have adopted this position when it is constitutionally permissible, under the Fifth Amendment, to offset general benefits.[246] The circuit courts have largely relied on *Bauman* as prohibiting the offset of general benefits at the federal level.[247]

The positions of the state courts are grouped into three major categories: one, states where benefits may not offset awards; two, states where special benefits may offset awards, and finally, states where general and special benefit may offset.[248] The only states that do not permit any offsetting are Iowa and Mississippi.[249] Under Mississippi law, compensation for a taking must be paid "in money."[250]

The overwhelming majority of states currently permit special, but not general, benefits to be offset.[251] These states include: Alaska,[252] Arizona,[253] Arkansas,[254] Colorado,[255] Connecticut,[256] Delaware,[257] Florida,[258] Georgia,[259] Hawaii,[260] Idaho,[261] Indiana,[262] Kansas,[263]

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244. *See, e.g.*, Hendler v. United States, 175 F.3d 1374, 1380 (Fed. Cir. 1999); United States v. Trout, 386 F.2d 216, 221–22 (5th Cir. 1967).

245. Schopflocher, *supra* note 13, at 158.

246. *See supra* Part II.A.

247. *See, e.g.*, 6816.5 Acres of Land, More or Less, in Rio Arriba Cnty. v. United States, 411 F.2d 834, 837 (10th Cir. 1969) (citing Bauman v. Ross, 167 U.S. 548 (1897)).

248. A leading treatise further divides these categories along whether the offset relates to damages to the remainder or the value of the part taken. *See* LEWIS ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN 1000 (1936).

249. *See* IOWA CONST. art. I, § 18; Dykes v. State Highway Comm'n of Miss., 535 So. 2d 1349, 1351–52 (Miss. 1988) (citing Brown v. Beatty, 34 Miss. 227 (1857)).

250. *Brown*, 34 Miss. at 234.

251. *See* Schopflocher, *supra* note 13, at 40; *see also* L.A. Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809, 825 (Cal. 1997) (noting that a minority of states permit the offsetting of general benefits).

252. State v. Lewis, 785 P.2d 24, 27 (Alaska 1990).

253. Taylor v. State *ex rel.* Herman, 467 P.2d 251, 254 (Ariz. Ct. App. 1970).

254. Ark. State Highway Comm'n v. Welter, 471 S.W.2d 541, 543 (Ark. 1971) (Fogleman, J., concurring) ("[W]e have clearly adopted the rule that special benefits peculiar to the tract involved may be set off against both severance damages and the value of the land actually taken.").

255. Mack v. Bd. of Cnty. Comm'rs, 381 P.2d 987, 990–91 (Colo. 1963).

256. Brito v. City of Waterbury, 32 A.2d 162, 163 (Conn. 1943). However, the Connecticut Supreme Court has upheld offsetting of a benefit, without defining it as general or special, when the improvement is not a public improvement. Tandet v. Urban Redevelopment Comm'n, 426 A.2d 280, 288 (Conn. 1979).

257. Acierno v. State, 643 A.2d 1328, 1332 (Del. 1994) (finding that general benefits may not be offset).

258. Daniels v. State Rd. Dep't, 170 So. 2d 846, 853–54 (Fla. 1964).

259. Williams v. State Highway Dep't, 185 S.E.2d 616, 617 (Ga. Ct. App. 1971).

260. Att'y Gen. v. Midkiff, 516 P.2d 1250, 1254 (Haw. 1973).

261. Tyson Creek R. Co. v. Empire Mill Co., 174 P. 1004, 1007 (Idaho 1918).

262. State v. Smith, 143 N.E.2d 666, 669 (Ind. 1957).

263. City of Wichita v. May's Co., 510 P.2d 184, 188 (Kan. 1973).

Kentucky,[264] Louisiana,[265] Maine,[266] Massachusetts,[267] Minnesota,[268] Missouri,[269] Montana,[270] Nebraska,[271] Nevada,[272] New Hampshire,[273] North Dakota,[274] Ohio,[275] Oklahoma,[276] Oregon,[277] Pennsylvania,[278] Rhode Island,[279] South Carolina,[280] South Dakota,[281] Tennessee,[282] Texas,[283] Utah,[284] Vermont,[285] Virginia,[286] Washington,[287] Wisconsin,[288] and Wyoming.[289]

The final group of states permit offsetting of both general and special benefits. They include: Alabama,[290] Illinois,[291] Maryland,[292] Michigan,[293] New Mexico,[294] New York,[295] North Carolina,[296] and West Virginia.[297]

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264. E. Ky. Rural Elec. Coop. Corp. v. Smith, 310 S.W.2d 535, 537 (Ky. 1958).
265. Dep't of Highways v. Trippeer Realty Corp., 276 So. 2d 315, 321 (La. 1973).
266. *See* ME. REV. STAT. tit. 23, § 154 (2010).
267. Benton v. Town of Brookline, 23 N.E. 846, 847 (Mass. 1890).
268. Mattson v. Colon, 194 N.W.2d 574, 577 (Minn. 1972).
269. State *ex rel.* State Highway Comm'n v. S. Dev. Co., 509 S.W.2d 18, 23–24 (Mo. 1974).
270. Gallatin Valley Electric Ry. v. Neible, 186 P. 689, 690 (Mont. 1919).
271. Prudential Ins. Co. v. Cent. Neb. Pub. Power & Irrigation Dist., 296 N.W. 752, 754 (Neb. 1941).
272. State *ex rel.* Nev. Dep't of Transp. v. Las Vegas Bldg. Materials, Inc., 761 P.2d 843, 846 (Nev. 1988).
273. Lebanon Hous. Auth. v. Nat'l Bank of Lebanon, 301 A.2d 337, 339 (N.H. 1973).
274. Lineburg v. Sandven, 21 N.W.2d 808, 812 (N.D. 1946).
275. Hilliard v. First Indus., L.P., 846 N.E.2d 559, 565 (Ohio Ct. App. 2005).
276. Guthrie & W. Ry. Co. v. Faulkner, 73 P. 290, 290 (Okla. 1903).
277. Dep't of Transp. v. Montgomery Ward Dev. Corp., 719 P.2d 507, 512 (Or. Ct. App. 1986).
278. Truck Terminal Realty Co. v. Dep't of Transp., 403 A.2d 986, 988 (Pa. 1979).
279. Capital Properties, Inc. v. State, 636 A.2d 319, 323 (R.I. 1994).
280. *See* Wilson v. Greenville County, 96 S.E. 301, 304 (S.C. 1918).
281. State Highway Comm'n v. Bloom, 93 N.W.2d 572, 577 (S.D. 1958).
282. Faulkner v. City of Nashville, 285 S.W. 39, 45 (Tenn. 1926).
283. Taub v. City of Deer Park, 882 S.W.2d 824, 827 (Tex. 1994).
284. Hempstead v. Salt Lake City, 90 P. 397, 401 (Utah 1907).
285. Howe v. State Highway Bd., 187 A.2d 342, 345 (Vt. 1963).
286. *See* Shirley v. Russell, 140 S.E. 816, 822 (Va. 1927).
287. *See* State v. Templeman, 693 P.2d 125, 127 (Wash. Ct. App. 1984).
288. Renk v. State, 191 N.W.2d 4, 8 (Wis. 1971).
289. *See* State Highway Comm'n v. Rollins, 471 P.2d 324, 329 (Wyo. 1970) (permitting the offset of special benefits, but not deciding if offsetting general benefits would be permissible).
290. McRea v. Marion Cnty., 133 So. 278, 280 (Ala. 1931) ("[T]he damages to adjoining property shall be reduced by all the benefits general and special.").
291. In Illinois, technically only special benefits may offset, but special benefits are defined as "[a]ny benefits to the property which enhance its market value and are not conjectural or speculative are considered special rather than general benefits." Ill. State Toll Highway Auth. v. Heritage Standard Bank & Trust Co., 552 N.E.2d 1151, 1158 (Ill. App. Ct. 1990).
292. Big Pool Holstein Farms, Inc. v. State Rds. Comm'n, 225 A.2d 283, 288 (Md. 1967).
293. Mich. State Highway Comm'n v. Frederick, 188 N.W.2d 193, 195 (Mich. 1971) (noting that Michigan law makes no distinction between general and special benefits).
294. State *ex rel.* State Highway Comm'n v. Atchison, T. & S. F. Ry. Co., 417 P.2d 68, 70 (N.M. 1966) ("[T]he market value of the remaining property necessarily includes any increase in the value thereof contributed by any kind of benefits accruing to it.").

California[298] and New Jersey[299] have also recently decided to permit both general and special benefits to offset.

B. Modern Justifications for the Traditional Offsetting Doctrine

Courts that have recently upheld the traditional offsetting doctrine have largely relied on the same justifications as the nineteenth-century courts that created the doctrine.[300] In fact, in the majority of recent cases, mid-level state appellate courts conclusively hold that the traditional offsetting doctrine is the law of their state without providing justification.[301]

For example, in 2011, the Missouri Court of Appeals upheld an application of the traditional offsetting doctrine.[302] The City of Maryland Heights condemned a portion of Robert Heitz's land to construct a public road to facilitate new real estate development opportunities.[303] The city argued that the project was a special benefit because it increased the "accessibility, visibility, frontage, and connectivity" of the Heitz property.[304] The Missouri court noted that the "distinction between general and special benefits has been identified as 'shadowy at best.'"[305] Despite this characterization, the court upheld the traditional doctrine, arguing that "to otherwise allow an offset for general benefits would effectively require the one whose land was taken to subsidize a project that the rest of the community received at no cost."[306]

In a recent case, the Supreme Court of Texas upheld its traditional offsetting rule.[307] A Texas city condemned a portion of Henry Taub's land to build a drainage ditch.[308] The city argued that the condemnation award should be offset by the value of the drainage ditch, which decreased the property's susceptibility to flooding.[309] Taub countered that the drainage ditch was a general benefit, as the decreased flooding would be shared with the general community.[310] The Texas court agreed with Taub's

295. Chiesa v. State, 324 N.E.2d 329, 331 (N.Y. 1974) ("Value of land taken consequential damages to remainder minus general and special benefits = just compensation.").

296. Dep't of Transp. v. Rowe, 549 S.E.2d 203, 209 (N.C. 2001) (finding that it was constitutional for jury to consider "general benefits").

297. Chesapeake & O. R. Co. v. Johnson, 60 S.E.2d 203, 206–07 (W. Va. 1950) (requiring the consideration of "all benefits").

298. L.A. Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809, 824–25 (Cal. 1997).

299. Borough of Harvey Cedars v. Karan, 70 A.3d 524, 543 (N.J. 2013).

300. For a discussion of these justifications, see *supra* Part I.E.

301. *See, e.g.*, Dep't of Highways v. Modica, 515 So. 2d 449 (La. Ct. App. 1987).

302. *See* City of Md. Heights v. Heitz, 358 S.W.3d 98, 105 (Mo. Ct. App. 2011).

303. *See id.* at 103.

304. *Id.* at 105.

305. *Id.* at 106 (citing State *ex rel.* State Highway Comm'n of Mo. v. Koziatek, 639 S.W.2d 86, 88 (Mo. Ct. App. 1982)).

306. *Id.*

307. *See* Taub v. City of Deer Park, 882 S.W.2d 824, 827 (Tex. 1994).

308. *See id.*

309. *See id.*

310. *See id.*

characterization, and held that general benefits could not offset a condemnation award because a landowner should not have to pay twice for benefits "that inure to the community at large."[311]

In addition to the views of state judges, one scholar supported limiting offsetting to special benefits because it reduces administrative costs.[312] The author acknowledges that permitting offsetting would simplify the judicial process and promote fairness.[313] However, the author contends that it would also increase administrative costs.[314] Property owners would be "encourage[ed]" to introduce evidence on "any and all kinds of problems a project might cause for their remainders," resulting in increased litigation costs.[315]

C. The California and New Jersey Approach

This section describes how California and New Jersey have rejected the distinction between general and special benefits.

In California, one of the leading authorities eliminating the distinction permitting the offsetting of both general and special benefits is the California Supreme Court's decision in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.*[316]

In *Continental Development*, the Los Angeles County Metropolitan Transportation Authority (MTA) condemned a portion of land owned by the Continental Development Corporation (Continental) to construct an elevated light rail line called the Green Line.[317] Prior to trial, the MTA provided both evidence and expert testimony that suggested Continental's property would increase in value by millions of dollars because of the Green Line project.[318] The MTA noted that Continental's property was only a ten-minute walk from a Green Line train station.[319] The MTA offered to settle for $200,000.[320]

The trial court determined that the development of the transit line would be shared "by numerous properties" and therefore excluded any evidence concerning the benefit of the light rail project.[321] The trial court stated that "[t]he benefit of being within walking distance of a rail transit station is merely the benefit of access. As such it confers no peculiar or unique

311. *See id.* at 828; *see also supra* notes 101–06 and accompanying text (discussing the theory that every citizen has a right to the common benefits of government).

312. *See* Juliet E. Cox, Comment, *Accessing the Benefits of California's New Valuation Rule for Partial Condemnations*, 88 CAL. L. REV. 565, 600–02 (2000).

313. *See id.* at 600–01.

314. *See id.* at 601.

315. *Id.* However, eliminating the general/special benefit dichotomy may reduce litigation. *See infra* notes 360–65 and accompanying text.

316. 941 P.2d 809 (Cal. 1997).

317. *See id.* at 811–12.

318. *See id.* at 813.

319. *See id.*

320. *See* L.A. Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 48 Cal. Rptr. 2d 466, 469 (Ct. App. 1995), *superseded by* 911 P.2d 1373 (Cal. 1996), *rev'd*, 941 P.2d 809 (Cal. 1997).

321. *Cont'l Dev. Corp.*, 941 P.2d at 812–13.

benefit upon defendant's property."[322] The jury awarded $1,122,149 in damages.[323] The MTA appealed, arguing that the "distinction between general and special benefits is unworkable, produces inconsistent results . . . , and should be abolished."[324]

On appeal, the California Supreme Court described the historical development of the offsetting doctrine.[325] Specifically, the court discussed its earlier ruling in *Beveridge v. Lewis*.[326] The court noted the old theory dictating that compensation must be in money, "rather than 'conjectured advantage.'"[327] Further the court discussed lack of clarity in the *Beveridge* rule—specifically, what types of benefits were to be considered, general versus special.[328]

In reference to this lack of clarity, the *Continental Development* court discussed how the traditional offsetting rule had proved difficult to apply.[329] A justice of a California appellate court described the distinction as "causing 'confusion.'"[330]

As California courts struggled to discover a meaningful distinction between general and special benefits, they reached inconsistent decisions.[331] The California Supreme Court cited a case where a project creating highway access had been found to generate special benefits in the case of the highway and general benefits in the case of a freeway and off-ramp.[332] The court also cited instances where lower courts had reached inconsistent decisions regarding the classification of benefits arising from a transit line and station.[333] The court recapitulated that the cases following *Beveridge* had failed to create any clear rules.[334]

The California Supreme Court also discussed the *Beveridge* court's concern with the "sanguine promoter"—that is, the overly optimistic project that is never completed, an issue that was particularly acute during nineteenth-century railroad development.[335] The California court characterized this concern as an issue of evidence rather than general versus

322. *See id.* at 813.
323. *Cont'l Dev. Corp.*, 48 Cal. Rptr. 2d at 469.
324. *Cont'l Dev. Corp.*, 941 P.2d at 812.
325. *See id.* at 814–18. For a detailed discussion of the history of offsetting in California prior to *Continental Development*, see Johnson, *supra* note 114.
326. *Cont'l Dev. Corp.*, 941 P.2d at 814–818 (discussing Beveridge v. Lewis, 70 P. 1083 (Cal. 1902)). For a discussion of *Beveridge*, see *supra* notes 235–40 and accompanying text.
327. *Cont'l Dev. Corp.*, 941 P.2d at 817 (quoting *Beveridge*, 70 P. at 1083).
328. *See id.* at 817–20.
329. *See id.* at 818.
330. *Id.* (quoting Gleaves, *Special Benefits in Eminent Domain, Phantom of the Opera*, 40 CAL. ST. B.J. 245, 249 (1965)).
331. *See id.*
332. *See id.* (citing Pierpont Inn, Inc. v. State, 449 P.2d 737 (Cal. 1969)).
333. *See id.* (affirming a finding of general benefits resulting from the construction of a transit station (citing L.A. Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 48 Cal. Rptr. 2d 466, 470 (Ct. App. 1995))); Orpheum Bldg. Co. v. S.F. Bay Area Rapid Transit Dist., 146 Cal. Rptr. 5, 14 (Ct. App. 1978) (affirming jury finding of special benefits resulting from the construction of a transit station)).
334. *Cont'l Dev. Corp.*, 941 P.2d at 818–19.
335. *See id.* at 820 (quoting Beveridge v. Lewis, 70 P. 1083, 1085 (Cal. 1902)).

special benefits.[336] The court stated that "[t]he demands of fairness are satisfied when compensation is determined on the basis of substantial evidence establishing, to a reasonable certainty, the value of the property taken and the net effect on the remainder property's value of benefits and detriments resulting from the project."[337] On the fairness point, the court added that fair compensation must be just, not only to the landowner, but also to the general public.[338]

Reflecting the court's concern about uncertainty and the notion that overly speculative benefits reflected an evidentiary concern present not only for general benefits, but for all valuation issues,[339] the court overturned the traditional offsetting rule and announced a rule "permitting offset [of] all reasonably certain, immediate, and nonspeculative benefits."[340] In California, so long as a benefit is not conjectural or speculative, as proven by evidence, it may offset a condemnation award.[341]

The New Jersey Supreme Court also rejected the distinction between general and special benefits in *Karan*[342] approaching the question much like the California Supreme Court.[343]

The court began by discussing the early justifications for adopting the "special/general benefits dichotomy" in New Jersey.[344] First, previous New Jersey cases had suggested that offsetting for general benefits would force a property owner to "contribute more for the public and common benefit than his neighbor,"[345] a double payment argument.[346] Early New Jersey cases also expressed a concern that general benefits were speculative and could lead to the legislature substituting "an *imaginary benefit* for . . . just compensation."[347] Placing this concern in context, the court discussed the historical period when courts created the offsetting doctrine, the period of time when "the laying of tracks for railroads [] stitched together far-flung communities and states into a nation during the nineteenth century."[348] The

336. *See id.*
337. *Id.*
338. *See id.* at 823 (citing United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950)).
339. *See supra* notes 335–38 and accompanying text.
340. *Cont'l Dev. Corp.*, 941 P.2d at 824.
341. *See id.*
342. For a discussion of the procedural history and facts of *Harvey Cedars*, see *supra* notes 8–19 and accompanying text.
343. *See supra* Part III.C.
344. *Borough of Harvey Cedars v. Karan*, 70 A.3d 524, 535 (N.J. 2013). For a more detailed discussion of the original justifications for the traditional offsetting doctrine, see *supra* Part I.E.
345. *Karan*, 70 A.3d at 535 (quoting State v. Miller, 23 N.J.L. 383, 385 (1852)).
346. *See supra* notes 109–11 and accompanying text.
347. *Karan*, 70 A.3d at 535 (quoting Carson v. Coleman, 11 N.J. Eq. 106, 108 (Ch. 1856)).
348. *Id.* at 536 (citing STOVER, *supra* note 125).

New Jersey court found that the concern over general benefits was generated by the speculative valuations of nineteenth-century railroads.[349]

The court then discussed the difficulties of distinguishing between general and special benefits.[350] The court criticized the inconsistent rules that had developed to define a benefit as special or general.[351] The court specifically noted that some New Jersey cases defined general benefits as "speculative or conjectural,"[352] while other cases used "benefits shared in common" with the community as a definition.[353] The court found that "the terms special and general benefits do more to obscure than illuminate the basic principles governing the computation of just compensation in eminent domain cases."[354]

The New Jersey court then proceeded to compare a total taking to a partial taking.[355] In the total taking context, courts compute compensation by considering anything that a buyer and seller would assess when purchasing a property.[356] The court opined that buyers and sellers would not consider benefits that were "speculative or conjectural and that are not projected into the indefinite future."[357] Thus, in total-takings cases, courts play a gatekeeping role, ensuring that the jury does not hear speculative evidence.[358] The court found that partial takings cases should be treated no differently.[359] Thus, in New Jersey, any "reasonably calculable benefits," those benefits that are not "speculative or conjectural," can be considered when offsetting severance damages.[360] It is irrelevant whether the benefit is peculiar to the particular property or enjoyed by the community as a whole.[361]

Some public figures and attorneys hope that the new rule in New Jersey will reduce litigation.[362] The general theory is that the existence of eminent domain should result in bargaining, and that eminent domain is rarely used.[363] Because the landowners are aware that the entity has the power of eminent domain, they are incentivized to negotiate for a fair price rather

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349. *Id.* (citing FISCHEL, *supra* note 50, at 80–81). For a discussion of the impact of railroads on the development of the offsetting doctrine, see *supra* notes 119–36 and accompanying text.

350. *See id.* at 539–40.

351. *See id.*

352. *Id.* at 540 (citing Mangles v. Hudson Cnty. Bd. of Chosen Freeholders, 25 A. 322, 323–24 (N.J. 1892)).

353. *Id.* (citing N.J. Tpk. Auth. v. Herrontown Woods, Inc., 367 A.2d 893, 896–97 (N.J. Super. Ct. App. Div. 1976)).

354. *See id.*

355. *See id.*

356. *See id.*

357. *Id.*

358. *See id.*

359. *See id.*

360. *Id.* at 543.

361. *See id.*

362. *See supra* note 159 and accompanying text.

363. *See* Thomas J. Miceli & Kathleen Segerson, *A Bargaining Model of Holdouts and Taking*, 9 AM. L. & ECON. REV. 160, 171 (2007).

than hold out for a windfall profit.[364] Along the New Jersey coastline, many residents elected to hold out despite eminent domain, believing that they could receive more compensation at trial.[365] This belief was fueled by the strong possibility that the benefits of the sand dune would be deemed general, and thus would not offset a condemnation award.[366] However, by permitting offsetting, it is more likely that property owners will settle before any litigation occurs.[367]

IV. A MODERN APPROACH: OFFSETTING ALL REASONABLY CERTAIN BENEFITS

Part IV argues that both federal and state courts should offset benefits against condemnation awards regardless of arbitrary classifications. Part IV.A maintains that the takings clause of the Fifth Amendment permits the offsetting of general benefits against condemnation awards. Part IV.B asserts that most state constitutions would similarly permit offsetting of general benefits. Part IV.C argues that the old justifications for offsetting are outmoded. Part IV.D contends the distinction between general and special benefits introduces unneeded complexity. Lastly, Part IV.E discusses the public policy need for a new offsetting test in partial takings cases.

A. The Takings Clause Does Not Prohibit Offsetting of General Benefits

From the U.S. Supreme Court decisions in *Bauman* and *Miller*,[368] it is fairly clear that while federal law presumes that only special benefits will offset,[369] it is constitutionally permissible to offset any benefit.[370]

Bauman does not hold that offsetting general benefits is unconstitutional.[371] Instead, the case articulates that it is constitutionally

364. *See id.* at 169–71. *But see id.* at 164–69 (discussing the behavior of landowners when there is no threat of the use of eminent domain).

365. *See* Kate Zernikie, *Trying to Shame Dune Holdouts at Jersey Shore*, N.Y. TIMES, Sept. 5, 2013, at A1 (discussing the 1000 holdouts who have refused dune construction on their property); *see also* Borough of Harvey Cedars v. Karan, 70 A.3d 524, 528 (N.J. 2013) (discussing the Karans' decision to go to trial).

366. *See supra* Part I.E (discussing the traditional offsetting doctrine).

367. *See* Spoto, *supra* note 223; *see also* Christine Clolinger, *NJ Court's Holding Could Facilitate Shoreline Sand Dune Construction*, 12 SANDBAR 10, 12 (2013) ("The government will likely no longer need to bring landowners to court to secure easements for sand dune construction.").

368. United States v. Miller, 317 U.S. 369 (1942); Bauman v. Ross, 167 U.S. 548 (1897).

369. *See supra* notes 200–19 and accompanying text (discussing *Bauman*); *supra* notes 220–24, 242–47 (discussing the current federal approach to offsetting and other court's interpretations of *Bauman*).

370. *See supra* Part II.A.3 (discussing the *Miller* opinion's assertion that any benefit may offset and the subsequent treatment of that assertion by the circuit courts); *see also* McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 366 (1918) (leaving whether to offset benefits to the states).

371. *See supra* notes 214–15 and accompanying text (discussing the only sections of the *Bauman* opinion that even suggest that offsetting general benefits might be unconstitutional).

permissible to offset any benefit.[372] The passages of the *Bauman* opinion that criticize the offsetting of general benefits[373] merely assert policy reasons why jurisdictions might consider limited offsetting to special benefits.[374] While opining that general benefits should not be considered,[375] the court tacitly approves of offsetting general benefits by citing to authorities that approved of that practice.[376]

As the Alabama Supreme Court has suggested,[377] the U.S. Supreme Court has held that decisions regarding offsetting are left for the individual states to decide.[378] This proposition appears tempered only by the proviso that the benefit must not be overly speculative, be it general or special.[379] In the Supreme Court's last exposition on offsetting, the only limitation the Court placed on offsetting was that the taking had to have "in fact benefited the remainder."[380] The Court did not limit offsetting to special benefits, let alone discuss the special/general benefit dichotomy.[381]

B. State Constitutions Do Not Prohibit Offsetting of General Benefits

Initially, if the United States Constitution did not prohibit offsetting it would follow that state constitutions must also not impose such a limitations. The state constitutional provisions often mirror the identical language used in the Fifth Amendment's Taking Clause.[382] However, states have a sovereign right to interpret their constitutions to provide greater protection of private property.[383] As is always the case, the U.S. Constitution is a floor, not a ceiling.[384]

Despite this notion of federalism, nothing in the state constitutions or the historical context for the ratification of the state constitutions supports a

372. *See supra* notes 218–19 and accompanying text (discussing *Bauman*'s holding that offsetting is constitutionally permissible and the authorities the Court relied on to reach that conclusion).

373. *See supra* notes 216–17 and accompanying text.

374. *See supra* notes 220–21 and accompanying text (noting that *Bauman* relies on authorities that permitted the offsetting of general benefits, and never, itself, holds that the offsetting of general benefits violates the federal Constitution).

375. *See* Bauman v. Ross, 167 U.S. 548, 581 (1897).

376. *See supra* notes 208–13 (noting the acknowledgement and citation to cases that permitted the offsetting of general benefits).

377. *See supra* note 222–24 and accompanying text (discussing the Alabama Supreme Court's assertion that the U.S. Supreme Court has found that the states may offset general benefits).

378. *See supra* note 221 and accompanying text (discussing the assertion that it would not decide if offsetting "actual" benefits violated the Constitution).

379. *See supra* note 221 and accompanying text (referencing McCoy's discussion that an "actual" benefit must refer to a real, as opposed to speculative, benefit).

380. United States v. Miller, 317 U.S. 369, 376 (1943); *see also supra* note 230 and accompanying text (quoting *Miller*).

381. *See supra* notes 229–30 (discussing *Miller* and its omission of the terms general and special benefit).

382. *See supra* notes 37–38 and accompanying text (discussing the language of state constitutional takings provisions).

383. *See supra* note 39 and accompanying text.

384. *See generally* William F. Swindler, *Minimum Standards of Constitutional Justice: Federal Floor and State Ceiling*, 49 MO. L. REV 1 (1984).

finding that offsetting general benefits is unconstitutional.[385] Instead, state courts that have determined that offsetting general benefits violates their state constitution, are actually misinterpreting their constitutions because of public policy concerns.[386] States' opinions on the subject always discuss fears of permitting the offsetting of remote, hypothetical, speculative, conjectural, or chimerical benefits.[387] In fact, many state courts merely cite to sister state authorities for the proposition that only special benefits may offset a condemnation award.[388]

The takeaway from the lack of a textual justification and reliance on policy concerns is that if states' concerns about the speculative nature of general benefits were assuaged, no further justification would exist for prohibiting the offsetting of such benefits.[389]

C. The Justifications of the Traditional Offsetting Rule Are Outmoded

1. The Primary Role of Takings Is No Longer to Provide Land to Private Companies

State courts' concerns about general benefits being largely speculative reflect concerns of the nineteenth century.[390] When the traditional offsetting doctrine was created, state courts may have been justifiably concerned about the speculative value of the projects of the industrial railroads.[391] In the nineteenth and early twentieth centuries, takings were a powerful tool of private companies in desperate need of public subsidies for expansive development projects.[392] It is clear that there were instances of abuse, including speculative valuations that allowed railroads to take land for free.[393]

However, modern takings are largely conducted by government entities to facilitate large public projects.[394] Takings no longer play the role of a

385. Such an assertion could not be true, because the text of the constitutional provisions and the historical context of ratification are generally identical to the Fifth Amendment. *See supra* notes 38–39 and accompanying text.

386. *See supra* notes 238–42 and accompanying text.

387. *See supra* notes 238–42 and accompanying text. For a detailed discussion of the original justifications for the traditional offsetting doctrine, see *supra* Part I.E.

388. *See supra* note 241 and accompanying text.

389. The only exception to this argument would be a state that does not permit offsetting at all on a notion of fundamental unfairness. The only states that do not permit some kind of offsetting are Iowa and Mississippi. *See supra* notes 249–50 and accompanying text.

390. *See* Borough of Harvey Cedars v. Karan, 70 A.3d 524, 540 (N.J. 2013) (declining to "pay slavish homage to labels that have outlived their usefulness").

391. For a discussion of the historical context that the offsetting doctrine was created in, see *supra* Part I.F.

392. *See supra* notes 123–24 and accompanying text.

393. *See supra* note 124 and accompanying text.

394. *See supra* Part III.C (discussing the California Supreme Court's rejection of the traditional offsetting doctrine in the context of a project designed to extend a public subway line); *supra* Part III.C.2 (discussing the New Jersey Supreme Court's rejection of the traditional offsetting doctrine in the context of a joint state-federal project to protect against large-scale flooding); *see also* Berman v. Parker, 348 U.S. 26, 28–31 (1954) (discussing a District of Columbia takings program aimed at addressing urban blight in the capital area).

private subsidy supporting the projects of private companies who lobbied government officials aggressively for the right to use the power of eminent domain.[395] Instead, the government conducts most takings and is accountable to the electorate.

2. Concern over the Speculative Nature of General Benefits Is Unwarranted

The chief concern of courts that reject offsetting of general benefits is that the benefits are overly speculative.[396] The problem with this argument is that it does not speak to general benefits at all but instead relates to a concern about the evidentiary standards required to prove valuation.[397]

There is no support for the claim that general benefits are any more speculative than special benefits.[398] Some state courts have recognized this, and they have redefined a general benefit to merely serve as a prohibition against "speculative" or "conjectural" benefits.[399] A better solution is to simply permit the offsetting of any benefit,[400] so long as its value can be substantially proven.[401]

There is little reason to worry that courts and litigants will not be able to arrive at nonspeculative valuations of the benefit of takings projects. First, litigants have access to a plethora of data regarding the value of properties in their area,[402] and litigants could almost certainly find data on the value of similar properties that have benefited from a similar project. Additionally, juries no longer deal in abstract properties and abstract projects. Frequently, juries are permitted to physically inspect a property, which can allow them to better understand the property in relation to the takings project.[403] For example, if Town A wanted to take a portion of B's oceanfront mansion, the jury could visit the mansion to observe the height and structure of the home as well as its proximity to the ocean.[404] This would provide clarity by allowing the jury to evaluate any expert testimony offered on valuation.

The availability of expert testimony in condemnation cases greatly reduces the risk of a speculative benefit offsetting a condemnation

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395. *See generally* WOLMAR, *supra* note 48.

396. *See supra* notes 114–17, 136, 240, 291, 339–41 and accompanying text (discussing courts' concern about the speculative nature of general benefits).

397. *See supra* notes 355–56 (discussing the New Jersey Supreme Court's opinion of the speculative nature of general benefits and the gatekeeping role played by judges).

398. *See supra* notes 336–37 and accompanying text (discussing the California Supreme Court's discussion that the fear of conjecture relates to evidence, not general or special benefits).

399. *See supra* note 291 (discussing the Illinois Supreme Court's definition of a special versus general benefit).

400. This is permitted by *Bauman*, *McCoy*, and *Miller*. *See supra* Part II.A.

401. *See supra* notes 339–41, 360–61 and accompanying text (discussing the rules in California and New Jersey, which permit the offsetting of any benefits that are not overly speculative).

402. *See supra* note 162 and accompanying text.

403. *See supra* notes 163–64 and accompanying text.

404. *See supra* notes 163–64 and accompanying text.

award.[405] Litigants and courts have access to experts that can testify both to the value before the taking, and the value of the property after the taking project is completed.[406] Judges and juries are not bound to simply accept the direct testimony of an expert either. Experts are subject to cross examination, and if the court is not satisfied with any expert opinion, it could appoint its own additional expert.[407]

Under the rule proposed in this Note, the judge performs their traditional "gatekeeping" role throughout the litigation.[408] The judge will only allow the jury to hear evidence that is sufficiently nonspeculative.[409] In the event that a judge determines that all of the evidence offered concerning the benefits of a taking project is speculative, the jury will determine a condemnation award without considering the benefit. This allows municipalities to offset any sufficiently proven benefits flowing from the taking and addresses the concerns of courts that general benefits are overly speculative.[410]

3. Double Payment Can Be Avoided by Reducing Offsets to Account for Taxation

In addition to speculation, many courts root their distinction between general and special benefits in a theory that because a landowner's condemnation award is offset by the benefits from the project and the landowner pays for the project in taxes, the landowner in effect double pays.[411]

A landowner is entitled to just compensation and therefore cannot be required to pay for the gross value of an improvement.[412] What this dictates is not that general benefits cannot offset a condemnation award, but that a landowner cannot be required to pay for the cost to produce the improvement.[413] Courts that have suggested that offsetting general benefits results in double taxation can remedy this concern by further offsetting the condemnation award to account for assessments paid by landowners for the improvement.

D. Eliminating the Distinction Between General and Special Benefits Will Simplify the Judicial Process

If courts eliminate the distinction between general and special benefits, they can focus on ensuring that the taking entity provides sufficient proof of the value of the offsetting benefit, rather than attempting to classify and offset based on indeterminate categories. In fact, many cases may not even

405. *See supra* notes 167–68 and accompanying text.
406. *See supra* note 168 and accompanying text.
407. *See supra* notes 170–71 and accompanying text.
408. *See supra* note 358 and accompanying text.
409. *See supra* note 358 and accompanying text.
410. *See supra* Part I.E.
411. *See supra* Part I.E.
412. *See supra* notes 182–88, 337 and accompanying text.
413. *See supra* notes 184, 188 and accompanying text.

reach the judiciary. With a clear rule in place, many litigants reach settlements without needing to come to court.[414]

Since the advent of the traditional offsetting doctrine, courts have experienced great confusion in determining whether benefits are general or special.[415] The doctrine generated so much confusion that a Missouri state court noted that "trained legal minds have difficulty in distinguishing between the two types of benefits."[416] A Missouri court also described the distinction as "shadowy."[417] Naturally flowing from this confusion was pages of inconsistent decisions in state and federal reporters.[418] Courts reached different decisions regarding the benefits flowing from railroads, highways, river channels, and telephone lines.[419]

All of this confusion only served to obscure the central goal—just compensation.[420] By eliminating the distinction, courts can focus on evaluating the evidence and ensuring that compensation is just, both to the landowner and the public.[421]

E. The Need for a New Partial Takings Approach

If offsetting is constitutional—as this Note argues[422]—and largely a product of the nineteenth century—a different era with a different legal system—offsetting should be rejected because public policy concerns of the twenty-first century public are different. Seas are rising,[423] and municipalities, states, and the federal government's options are limited.[424] One way to make implementing solutions easier is to ensure that federal and state partial condemnation law is fair to all parties involved.[425]

Ultimately, fairness requires that courts render compensation that is just to the landowner and the public.[426] If a landowner's property sits directly on the coastline, is it just that his compensation is reduced, when the evidence shows that a sand dune project would save his home from certain destruction? One thing that is certain, whatever benefit the dune project has on the property, is that the landowner will capture the value of that

414. *See supra* note 365.

415. *See supra* notes 6, 328 and accompanying text (discussing the confusion created by the distinction between general and special benefits).

416. State *ex rel.* State Highway Comm'n v. Gatson, 617 S.W.2d 80, 82 (Mo. Ct. App. 1981).

417. *See supra* note 305 and accompanying text.

418. *See supra* notes 329–30, 350–51 (discussing the inconsistency courts generated in determining whether benefits were general or special).

419. *See supra* notes 91–98 and accompanying text (citing cases).

420. *See supra* note 354 and accompanying text (discussing the New Jersey's Supreme Court's opinion that the special/general benefit dichotomy did little to illuminate any principles).

421. *See supra* note 338 and accompanying text (arguing that compensation must be just to the landowner and the public).

422. *See supra* Part IV.A–B.

423. *See supra* notes 138–49 and accompanying text.

424. *See supra* notes 143–46 and accompanying text.

425. *See supra* notes 160, 313, 337–38 and accompanying text (discussing the need for fairness in partial takings cases).

426. *See supra* note 338 and accompanying text.

enhanced benefit when the property is sold.[427] In a circumstance where a landowner benefits from a project, as shown by the evidence, not permitting that benefit to offset a condemnation award acts as a subsidy to that particular landowner, which is paid by the rest of the community.[428]

Instead, permitting all nonspeculative benefits to offset a partial condemnation award is fair to the landowners because they receive the benefits while living on the property, which they can sell in the future.[429] Under this rule, the other members of the community do not wholly subsidize the project, but instead pay their fair share in taxes,[430] and the community members are not prevented from receiving the projections of the project because of a few holdouts.[431]

CONCLUSION

Developed in the nineteenth century, the traditional approach to offsetting in partial takings cases reflects nineteenth-century concerns and uses nineteenth-century valuation methods. The special/general benefits dichotomy has paralyzed courts and litigants generating inconsistent opinion after inconsistent opinion. Yet, the majority of state and the federal courts appear to continue to revere the doctrine as though it were laid out in the Bill of Rights.

It is time for the courts to recognize that this judicially created distinction only serves to layer unneeded complexity on an already difficult question of just compensation. Courts should reject this faux sophistication and follow a simplified rule that all reasonably certain benefits can offset a condemnation award in a partial takings case.

427. *See supra* notes 99–101 and accompanying text.

428. *See supra* note 151 and accompanying text.

429. *See supra* notes 99–101 and accompanying text.

430. *See supra* notes 103–08 and accompanying text (discussing taxpayers right to receive public benefits).

431. *See supra* notes 362–67 and accompanying text (discussing the holdout problem in eminent domain, and specifically only the New Jersey coastline).