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## Articles

### WHAT HAS LOVE GOT TO DO WITH IT?: SENTIMENTAL ATTACHMENTS AND LEGAL DECISION-MAKING

DAVID MARKELL,\* TOM TYLER,† AND SARAH F. BROSNAN‡

#### I. INTRODUCTION

THERE is burgeoning literature about the “behavioral era” in law—i.e., an era that seeks to conform the law to emerging understandings of what makes people tick.<sup>1</sup> The basic concept rests on two key assumptions. First, individuals are not always rational economic actors.<sup>2</sup> This is, by now,

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1. See generally Michael P. Vandenbergh et al., *Regulation in the Behavioral Era*, 95 MINN. L. REV. 715 (2011) (describing recent trend to account for behavior in formulating regulations).

2. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1055-66, 1070 (2000) (noting that “[t]here is simply too much credible experimental evidence that individuals frequently act in ways that are incompatible with the assumptions of rational choice theory” and describing several variations of rational choice theory including “wealth maximization version” that predicts that “actors will attempt to maximize their financial well-being or monetary situation”); Vandenbergh et al., *supra* note 1, at 730 (“Although there are multiple interpretations of [rational choice theory], a common assumption is that individuals are rational actors whose decisions are driven by the desire to maximize utility given resource constraints. . . . Ultimately, decisions are made on the basis of a deliberate analysis of the expected payoffs of a set of options, considering both their desirability and their probability of occurring.” (footnotes omitted)). See generally Andrew M. Colman, *Cooperation, Psychological Game Theory, and Limitations of Rationality in Social Interaction*, 26 BEHAV. & BRAIN SCI. 139, 139-43 (2003) (describing weaknesses of rational choice theory).

well established as a matter of fact.<sup>3</sup> Second, as a normative matter, it therefore is appropriate, and important, to structure legal regimes (the law and the institutions that make and administer it) so that they are responsive to this emerging understanding of “behavioral realities.”<sup>4</sup> Better alignment of our legal system and people’s desires will build confidence in government, enhance legitimacy, and promote compliance with the decisions of legal authorities.<sup>5</sup>

There has been substantial work to improve the understanding of human behavior relevant to design of legal procedures. Significant advances have been made and we know much more about peoples’ interests, behaviors, and biases now than in the past.<sup>6</sup> Similarly, we are beginning to “operationalize” this emerging understanding of human behavior in terms of how it might relate to the law and governance mechanisms. For example, the Office of Management and Budget (OMB) is making efforts to foster integration of such insights into the operation of the administrative state, including the operation of our agencies. In its 2009 report to Congress, the OMB’s Office of Information and Regulatory Analysis (OIRA) highlights consideration of “behaviorally informed approaches” to regulation as one of three “potential reforms that might improve regulatory policy and analysis.”<sup>7</sup> OIRA suggests that “[w]ith an accurate understanding of human behavior, agencies would be in a position to suggest innovative, effective, and low-cost methods of achieving regulatory goals.”<sup>8</sup> OIRA identifies the endowment effect, which it characterizes as “loss aversion, in the sense that [people] dislike losses far more than they like correspond-

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3. For a further discussion of the research in the eminent domain arena, see *infra* notes 118-216 and accompanying text.

4. See generally Korobkin & Ulen, *supra* note 2 (arguing that law and economics can reinvigorate itself with more nuanced understanding of human behavior that draws on cognitive psychology, sociology, and other behavioral sciences). This new scholarly paradigm would be called “law and behavioral science.” See *id.* at 1057. As Judge Posner and others have recognized, there has been considerable work to bring insights from the psychology and sociology literatures and empirical findings to increase understanding of legal regimes. See Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 769 (1987) (discussing impact other disciplines have on understanding of law).

5. See Emanuela Carbonara et al., *Legal Innovation and the Compliance Paradox*, 9 MINN. J. L. SCI. & TECH. 837, 841-42 (2008) (“It is generally recognized that the alignment of legal precepts and decisions of authorities with current social norms and values has a positive influence on people’s compliance with law, even when it is not in their self-interest to do so. Legitimacy is undermined when the content of the law departs from social norms, be they based on moral, ethical, or merely cultural values.”).

6. See Vandenberg et al., *supra* note 1 (discussing increasing acceptance of behavioral realities).

7. OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, 2009 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 4, 35-37 (2009) [hereinafter 2009 REPORT TO CONGRESS].

8. *Id.* at 35-36.

ing gains,” as an example of an insight from the social science literature that the regulatory state should incorporate into its policy making.<sup>9</sup>

Our underlying premise is that improving understanding of human motivations, not only in the abstract but also in the context of existing governance mechanisms, is an indispensable building block for operationalizing a behavioral era. In other words, foundational work in understanding human perspectives *and* in assessing the effectiveness of existing institutions in responding to human concerns is critical to improving our regulatory state and the institutions that comprise it. We have contributed to this literature in previous work, in which we have argued for the use of public evaluations as one basis for deciding how (and whether) to regulate decisions with public consequences and explored the effectiveness of different processes based on public preferences.<sup>10</sup>

Our purpose in the study that we present in this Article is to build on this previous work by adding important insights about both peoples’ preferences and the responsiveness of different institutions to those preferences. As indicated above, there is a rich literature that strongly suggests that people attach sentimental as well as monetary value to some items and do not look at issues solely from a rational economic perspective.<sup>11</sup> Our Article, which discusses several important findings from a survey we conducted of peoples’ preferences for different decision-making processes for resolving land use disputes in Florida, builds on this foundation in at least five important ways. First, our findings show that people bring a range of values to their evaluation of decision-making processes. That is, our findings show that people bring sentimental as well as monetary values to their consideration of the adequacy of different procedures, and that the

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9. *Id.* at 36-37.

10. See generally David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens’ Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1 (2008); Tom Tyler & David Markell, *The Public Regulation of Land-Use Decisions: Criteria for Evaluating Alternative Procedures*, 7 J. EMPIRICAL LEGAL STUD. 538 (2009).

11. For a further discussion of the fact that people do not solely view issues from a rational economic perspective, see *supra* note 2 and accompanying text and *infra* notes 119-217 and accompanying text. By monetary values we refer to the economic gains and losses associated with a transaction, for example the value of one’s home. Sentimental values refer to the emotional attachment that people have which shape the psychological sense of gain or loss that would result from a transaction. When people feel a sense of great loss because they have had to sell and move out of a home they have lived in for decades, this loss is not due simply to any decline in monetary value that they may have experienced. It is also due to a non-monetary loss linked to their feelings about their house. A more immediate example of this additional loss is provided by the endowment effect. If you give someone a cup that is worth five dollars and then seek to buy it back, you will typically find that the person wants more than five dollars for that cup. The cup, once someone possesses it, acquires additional value in the owner’s eyes immediately upon possession, and thereby acquires greater value to the owner than it would be viewed as having by a neutral outsider (who could buy a similar mug in a store for less).

amount of weight people attach to monetary and sentimental values affects their views about how well different procedures protect their interests.<sup>12</sup> This finding lends support to those who believe that we should structure legal regimes in light of the reality that people are not always rational economic actors.

Second, we generated several findings about the acceptability of judicial litigation, the process on which we primarily focus in this Article. Our survey respondents viewed judicial litigation as the most preferred process overall, and also as the best for protecting economic interests.<sup>13</sup> In contrast, our respondents did not give judicial litigation high marks for protecting sentimental values.<sup>14</sup> Other procedures we studied, including referenda, did much better when sentimental values were important.<sup>15</sup> Thus, our findings provide insights concerning the comparative advantages of different types of decision-making processes, including judicial litigation, in different contexts.

A third series of important findings offers some insights as to *why* our respondents preferred judicial litigation, notably that the respondents viewed judicial litigation as a neutral process. Related to this, our findings reflect that when monetary interests are important, stakeholders accept decisions made by an arbiter who they perceive to be neutral. That is, they define fairness in terms of neutrality.<sup>16</sup> Other features of decision-making, such as voice and quality of treatment, carried much less weight.<sup>17</sup>

A fourth set of key findings sheds light on what it would take for our respondents to believe that judicial litigation would adequately protect sentimental values. Our respondents believed that procedural justice is particularly important when sentimental values are important.<sup>18</sup> Further, we found that a particular feature of procedural justice discussed in the procedural justice literature—trust in the decision-maker (the judge in ju-

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12. For a further discussion of our survey's findings, see *infra* notes 86-118 and accompanying text.

13. See *infra* notes 86-118 and accompanying text. The preference for judicial litigation in their overall rankings of processes provides some support for the idea that our respondents gave monetary interests more weight than sentimental interests but we did not ask specific questions to test this and do not discuss this relative weighting in detail in this Article.

14. See *infra* notes 86-118 and accompanying text. We asked about five different types of procedures, ranging from civil judicial litigation to referendums. An interesting finding of our study is that, despite the professed interest in sentimental value, people still generally preferred litigation, which was seen to maximize economic interests and, as the text reflects, did not do particularly well when sentimental values were important.

15. See *infra* notes 86-118 and accompanying text.

16. See *infra* notes 86-118 and accompanying text.

17. See *infra* notes 86-118 and accompanying text.

18. See *infra* note 90 and accompanying text (depicting "Table 2: What features shape the view that courts protect value?").

dicial litigation)—is key to protection of sentimental values.<sup>19</sup> In order to create an atmosphere of trust, it was particularly important that judges provide opportunities for voice, make it clear that their decisions had been made neutrally, and show respect for people and their rights.<sup>20</sup> These findings about the process features that are important when sentimental values predominate hold promise for improving satisfaction with judicial litigation by pointing the way for process designers to incorporate and highlight such features when sentimental values are salient.

A fifth and final finding that is of particular interest for at least two reasons is that preferences for processes depend in part on exogenous factors. Our findings show that one exogenous factor, notably the background level of trust in local government, influences peoples' preferences for different processes.<sup>21</sup> Those with a high degree of trust proved relatively comfortable with government processes in which government officials have the final say (including judicial litigation), while respondents with low levels of trust preferred processes that left power in the hands of the people (e.g., through referenda).<sup>22</sup> Low-trust respondents apparently had more confidence in their fellow citizens than in their representatives, bureaucrats, or judges.<sup>23</sup> This intriguing finding highlights the importance of trust in the litigation setting for issues that have sentimental value. The key issue to people is trust in judges, who are, after all, government officials.

Further, it suggests the importance of periodic appraisals of process design because polling data reflect dramatic changes (declines) in confidence in government in recent years. Pollster Stanley Greenberg recently found that trust in government is declining substantially, noting that “[j]ust a quarter of the country is optimistic about our system of government—the lowest since polls by ABC and others began asking this question in 1974.”<sup>24</sup> Mr. Greenberg's polling results are by no means anomalous. A 2010 Pew survey found that “just 22 % [of all Americans] say they can trust the government in Washington almost always or most of the time, among the lowest measures in half a century.”<sup>25</sup> Pew reports

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19. See generally TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002) (describing how trust in judges is crucial to protecting litigants' sentimental values).

20. For a further discussion of responses to the survey, see *infra* notes 86-118.

21. See *infra* notes 86-118.

22. See *infra* notes 86-118.

23. See *infra* notes 86-118.

24. Stanley B. Greenberg, *Why Voters Tune Out Democrats*, N.Y. TIMES, July 31, 2011, at SR1.

25. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, DISTRUST, DISCONTENT, ANGER AND PARTISAN RANCOR: THE PEOPLE AND THEIR GOVERNMENT 2 (2010), available at [www.people-press.org/files/legacy-pdf/606.pdf](http://www.people-press.org/files/legacy-pdf/606.pdf). A September 2011 Gallup poll found that “[a] record-high 81% of Americans are dissatisfied with the way the country is being governed, adding to negativity that has been building over the past 10 years.” See Lydia Saad, *Americans Express Historic Negativity Toward U.S. Gov-*

that when the National Election Study “first asked this question in 1958, 73% of Americans trusted the government to do what is right just about always or most of the time.”<sup>26</sup> An October 2010 ABC News/Yahoo! News poll found that only 33% are optimistic about “our system of government and how well it works,” the lowest number in “nearly a dozen measurements taken across the decades.”<sup>27</sup> Thus, our finding about the salience of trust in government to process preferences suggests the need not only to pay attention to the predominant values of key stakeholders in designing processes, but also to be mindful of evolving community mores. Preferences for different processes may be dynamic—they may shift over time as exogenous factors shift.

The poor performance of judicial litigation in protecting sentimental values, the salience of trust when sentimental values predominate, and declining levels of such trust<sup>28</sup> seemingly create a multi-barreled challenge to the legitimacy of the court system when it faces decisions that implicate such values.<sup>29</sup> These findings highlight the potential value and promise of taking action to bolster confidence in litigation when sentimental values are likely of high importance.

The eminent domain arena, in which a government entity may require a party to sell its property, provides an intriguing context to consider our findings. Two key features of this legal domain that are oft-highlighted in relevant literature are that (1) sentimental values frequently are of significant importance, and (2) there is considerable dissatisfaction with extant procedures used to resolve disputes.<sup>30</sup> Professors Nadler and Dia-

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*ernment*, GALLUP: POLITICS (Sept. 26, 2011), <http://www.gallup.com/poll/149678/americans-express-historic-negativity-toward-government.aspx>.

26. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note 25, at 13.

27. Gary Langer, *Public Optimism Hits a 36-Year Low in Views of the ‘System of Government’*, ABC NEWS, Oct. 26, 2010, <http://abcnews.go.com/Site/page?id=11965387> (internal quotation marks omitted).

28. *See* Greenberg, *supra* note 24 (concluding that “distrust of government . . . is unfolding as a full-blown crisis of legitimacy”). Greenberg suggests that this declining sense of trust in government is shifting the political landscape in favor of Republican governance and that “many voters . . . are turning away from Democrats, Socialists, liberals and progressives.” *Id.* We do not take a position on Mr. Greenberg’s claim but include his suggestion simply to highlight the significant stakes associated with trust in government.

29. We are not suggesting that courts uniquely require a hard look in this regard. Indeed, courts fare better than other institutions according to some surveys. For example, we have previously discussed the relatively dismal performance of local government public hearings, the most frequently used form of dispute resolution for some disputes. *See generally* Tyler & Markell, *supra* note 10.

Nevertheless, our findings point to a gap between citizen expectations and court performance in at least some contexts—notably when sentimental value is particularly salient—and we believe this finding deserves attention. *Cf.* James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 72 (2008) (concluding that campaign contributions and election attack ads lead to reduction in perceived legitimacy of state courts with elected judges).

30. *See infra* notes 86-118 and accompanying text.

mond capture nicely the disconnect between people's values and extant judicial processes, observing that "[a]lthough the law of eminent domain does not recognize distinctions among property owners beyond those reflected in the fair market value of the property, public sensibilities include more."<sup>31</sup> Scholars and others seeking to ameliorate dissatisfaction typically urge changes to the normative rules by having the courts give more attention to sentimental values in making compensation decisions or by narrowing the use of eminent domain.<sup>32</sup> Our study suggests the promise of a different framework based on the procedural justice literature, which focuses particularly on identifying and incorporating procedural features that enhance trust.<sup>33</sup> In short, our findings suggest the value and importance of focusing on process as an essential (though by no means exclusive) step in designing procedures that the public will find acceptable.<sup>34</sup>

More generally, our findings highlight the importance of context in process design; if a goal of process design is to have processes that are acceptable to key stakeholders, it is important to understand the values these stakeholders hold concerning the particular decision involved, and more generally towards societal governance structures.<sup>35</sup> Process prefer-

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31. Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713, 742 (2008). It is an oversimplification to refer to the "law of eminent domain" as a single body of law that consists of judicial litigation or as a single set of procedures. The variability in approaches that governments use to acquire property highlights the importance of paying attention to context in formulating possible fixes. Jurisdictions differ in the procedures they use for eminent domain. See, e.g., DAVID McCORD, 7 NICHOLS ON EMINENT DOMAIN § G2A.03 (2011) [hereinafter NICHOLS ON EMINENT DOMAIN] (summarizing nature of eminent domain procedures in different states); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 104, 127-28 (2006) (discussing pre-condemnation negotiations and use of "quick-take" authority in noting that "in the vast majority of cases, formal eminent domain proceedings are never commenced" and observing that there has been "universal disregard for how eminent domain works outside of the courtroom.").

32. See Garnett, *supra* note 31, at 110 (noting that "[a]cademic discussions tend to assume that there are two ways to minimize the risk of undercompensation," and referencing two discussed in text); Nadler & Diamond, *supra* note 31, at 743 ("Th[e] pattern of results [from their study] suggests that a property rule might satisfy people in some situations where proposed use is perceived as questionable; at the same time, our data suggest that variability in use might also be satisfied by a liability rule, that is, higher compensation when the proposed use is perceived as questionable.").

33. We recommend this approach in other areas where sentimental values are high as well. We are not taking a position on the appropriate scope of substantive reform in any area. Our process suggestions may be considered independent of substantive reforms, or as complements to them.

34. See Nadler & Diamond, *supra* note 31, at 748 (discussing implications of findings). In their interesting study of concerns with eminent domain law, Professors Nadler and Diamond identify procedural reform as important to address concerns about subjective attachment and begin to "map out" a possible response. See *id.*

35. As the text suggests, a key threshold issue involves identifying the appropriate universe of key stakeholders. For an example regarding the views of owners



ences vary depending on the strength of different values. Our findings suggest the value of using tools from the procedural justice literature to understand peoples' preferences and the process features that are most important to them, and to design processes that align with these preferences.

Part II explains in more detail the different types of values (monetary and sentimental) about which we elicited information from the survey participants. Part III reviews our survey methodology. Part IV contains our findings and our review of the implications of those findings for process design. Part V illustrates the value of our findings by applying them in a particularly controversial context, notably government's use of eminent domain authority to take land at a market price from owners who are not interested in selling. Ultimately, our purpose is to examine the idea of sentimental attachment and consider how it might both enrich our view of the desirability of decision-making institutions, such as the courts as community decision-makers, and provide insights about the strategies the courts and other institutions should use in performing this responsibility in a way that bolsters legitimacy.

## II. MONETARY AND SENTIMENTAL VALUES

Surprisingly little empirical literature has addressed monetary versus sentimental value.<sup>36</sup> Often when an economist or legal scholar speaks of value, they mean the monetary value.<sup>37</sup> This is typically operationalized as either fair market value or the closely related willingness-to-pay measure, which is the amount of money someone will pay to acquire an object.<sup>38</sup> However, despite the implicit assumption that value is some sort of quantifiable market-based component of an object, growing research indicates that a number of factors affect valuation and that sentimental factors are often quite salient.<sup>39</sup>

The key distinction underlying market-based monetary value is that the value of something is established through some procedure that involves neutral and fact-based estimation that considers other people's sense of worth. While monetary value involves a subjective evaluation of these facts, it is neutral in that no one person can define market value without considering what something is worth to others. Sentimental value

in eminent domain proceedings, see *infra* notes 124-27 and 134-67 and accompanying text.

36. One reason for this involves the challenge of adequately creating sentimental value in the laboratory in a relatively short experimental session.

37. See, e.g., Jack L. Knetsch & J. A. Sinden, *Willingness to Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value*, 99 Q.J. ECON. 507 (1984) (describing trend toward defining value in monetary terms). Note that almost thirty years ago there was evidence that willingness to pay was not always equivalent to compensation value.

38. See generally *id.* (operationalizing fair market value as willingness-to-pay).

39. See, e.g., Nadler & Diamond, *supra* note 31 (discussing sentimental factors' effect on valuation); Vandenbergh et al., *supra* note 1 (same).

is a unique subjective sense of the personal value of some object or relationship that derives from the fact of ownership, information acquired about one's possession, or the formation of an emotional attachment. The sentimental value of my home to me is not something that is shared by others, nor that others would recognize, be willing to agree with, or be willing to pay to acquire the object. The example we already provided of the endowment effect provides an example of value derived from the fact of ownership. If I am given a cup that can be purchased in a store for five dollars, the market value of this cup to people in general is the value of similar mugs available on the market (i.e., five dollars). The sentimental attachment that leads me to want to receive seven dollars for that cup is a personal sense of value connected uniquely to that object by me and is not something that other people would generally share. If I tried to sell my cup on eBay for seven dollars, I would be likely to find that people would prefer to go to a store and buy a similar cup for five dollars, since they do not feel the sentiments I do toward my cup.

This distinction between monetary and sentimental value is critically important in a variety of contexts, particularly in the legal profession, where juries and judges often make decisions considering the appropriate value of the commodities at hand.<sup>40</sup> The omission of sentimental aspects of value may leave all individuals feeling frustrated with the process or outcome, especially if the sentimental values predominate.

The best empirical approach thus far to understanding sentimental value is the literature on the endowment effect that we noted above. Endowment effect is a term that is used to describe the phenomenon by which individuals value what they have just come to possess more than their expressed value for the item prior to the moment of possession.<sup>41</sup> For example, individuals who earlier expressed a willingness to pay ten dollars for an item might not be willing to sell it for less than, say, twelve dollars within moments of it becoming theirs. This literature shows clearly that people's perception of value is quite malleable, in this case apparently due to the actual fact of ownership (that is, more so than any sentimental value acquired by the fact of long possession).<sup>42</sup>

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40. For a further discussion of eminent domain and other areas of law in which sentimental value is important, see *infra* notes 118-216 and accompanying text.

41. See generally Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990) (defining and discussing endowment effect); Jack L. Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, 79 AM. ECON. REV. 1277 (1989) (same).

42. While we use the endowment effect to illustrate the idea of sentimental value, the endowment effect has been presented as a more perceptual and immediate psychological process than is reflected in the development of emotional connections with objects (like one's home) that reflect a history of experiences with that object over time. However, both reflect the concept of a unique valuation of an object that is not shared by others.

It is difficult to quantify the endowment effect because it varies widely across individuals and contexts.<sup>43</sup> While this has led some to consider the effect as an artifact of experimental procedures,<sup>44</sup> many scholars have concluded that such an effect exists.<sup>45</sup> Indeed, humans are not the only species that show this behavior, indicating that there has been selective pressure to behave in this way across a number of species (or at least, a number of primates).<sup>46</sup> This indicates that this response is not a cultural or experimental artifact, but an evolved response that affects our understanding of human behavior.<sup>47</sup>

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43. See, e.g., Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1229 (2003) (noting that “the existence and extent of the endowment effect is context-dependent”).

44. See, e.g., Owen D. Jones & Sarah F. Brosnan, *Law, Biology, and Property: A New Theory of the Endowment Effect*, 49 WM. & MARY L. REV. 1935 (2008) (proposing “new” version of endowment effect); Charles R. Plott & Kathryn Zeiler, *Exchange Asymmetries Incorrectly Interpreted as Evidence of Endowment Effect Theory and Prospect Theory?*, 97 AM. ECON. REV. 1449, 1462-63 (2007) [hereinafter Plott & Zeiler, *Exchange Asymmetries*] (challenging “interpretation of exchange asymmetries as providing empirical support for [ ] endowment effect theory”); Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay—Willingness to Accept Gap, the “Endowment Effect,” Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 95 AM. ECON. REV. 530, 544 (2005) (stating that “endowment effect theory and prospect theory most likely do not explain” behavior in manner that advocates claim).

45. See Robert Franciosi et al., *Experimental Tests of the Endowment Effect*, 30 J. ECON. BEHAV. & ORG. 213, 226 (1996) (“Is the endowment effect an important characteristic of behavior that should concern us? As an observation contrary to standard preference theory it cannot be lightly dismissed.”); John K. Horowitz & Kenneth E. McConnell, *A Review of WTA/WTP Studies*, 44 J. ENVTL. ECON. & MGMT. 426 (2002) (basing its analysis in part on endowment effect dichotomies); Kahneman et al., *supra* note 42, at 1325 (“[The] ‘endowment effect’ persists even in market settings with opportunities to learn.”); Serdar Sayman & Ayşe Öncüler, *Effects of Study Design Characteristics on the WTA-WTP Disparity: A Meta Analytical Framework*, 26 J. ECON. PSYCH. 289, 297 (2005) (“One explanation for the disparity is the endowment effect, which is a manifestation of the loss aversion property of the Prospect Theory.”). As indicated above, the OMB and others have begun to incorporate the endowment effect into their policies. See *supra* notes 7-9 and accompanying text.

46. See Sarah F. Brosnan et al., *Endowment Effects in Chimpanzees*, 17 CURRENT BIOLOGY 1704, 1704 (2007) (“We show the first evidence that chimpanzees do exhibit an endowment effect . . .”); Venkat Lakshminaryanan et al., *Endowment Effect in Capuchin Monkeys*, 363 PHIL. TRANSACTIONS ROYAL SOC’Y B 3837, 3837 (2008) (“[C]ommon evolutionary ancestry shared by humans and capuchins may account for the occurrence of the endowment effect in both species.”); T.E. Flemming et al., *Endowment Effects in Orangutans*, ANIMAL COGNITION (forthcoming).

47. For a further discussion of the endowment effect as an evolutionary response, see Jones & Brosnan, *supra* note 44, at 1936 (“[T]he endowment effect is an evolved propensity of humans and . . . the degree to which an item is evolutionarily relevant will affect the strength of the endowment effect.”). Evolutionary similarity can emerge through several processes, chief among them being homology and convergence. Homology describes the situation in which two species share a common trait through a common ancestor, while convergence describes the situation in which two species come to share a trait through common selective pressures, but not common origin. These can be difficult to distinguish; although very closely related species likely share many traits through homology, convergence is a

Further, studies have shown that endowment effects appear in contexts in which objects in one's possession are useful, for instance keeping an item in one's possession when it is valuable, but not keeping the object when it would not be useful. This further highlights the importance of object value and salience to understanding these effects.<sup>48</sup> It may be that possession in and of itself—when the object is worth possessing—is so valuable that, evolutionarily, it was always better to hang on to an object than to risk losing both it and the item that may be acquired in exchange, unless the potential gains from the new object were, on average, sufficiently high to outweigh the cost of loss of both.<sup>49</sup> For instance, in trades or barter, the risk of getting nothing in return may have outweighed the potential benefit from obtaining a more preferred item.<sup>50</sup> This is not to

possibility as well. On the flip side, so-called deep homology can exist between extremely phylogenetically distant species, which may be difficult to detect. For the purposes of the current argument, whether these similarities are due to homology (behavior shared by a common ancestor to these primates) or convergence (similar selective pressures) is not important. What is relevant is that this behavior emerged in more than one species and operates in what appears to be very similar circumstances. See, e.g., MARK RIDLEY, *EVOLUTION* (3d ed. 2004); Catherine F. Talbot et al., *Squirrel Monkeys' Response to Inequitable Outcomes Indicates a Behavioral Convergence Within the Primates*, 7 *BIOLOGY LETTERS* 680 (2011).

48. See, e.g., Sarah F. Brosnan et al., *Evolution and the Expression of Biases: Situational Value Changes the Endowment Effect in Chimpanzees*, 33 *EVOLUTION & HUM. BEHAV.* (forthcoming 2012). In this study, subjects had access to two tools; each tool could be used to achieve one of the two food items, but not the other (e.g., honey dipping and juice sponging), nor was either tool useful when the corresponding food was not available. The subjects' endowment effects for the pair of tools were tested for the same pair of tools in three different contexts: when both foods were available; when both foods were visible, but not accessible; or when both foods were absent. Chimpanzees showed endowment effects for the tools when foods were available, but not when foods were inaccessible or invisible.

49. Sarah F. Brosnan et al., *Chimpanzee Autarky*, 3 *PLoS ONE* 1, 1 (2008), available at <http://www.plosone.org/article/info:doi/10.1371/journal.pone.0001518> (“[C]himpanzees do barter, relinquishing lower value items to obtain higher value items (and not the reverse). However, they do not trade in all beneficial situations, maintaining possession of less preferred items when the relative gains they stand to make are small.”); Sarah F. Brosnan, *Property in Nonhuman Primates*, 132 *NEW DIRECTIONS IN CHILD & ADOLESCENT DEV.* 9, 18 (2011); Sarah F. Brosnan & Michael J. Beran, *Trading Behavior Between Conspecifics in Chimpanzees, Pan Troglodytes*, 123 *J. COMP. PSYCHOL.* 181, 182 (2009) (“Again, chimpanzees only traded for preferred foods and, as would be expected, rarely traded when foods were close in value.”); Jones & Brosnan, *supra* note 44 (studying endowment effect in chimpanzees). The endowment effect is not arbitrarily inclusive; that is, you might expect the possessor of our five-dollar coffee mug to refuse anything less than seven dollars for the mug under typical circumstances, but to only refuse an offer of one hundred dollars in extraordinary circumstances, say if the mug was a final gift from a deceased relative.

50. See Brosnan et al., *Chimpanzee Autarky*, *supra* note 49, at 3 (“First, the risk of defection discourages costly commodity barter. When a chimpanzee hands another individual a barter commodity, the second individual (let's say ‘the seller’) could defect and run away with both commodities.”); Brosnan & Beran, *supra* note 49, at 182 (“Not trading for closely valued items] potentially represents a trade-off between the gains of trade on the one hand and the risks inherent in giving up an item on the other.”); Brosnan, *Property in Nonhuman Primates*, *supra* note 49, at 18

say that because a trait is widely shared it is more important or right; that would be committing the naturalistic fallacy.<sup>51</sup> On the other hand, the widespread occurrence of the effect supports the view that the trait both exists (e.g., beyond an experimental artifact) and has an evolutionary origin;<sup>52</sup> it may also help to explain why it exists, and it may provide insight into situations in which a trait is sufficiently deeply ingrained in a species' biology that it will be challenging to change.<sup>53</sup> Beyond the consensus view that people and other species attach greater value to an item once they possess it than to the same item when they do not have it in their possession, much remains to be learned about particular features of the endowment effect, including why it exists and its resilience in different contexts.

While the endowment effect (the act of possession) has received the majority of empirical attention, at least two other factors affect value: acquired information about one's possession,<sup>54</sup> and the formation of an emotional attachment to one's possession.<sup>55</sup> Closely related to the idea that the act of possession affects value is that an object one possesses for an extended period of time may gain additional value due to the very fact of possession. There is experimental support for the concept that a component of the value of an item stems from value that accrues due to usage or information acquisition. This phenomenon, too, occurs among other species, with individuals, for instance, fighting harder to maintain territories that they possess than to gain territories that they would like to acquire.<sup>56</sup> This is hypothesized to occur due to the additional, very real value that is

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(“This behavior, similar to that seen in the endowment effect study discussed earlier, indicates that chimpanzees are hesitant to give up an item in their possession, possibly because of the risks of trade.”).

51. The naturalistic fallacy describes a situation in which a behavior is considered morally acceptable or in some other way permissible by the fact that other species engage in the behavior. In other words, the fact that the behavior occurs in nature is somehow seen as a normative justification for said behavior. For an extreme example of this fallacy, consider rape, called forced copulation in the animal literature. This behavior occurs regularly in a variety of animals, including orangutans, another great ape species closely related to humans. Despite this prevalence, and hypotheses regarding the evolutionary function of the behavior, rape in humans is neither acceptable nor necessarily a result of the same mechanisms (e.g., in humans it may be about power rather than reproduction per se).

52. See Plott & Zeiler, *Exchange Asymmetries*, *supra* note 44 (explaining experimental nature of procedures leading to evidence of prospect theory).

53. See generally Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405 (2005) (discussing true impact of behavioral biology on law); Jones & Brosnan, *supra* note 44 (arguing legal field could greatly benefit from greater knowledge of behavioral biology).

54. See *infra* note 67 (recounting effect of one's possession).

55. See *infra* note 67 (explaining that one's possession leads to emotional attachment). For an excellent review of the literature on how property, attitudes about property, and self-identity interact, see Jeremy A. Blumenthal, “To Be Human”: A Psychological Perspective on Property Law, 83 TUL. L. REV. 609 (2009).

56. J.R. KREBS & N.B. DAVIES, AN INTRODUCTION TO BEHAVIOURAL ECOLOGY 159-60 (3d ed. 1993) (summarizing principle that humans will fight harder to maintain their possessions than to obtain those they wish to acquire). For the

acquired when an individual learns the details of one's territory, e.g., the location of good food sources or nesting sites or hiding spots from predators.<sup>57</sup> Modern Western humans may have similar emphases, as evidenced by the adverse possession doctrine.<sup>58</sup> Thus, individuals very reasonably value a thing that they possess more so than others who do not possess it, possibly due to the benefits provided by additional knowledge of the object.

Beyond this, humans also ascribe value due simply to the feelings, memories, and emotions that exist for a possession, typically called sentimental value.<sup>59</sup> Sentimental value is value that is inherently personal and highly subjective. An object may only acquire sentimental value for one or a few individuals, and the presence of sentimental value for one individual does not mean that the same object will have such value for anyone else, although others may recognize this value.<sup>60</sup> This sort of emotional attachment may have particular salience in the case of homes, leading individuals to feel that it merits particular protection, including from government.<sup>61</sup> In scenario studies in which individuals are asked to speculate about how they would feel about various eminent domain decisions, both the length of time during which a family has lived in a house and, to a much lesser degree, the proposed purpose of the new use of the property, affected perceptions of the entire interaction.<sup>62</sup> It is unclear precisely how sentimental value as we describe it ties in to the endowment effect. The general consensus seems to be that the endowment effect describes a phenomenon that occurs far too rapidly to be due to information acquisition, but is instead a predisposition to value what one possesses regardless of other information.<sup>63</sup> Thus it may be that these are additive; humans may value what they own, and then increase the value once they have learned information which makes that possession more useful or have developed an emotional attachment.

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original study, see John R. Krebs, *Territorial Defense in the Great Tit (Parus Major): Do Residents Always Win?*, 11 BEHAV. ECOLOGY & SOCIOBIOLOGY 185 (1982).

57. See KREBS & DAVIES, *supra* note 56, at 159-60 (discussing value attributed to territory).

58. See Jeffrey Evans Stake, *The Property "Instinct"*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON B 1763, 1766-67 (2004) (explaining how evolution provides insight into justifications for adverse possession).

59. See Anthony Hatzimoysis, *Sentimental Value*, 53 PHIL. Q. 373, 373 (2003) (explaining notion of sentimental value as emotional attachment); Guy Fletcher, *Sentimental Value*, 43 J. VALUE INQUIRY 55 (2009) (same).

60. See Hatzimoysis, *supra* note 59, at 374-75 (discussing personal nature of sentimental value).

61. For initial studies, see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

62. See Nadler & Diamond, *supra* note 31, at 731-33 (showing individuals' refusal to sell at any price).

63. See Christopher Curran, *The Endowment Effect*, in 1 ENCYCLOPEDIA OF LAW AND ECONOMICS 819 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (conflating these two approaches, seemingly).

Together, these factors influence the value people attach to items, and can be colloquially grouped under the heading of “sentimental value.” Regardless of the precise relationship between and among these types of sentimental value, the key point for our purposes is that the literature in each of these areas supports the existence of such value beyond what is often considered to be an item’s monetary value. The question for us in this Article is what effect the existence of sentimental value should have on governance decision-making processes. As indicated above, our premise is that decision-making procedures should be structured so that they are responsive to the interests of key stakeholders; thus, the nature of a procedure needs to increase a person’s sense of the legitimacy of the process (and of governance more generally) rather than diminish it. Having shown that there is good reason to believe that procedures that rely exclusively on monetary fair market value as the sole measure of value likely do not capture all of the interests people have, in at least some circumstances, the next question is whether there are ways to improve decision-making procedures so that they better align with a broader set of people’s interests. One way to consider this broader set of interests is in terms of what remedies to provide to satisfy these interests. However, we argue that it is also important to address the issue of interests when considering how decisions surrounding these interests are made.

One seemingly straightforward strategy for capturing sentimental value in decision-making is to require decision-makers to consider such values. However, even if one were inclined from a conceptual or theoretical perspective to incorporate subjective values into decision-making, there are significant challenges to doing so effectively. Two particular difficulties with value—both issues with respect to sentimental value—are that, first, value is subjective, and second, value perception shifts within the same individual across different contexts. For instance, considering the endowment effect, individuals value the same item differently depending on whether they do or do not own it, and this change takes place rapidly, in the moment or two surrounding the acquisition of possession.<sup>64</sup> In other words, an individual’s willingness to pay for an item becomes smaller than the willingness to accept the monetarily equivalent offer for that object, apparently at the instant at which ownership is acquired.

In short, sentimental value, defined broadly to include the endowment effect, information acquisition, and traditional or popular notions of sentimental value, may be very difficult to place a monetary amount on due to differences in subjective perception, both across contexts (are you the owner or the would-be purchaser) and within contexts (you may value the home you grew up in more than I do). The dynamic and ad hoc character of value raises significant rule of law questions.<sup>65</sup> An area of the

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64. See Knetsch, *supra* note 41, 1282-83 (analyzing outcome of scientific studies of indifference curves).

65. For a further discussion of this phenomenon in the eminent domain arena, see *infra* note 195-97. One risk of too much ad hoc-ism is the possible un-

law in which this issue of sentimental value is most pressing is in eminent domain. One of the features of eminent domain that leads to protests and dissatisfaction is that the rulings of what qualifies as fair market value are typically not considered such by the homeowner.<sup>66</sup> This provides a challenge as it seems difficult to quantify sentimental value in any reasonable or fair way.<sup>67</sup> Several leading scholars have proposed a variety of strategies to address this challenge of incorporating sentimental value into determination of a property's worth for eminent domain purposes, but none has gained traction.<sup>68</sup> Given the inherent subjectivity, it remains unsettled whether there are viable ways to ascribe importance to sentimental value when making legal decisions, and if so, how we should go about doing so.<sup>69</sup>

These challenges in practicability—in being able to easily assign sentimental values to objects—bring us back to the larger questions that are the focus of this Article. First, does the existence of sentimental in addition to monetary value affect peoples' views about how well different decision-making processes will protect their interests? The answer is yes.<sup>70</sup>

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dermining of “rule of law.” See, e.g., Melissa M. Berry et al., *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-percolation After Rapanos*, 15 VA. J. SOC. POL'Y & L. 299, 309 (2008) (arguing that “[t]he essential elements to a legal regime based on the rule of law involve: (1) clear and understandable rules; (2) predictability and certainty; (3) procedural validity in the formation of rules; and (4) rules independent of individual whims of government officials and instead with a basis in established law”).

66. For a further consideration of findings in the context of eminent domain, see *infra* notes 121-217.

67. See *infra* notes 121-217.

68. See *infra* notes 121-217.

69. See *infra* notes 121-217. There are other challenges to valuation as well that are widely discussed and studied within the literature on the psychology of justice. Studies of perceived justice show that people's self-interested motivations shape their feelings of justice and entitlement. People in settings in which their perception of entitlement shapes what they will receive are motivated to give in to such self-interested motivations and heighten their feelings of fair value. For example, the equity literature seeks to build employee morale by providing employees with what they view as a fair level of compensation. This approach has not been particularly successful and the reasons for that lack of success provide a cautionary message for the situation being discussed here. Studies find that people generally exaggerate the value of their work efforts relative to the ratings of neutral observers. See generally Mark R. Leary, *Motivational and Emotional Aspects of The Self*, 58 ANN. REV. PSYCHOL. 317 (2007). In order to give people what they view as fair pay, therefore, managers need to pay them more than what a neutral assessment suggests their work is worth. As a consequence, a focus on giving people what is needed for them to be satisfied with their “value” has negative management implications. See TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* (1997) (studying social justice from social society perspective). These challenges provide further support for focusing on identifying acceptable procedures for determining value. We suggest, in keeping with the overall procedural justice literature, that the procedure for determining value can help to create the motivation for accepting that value.

70. For a further discussion of our survey results, see *infra* notes 86-118 and accompanying text.



Second, if peoples' views about how well a process protects their interests vary based on whether they want a process to protect monetary versus sentimental value, which procedures do people find effective (and ineffectual) for the latter? The answer to this second question is that referendums do best and judicial litigation was third best out of the five processes we studied.<sup>71</sup> Third, concerning judicial litigation in particular (the process on which we focused), given that people did not think it was particularly effective in protecting sentimental values, are there process features that might enhance its perceived effectiveness? In short, our hope was to develop insights concerning whether existing procedures do well (or not) in addressing sentimental value, why procedures do well (or not), and, based on these insights, to advance understanding about options for revising procedures to increase satisfaction when sentimental values are important.

As is probably clear already, but we emphasize it here, our focus is not on fair value per se (i.e., upon issues of distributive justice). Instead, we focus on another issue central to designing a legal system: creating procedures that can authoritatively resolve disputes among people about value. Our argument flows from the abundance of evidence that peoples' willingness to trust the law and the actions of legal authorities is linked to legitimacy.<sup>72</sup> Moreover, legitimacy is created and maintained through making decisions using procedures that people judge to be fair.<sup>73</sup> Hence, in the eminent domain arena, for example, if the government is to have the power to take private property for just compensation, we are concerned about the ability of the legal system to use fair procedures as a way of establishing and legitimating a particular approach to a level of remuneration when the government takes private property. Our findings, and the procedural justice literature more broadly, show that in important respects it is the procedure for determining value that people trust to protect the monetary and sentimental value of their property.

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71. See *infra* notes 86-118 and accompanying text.

72. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006) (explaining link between trust in law enforcement and legitimacy).

73. See generally *id.* (summarizing evidence linking legitimacy to belief in law enforcement).

III. OUR STUDY METHODOLOGY<sup>74</sup>A. *Our Sample*

The questionnaire was posted on a website and interested parties were invited to complete it.<sup>75</sup> A number of groups were contacted and shared information about the web link with their members and others who receive their newsletters or are on their listservs. Several leading organizations were very helpful and shared the questionnaire with their constituents via listservs and other means. These included: (1) the leading organization in Florida for lawyers in the field, the Environmental Law and Land Use Section of the Florida Bar;<sup>76</sup> (2) the leading state association for planners, the Florida Chapter of the American Planning Association;<sup>77</sup> (3) the state agency responsible for overseeing land use regulation in Florida, the Department of Community Affairs, which sent the survey to the eleven state regional planning councils;<sup>78</sup> (4) the Florida League of Cities, which represents the 400-plus cities in Florida;<sup>79</sup> (5) the Florida Home Builders Association, a leading trade group for developers;<sup>80</sup> (6) 1000 Friends of Florida, a statewide organization with a significant focus

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74. This summary of our study methodology in Parts III(A) and (B) is excerpted from Tyler & Markell, *supra* note 10 at 549-51. That article covered different findings from the same study. We have excerpted part of this introduction here, although the details about the questionnaire differ because the two articles focus on different issues and different questions. *See id.* at 550-54 (explaining methodology behind the study).

75. The authors will provide interested readers with a copy of the questionnaire. Please e-mail any of the authors.

76. The Environmental Law and Land Use Section is comprised primarily of attorneys, though it also has affiliate members in related disciplines. The section representative indicated that the listserv goes to approximately 1,200 people. Almost all are ELUL section members. Approximately 100 are affiliate members. These individuals represent the gamut of interests in the land use arena.

77. *See* Tyler & Markell, *supra* note 10. The listserv of the Florida APA, a non-profit organization, includes a total of more than 3,000 individuals. The Florida APA notified its members via its October 30, 2008 monthly bulletin and also included a notice concerning the survey in its quarterly publication, *Florida Planning*.

78. The Director of Intergovernmental and Public Affairs for the State Department of Community Affairs (DCA) sent an e-mail to the eleven regional planning council executive directors on our behalf and we followed up with an additional e-mail to the RPC Directors. *See* FLA. STAT § 20.18 (2008) (summarizing DCA's role as State of Florida's land planning agency).

79. *See* E-mail from Rebecca O'Hara, Fla. League of Cities, to authors (Oct. 10, 2008) (on file with authors). The council published the notice in its *Datagram*, a newsletter sent to several hundred municipalities.

80. *See* E-mail from Doug Buck, Dir. of Gov't Affairs, Fla. Home Builders, to authors (Oct. 28, 2008) (on file with authors). We asked all organization representatives with whom we spoke to share with us the note they sent their members/constituents and also to let us know how many people would likely receive the notice. The Florida Home Builders Director of Government Affairs indicated that he was making it available to members who might wish to comment.

on land use;<sup>81</sup> and (7) Tallahassee-Leon County Citizens United for Responsible Growth, a local citizens' organization interested in land use.<sup>82</sup> Because the information was widely circulated it is not possible to calculate a response rate. A total of 228 people responded to the questionnaire.<sup>83</sup>

The survey measured standard demographics: age, gender, income, education, and ethnicity. The demographics of the sample suggest that a range of stakeholders responded. The sample was comprised of 7% from ages 16 to 34; 11% from 35 to 44; 27% from 45 to 54; 39% from 55 to 64; and 17% from 65 or over. It was 45% female. The income distribution was 55% under \$100,000 and 45% above it. With respect to education, 16% had some college or less, 21% were college graduates, 27% had master's degrees; 8% PhDs; and 21% had professional degrees. Finally, 87% were white. As is clear, this was not a random sample of the general population; instead, it was a sample of elites.<sup>84</sup> As such it may not reflect the views about law and government that would be found in a survey of the entire community.

Respondents were asked about their familiarity with different procedures in the context of making land use decisions. Of those who completed the questions, 86% indicated personal experience with private negotiations; 96% with public hearings; 67% with administrative litigation; 52% with judicial legal procedures; and 41% with public referendums. As a result, this sample of elites likely had a relatively good familiarity with the processes we studied.

## B. *Our Methodology*

### 1. *A Survey of Land Use Decision-Making Procedures*

Respondents were asked questions about various procedures at the beginning of the survey. The procedures were defined as follows.

*Informal meetings to negotiate a resolution to conflicts.* It is sometimes possible to have informal meetings with . . . interested parties to

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81. See Tyler & Markell, *supra* note 10. 1000 Friends indicates its listserv includes about 1,200 individuals.

82. We asked several other groups to send out notice about the survey via their listserv or otherwise, but our understanding is that they did not do so.

83. As noted, this sample is a self-selected set of elites who have a stake in land use procedures. It is not a random sample of the people in the community. Our goal is to demonstrate the value of this type of empirical research in an effort to stimulate further studies using surveys to better understand how to manage contentious legal issues. We encourage those future researchers to use methods for collecting data that are less open to self-selection criticisms as a way of validating and extending the findings we report in this Article. We also encourage the readers of this Article to recognize the possible limits associated with using data collected from self-selected elites.

84. We did not investigate whether elites are more or less likely to be involved in eminent domain proceedings. They may be more likely to have property, but they may also be more likely to have the power and knowledge to fight off eminent domain, or to live in neighborhoods that protect them.

discuss possible land use changes. Areas of possible conflict are resolved informally among the various interested parties.

*Public hearings—Local government officials.* Elected local officials typically hold public hearings in considering whether to amend a general comprehensive land use plan and in considering a rezoning request. These hearings allow people to present their views orally and to submit relevant information in writing. Decisions are made based upon the views of elected officials about what is best for the community.

*Administrative hearings.* A person affected by a comprehensive plan amendment decision may file a petition for an administrative hearing convened by the State's Division of Administrative Hearings (DOAH). Those who are affected may represent themselves or be represented by counsel and may offer evidence through witnesses and cross-examine other witnesses. Decisions are made based upon the consistency of the proposed land use with rules and regulations about land use.

*Court challenge.* After a local government body makes a rezoning or other development order decision, in some situations it is possible to go to circuit court to challenge the decision. This challenge would argue that the decision is inconsistent with the comprehensive plan or existing laws on zoning. Decisions are made based upon the consistency of the planned land use with the comprehensive plan or existing laws on zoning.

*Ballot referendum.* Before a land use change is approved in some jurisdictions, the jurisdiction puts the issue on the local ballot and allows the public to vote it up or down. Decisions reflect the desires of the majority of voters.<sup>85</sup>

## 2. *Questionnaire*

Respondents were then asked the same questions about each of the five procedures outlined above.

### a. *Acceptability*

People were asked about their willingness to accept the decisions made using the procedure to measure the degree to which a procedure was authoritative. They were asked to agree or disagree with the following assertion: "I would be willing to accept the results of this procedure." Responses were recorded on a six-point scale ranging from "strongly disagree" to "strongly agree."

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85. There are many variations on each of these forms of dispute resolution. This reality should be kept in mind in reviewing the results. It is conceivable that different variations of different types of procedures would engender different reactions. Our results are obviously based on the description that we provided in the questionnaire of each type of procedure, which we have included in the text.

b. Monetary Value

For each procedure respondents were asked to respond to two assertions. The assertions were: (1) “This procedure respects the monetary value of the property involved” and (2) “This procedural adequately protects the monetary value of the property involved.” Responses were recorded on a six-point scale ranging from “strongly disagree” to “strongly agree.”

c. Sentimental Value

For each procedure, respondents were asked to respond to two assertions. The assertions were: (1) “This procedure respects the sentimental value of the property involved” and (2) “This procedure adequately protects the sentimental value of the property involved.” Responses were recorded on a six-point scale ranging from “strongly disagree” to “strongly agree.”

#### IV. RESULTS

In this Part, we focus on survey results in three key areas: (1) respondents’ views about the extent to which different procedures protect monetary and sentimental value and are acceptable; (2) why respondents favor particular procedures (or are apprehensive about them); and (3) the role of exogenous factors, notably trust in government, in shaping preferences. We then discuss some of the more significant ways in which, at least in our view, these findings have promise for influencing process design—the implications of these results.

##### A. *What Did Respondents Think About Different Procedures?*

Respondents were asked how much they felt that resolving land use conflicts using various procedures protected monetary value and sentimental value. To examine this question a combined index was used in which each procedure was rated in terms of its ability to respect/protect monetary or sentimental value. The procedures considered were: judicial litigation; administrative hearings; negotiations; public hearings; and public referendum.

Among the procedures, respondents rated the courts first in terms of respecting/protecting monetary value and third in terms of respecting/protecting sentimental value (Table 1, below). They were also asked which forums produced outcomes that they would be willing to accept and again, the courts were rated first. This suggests that peoples’ willingness to accept decisions is linked more to the protection of monetary value, not sentimental value. If protecting sentimental value were the key to acceptability, people would presumably indicate the willingness to most readily accept referendum outcomes since they rated referendums as most likely to protect sentimental value.

TABLE 1: HOW WELL CAN DIFFERENT PROCEDURES PROTECT MONETARY AND SENTIMENTAL VALUE?<sup>86</sup>

	<i>Willingness to accept decisions</i>	<i>Monetary value</i>	<i>Sentimental value</i>
Judicial litigation	4.07 (1.37)	3.86 (1.28)	2.92 (1.23)
Administrative hearings	3.59 (1.43)***	3.69 (1.28)**	2.83 (1.21)
Negotiations	3.24 (1.37)***	3.45 (1.15)***	3.16 (1.18)^
Public hearings	3.20 (1.53)***	3.27 (1.37)***	2.70 (1.29)
Referendums	3.69 (1.81)*	3.01 (1.50)***	3.47 (1.53)***

It is also possible to separately examine whether a procedure would respect a particular value and whether it would provide protection for that value. Although in many senses these are similar, it is possible to respect without fully protecting, or to protect without respecting. Thus, we chose to ask about each in case our respondents saw them differently.

Table 1a presents the results of such an analysis. Given that the likelihood of the courts respecting and protecting monetary value was highly correlated ( $r = 0.81$ ), as was the case with respecting and protecting sentimental value ( $r = 0.79$ ), it is not surprising that the ability of particular procedures to do both is very similar. In the case of the courts, for example, the courts were viewed as most able to respect and protect monetary value, but not the most able to either respect or protect sentimental value. Referendums were viewed as best able to achieve both of these ends in the case of sentimental values.<sup>87</sup>

TABLE 1A: RESPECT VS. PROTECT.<sup>88</sup>

	MONETARY VALUE		SENTIMENTAL VALUE	
	<i>Respect</i>	<i>Protect</i>	<i>Respect</i>	<i>Protect</i>
Judicial litigation	3.88 (1.34)	3.83 (1.37)	2.96 (1.33)	2.86 (1.28)
Administrative hearings	3.69 (1.40)	3.66 (1.29)	2.85 (1.29)	2.86 (1.25)
Negotiations	3.53 (1.26)	3.34 (1.24)	3.26 (1.29)	3.07 (1.22)
Public hearings	3.24 (1.50)	3.29 (1.41)	2.67 (1.43)	2.71 (1.32)
Referendums	3.13 (1.64)	2.86 (1.54)	3.61 (1.63)	3.31 (1.61)

86. Entries represent the means. The number in parentheses is the standard deviation. The significance levels noted indicate whether ratings for other procedures differ significantly from those for judicial adjudication. ^ $p < 0.10$ ; \* $p < 0.05$ ; \*\* $p < 0.01$ ; \*\*\* $p < 0.001$ ).

87. It is important to note that we are talking about respondent perceptions. It could well be that in reality, referendums would not produce compensation that would reflect sentimental value.

88. Entries are the means. Numbers in parentheses are the standard deviation.

B. *What Shapes Respondents' Views About Different Procedures, with a Particular Focus on Judicial Litigation?*

In addition to assessing whether our respondents had different perspectives about the capacity of different procedures to protect sentimental and monetary value, we asked what it was about the perceived functioning of the different procedures that influenced our respondents' evaluations. To do so, we contrasted the influence of the perceived control over outcomes and the judgment that fair procedures were used to make decisions. In this section, we summarize our findings about what it was about courts that shaped the respondents' view that courts do not protect sentimental value.

The regression analysis shown in Table 2 indicates that people particularly associated courts' use of fair, procedurally just procedures with the protection of sentimental value, at least in comparison to protecting monetary value, which was more equally balanced between having control over the outcome and thinking that one might win versus viewing the procedure as fair.<sup>89</sup> In the case of sentimental value, the weight given to the likelihood of winning was 0.24, while the weight given to procedural justice was 0.38. The key finding is that when people were concerned about protecting sentimental value they focused upon having a fair (procedurally just) procedure for making decisions.

TABLE 2: WHAT FEATURES SHAPE THE VIEW THAT COURTS PROTECT VALUE?<sup>90</sup>

	<i>Respect/protect monetary value</i>	<i>Respect/protect sentimental value</i>
Likelihood of winning	0.29***	0.24*
Procedural justice	0.35***	0.38***
Adj. R.-sq.	35%***	33%***

In our study, we sought to unpack this issue still further. In particular, our questions sought to elicit information that would help us to under-

89. A regression is an analysis that considers the contribution of several factors to explain a dependent variable. In the regression analysis shown in Table 2, each column represents a regression analysis in which both likelihood of winning and procedural justice are entered simultaneously into an equation to determine how much the respondents believe the courts can respect/protect each type of value. The number in the final row (adjusted square of the multiple correlation coefficient) indicates the total amount of variance in the dependent variable (respecting/protecting value) explained by both factors considered at one time. Each entry in a particular column is the standardized regression coefficient (i.e., beta weight) reflecting the relative weight of each factor in predicting value judgments. The magnitude of these standardized scores can be compared (i.e., 0.4 is twice the weight of 0.2). The asterisks by each number represent its statistical significance.

90. Entries are standardized regression coefficients. \*p < .05; \*\*p < .01; \*\*\*p < .001.

stand which procedural features people most care about, if procedural justice is important in the context of protecting sentimental value. We looked to the procedural justice literature for insights about the types of procedural justice features that might be salient.<sup>91</sup> While procedural justice is a product of voice, neutrality, treatment with respect, and trust in authorities,<sup>92</sup> researchers have recognized that these procedural elements reflect two stages of judgment. Voice, neutrality, and treatment with respect are responses to things that authorities do. Trust is an inference about the character of the authorities. As Tom R. Tyler and Yuen J. Huo argue,<sup>93</sup> trust can be a consequence of what authorities do. This provides a framework for understanding the results shown in Table 3. In our regression analysis for Table 3, the independent variables were the elements defining the fairness of a procedure. Our findings indicate that it is clear that trusting the motives of the authorities is the key to feeling that they will make decisions in ways that protect sentimental value. In contrast, neutrality is the key to protecting monetary value.

TABLE 3: WHICH PROCEDURAL JUSTICE FEATURES LEAD PEOPLE TO THINK THAT THE COURTS WILL PROTECT VALUE?<sup>94</sup>

	<i>Respect/protect monetary value</i>	<i>Respect/protect sentimental value</i>
Voice	0.03	0.08
Neutrality	0.32*	-0.01
Trust	-0.02	0.50***
Quality of treatment	0.28	0.03
Nonfairness issues (cost, delay)	-0.04	0.00
Adj. R.-sq.	31%***	33%***

Our next level of inquiry involved investigating the key process features linked to trust. In other words, if trust in the decision-maker is important, the question is what features of a procedure tend to create such trust. The results of a regression of the other procedural elements on trust (Table 4) show that judges are trusted if they provide opportunities for voice, make clear that their decisions are made neutrally, and show respect for people and their rights. As Table 3 reflects, this is distinct from protecting monetary value. When people see decisions being neutrally made they feel that monetary value is being protected.

91. See generally TYLER, *supra* note 72.

92. See *id.*

93. See generally TYLER & HUO, *supra* note 19.

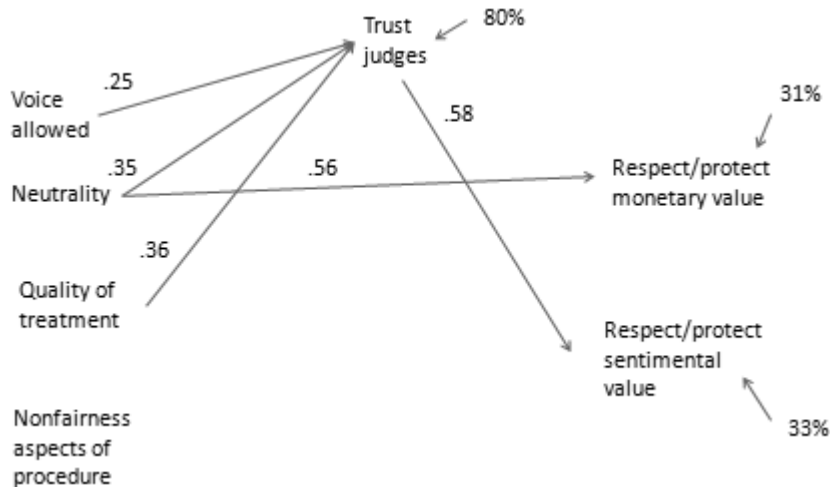
94. Entries are standardized regression coefficients.



TABLE 4: WHY DO PEOPLE TRUST COURTROOM AUTHORITIES?<sup>95</sup>

	<i>Trust the motives and intentions of judges</i>
Voice	0.25***
Neutrality	0.34***
Quality of treatment	0.35***
Nonfairness issues (cost, delay)	0.04
Adj. R.-sq.	81%***

The results from Tables 3 and 4 can be combined into an overall model that recognizes that voice, neutrality, and quality of treatment can influence inferences of trust as well as shape views about value protection directly. Figure 1 shows the results of a path analysis that maps the relationship among these variables. It indicates that protection of the monetary value of property is a direct result of having a neutral procedure. However, protection of sentimental value is more complex. It is linked to inferences of trustworthy character. In turn, such character comes from allowing voice, displaying neutrality, and being respectful. Hence, there are different antecedents of protecting monetary and sentimental value.



The findings of this study point to the complexity of judging. On the one hand, judges show their ability to protect monetary value by being neutral and rule-based in their decision-making. Their behavior is rule-based and consistent across people. Our findings lend support for the idea that it is this justice of procedure that helps to legitimate courts and leads them to be acceptable as a mechanism for making decisions.

95. Entries are standardized regression coefficients.

On the other hand, our findings point to trust in judges as crucial to their ability to acceptably manage sentimental value. People want to feel that the authority they are dealing with is benevolent and caring. That is, the authorities listen to peoples' needs and concerns, they consider those needs and concerns when making decisions, and they are motivated to be sympathetic toward and caring about the people who appear before them. These latter concerns are especially important when sentimental value is at issue.

Balancing the two objectives of neutrality and trustworthiness makes judging a complex and nuanced activity. The findings of this study suggest that striking an appropriate balance depends upon the nature of the problem before the court. If monetary value is the key issue, judges should emphasize neutrality. If sentimental value matters, they should focus upon allowing voice, communicating concern and respect for litigants and their stories, and displaying neutrality.

C. *What Role Does Trust in Government Play in Shaping Views  
About the Courts?*

Our discussion in the previous section focused on process features that influence peoples' views about how well different procedures protect peoples' interests. Among other issues, we discussed the issue of trust in connection with the particular judges who try cases.<sup>96</sup> In this section, we expand our focus to assess the influence of exogenous factors on peoples' perceptions about different decision-making procedures. As indicated above,<sup>97</sup> we asked our survey participants about several exogenous factors and learned that trust in government has a significant effect on views about decision-making processes. There is a significant literature on trust in government, which reflects that legal and political authorities generally have declining legitimacy in American society.<sup>98</sup>

We explored the question of trust at the governmental level by examining the role of trust in local government in shaping views about different decision-making procedures. Table 5 shows the relationship between trust in government and judgments about whether the courts protect monetary and sentimental value. Interestingly, those who distrust government are less likely to say that it protects either value:  $r = -0.19$ , ( $p < 0.05$ ) for monetary value;  $r = -0.21$ , ( $p < 0.01$ ) for sentimental value. In contrast to trust in the courts, low trust in government leads to a greater belief that referendums protect monetary value ( $r = 0.37$ ,  $p < 0.001$ ) as well as sentimental value ( $r = 0.29$ ,  $p < 0.001$ ). In other words, there is a positive correlation between high levels of trust and protection of value: the higher the level of

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96. For a further discussion of the factors that shape respondents views, see *supra* Part IV(B).

97. For a further explanation of how monetary and sentimental values affect property, see *supra* note 36-73.

98. See *supra* note 24-28.

trust a person had in government, the more the person thought the courts protect value. On the other hand, those who had low levels of trust in government thought referendums protect value more effectively.

As we discuss in more detail below, referendums represent government-by-the-public and our findings suggest that people who distrust government trust the public to recognize and take account of sentimental values attached to homes and land. People believe that others in their community will make decisions that take account of their values, while judicial authorities will not. This goes beyond sentimental values, people also believe that fellow citizens are more likely to respect monetary values than are judicial authorities.

TABLE 5: CORRELATION BETWEEN TRUST AND VIEWS ABOUT WHAT PROCEDURES PROTECT VALUES.<sup>99</sup>

	COURTS RESPECT & PROTECT		REFERENDUMS RESPECT & PROTECT	
	<i>Monetary value</i>	<i>Sentimental value</i>	<i>Monetary value</i>	<i>Sentimental value</i>
Trust in local government (H = high)	0.19*	0.21**	-0.37***	-0.29***
Trust in national government (H = high)	0.20**	0.28***	-0.13	-0.10

These findings suggest that judicial procedures do not exist in a vacuum; they are part of government. When people distrust government, they are more distrustful of the courts and of judges. Hence, judges need to work especially hard to legitimize themselves, their proceedings, and their decisions when dealing with a public that is skeptical of the government in general. That is especially true when sentimental values are important.

While this study focuses upon local issues of land use and community and state government, we can extrapolate from these findings to suggest that trust in the federal government is relevant to the likely acceptability of federal decisions. Table 5 shows that the same pattern was observed in terms of trust in local and federal governments.

#### D. *Implications*

What are the implications of our findings for policy makers and others who are concerned about legitimacy? These findings suggest that there is benefit to expanding efforts to promote citizen satisfaction with governmental decision-making procedures beyond outcome-based re-

<sup>99</sup> Entries are the correlation coefficient.

forms.<sup>100</sup> That is, the search for procedures that will produce better distributive outcomes is important, but it should be complemented by a search for procedures that, *qua* procedures, will engender higher levels of stakeholder satisfaction. This is particularly the case when sentimental values are salient since, according to our findings, stakeholders may place higher value on process in such situations.<sup>101</sup> In the eminent domain arena that we discuss in Part V, for example, we argue that it is worthwhile to consider reforms beyond outcome-based improvements such as more effectively estimating the sentimental value associated with homes or land in an effort to compensate people adequately.<sup>102</sup> In particular, it is valuable to focus upon identifying a procedure (and process features) that produces outcomes that people will accept and that they believe protect their interests.<sup>103</sup>

A second set of implications involves the role of money as the default in our results. A core concept in economics is the idea of revealed preferences. According to that idea, we understand what people prefer by look-

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100. In considering this argument, it is important to recognize that when we presented each procedure to respondents we also presented the decision rule that would be involved. For example, with a referendum respondents were told that the views of a majority of voters would determine the outcome. Since a decision rule is part of a procedure, we view respondent choices as reflecting their reaction to the totality of each type of procedure.

101. *See supra* note 69.

102. In some cases, procedural reforms may be a palliative or placebo. This should be kept in mind in determining an appropriate mix of procedural and outcome-oriented reforms. *See* Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 *Duke L.J.* 703, 738-42 (1994) (discussing models of measuring behavioral responses).

103. As we note elsewhere, public satisfaction is obviously not the only factor process designers should consider. For example, accuracy of outcome is another, as is the notion that the legal process may help to promote (or impede) efficient policies for fostering innovation and growth. *See* Henry N. Butler & Larry E. Ribstein, *Legal Process and the Discovery of Better Policies for Fostering Innovation and Growth*, in KAUFFMAN TASK FORCE ON LAW, INNOVATION, AND GROWTH, *RULES FOR GROWTH: PROMOTING INNOVATION AND GROWTH THROUGH LEGAL REFORM* 463 (2011) (explaining that legal processes may encourage efficiency); *see also* Nadler & Diamond, *supra* note 31, at 745 (noting that procedural justice tack is not necessarily panacea). Professors Nadler and Diamond state:

The Court in *Kelo* took notice of what it characterized as the full planning and democratic consideration of the redevelopment plan that led to the taking. . . . Regardless of whether planning is a useful and legitimate indicator of a genuine public purpose, researchers who study procedural justice predict that public hearings and opportunities for diverse constituencies to be heard might reduce feelings of dignitary harm. We suspect that while considerations of procedural justice might ameliorate the perceived unfairness of eminent domain for some takings, long-term home ownership may instill an entitlement and provoke an outrage that cannot be avoided with even the most democratic decision-making process. In future research we plan to investigate the potential role of procedure in influencing public reaction.

Nadler & Diamond, *supra* note 31, at 745 (citation omitted).

ing at the choices they make. In the case of this Article, we are concerned with choices not among outcomes but among possible procedures for reaching outcomes. When people were simply asked to pick a desirable procedure they expressed the highest level of willingness to accept the courts (Table 1). Further, when asked which procedures protect monetary value people also chose adjudication. However, when asked which procedures protect sentimental value people chose other procedures. This suggests that the primary value people had in mind when they chose the courts was protecting monetary value.<sup>104</sup> These findings raise several questions. Why is peoples' default to protect monetary values? Is love always a second-hand emotion? Following from our findings, if money is typically the more important value, it will be important for processes to highlight their neutrality, while giving somewhat secondary attention to trust. On the other hand, if there are situations in which the default is typically reversed and sentimental values predominate, policy makers might consider highlighting trust-creating features. More research is needed to help gauge the relative importance of monetary and other values in different situations since the relative salience of different values affects the processes people think will best protect their interests and the process features that are important to peoples' satisfaction.

A third set of implications from our findings is the framework they provide for identifying in advance situations that are likely to pose problems for the legal system and for identifying process changes that hold promise for ameliorating public dissatisfaction in such situations.<sup>105</sup> Our findings suggest that people generally expect that they will prefer resolution by courts, but that the courts are less authoritative in particular types of situations. Although people generally express willingness to defer to the decisions of judges and overall view adjudication as the most desirable procedure to use in resolving conflicts, this study suggests that they are less likely to apply these feelings to cases where sentimental value is a key issue. This study suggests that when sentimental issues are at stake people focus on the character of the judge—i.e., whether they trust the person in authority. When monetary issues are at stake, individuals evaluate the neutrality of the decision-making rules. Hence, the context changes how people think about procedural fairness. Since a key virtue of the court is its neutral decision-making, the acceptability of the courts as a mechanism for resolving disputes suffers when that is not the basis of their legitimacy.

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104. One way to compare the role of these two judgments is to do a regression analysis looking at the influence of monetary and sentimental judgments upon willingness to accept decisions made by the court. When we do so we find that monetary judgments (beta = 0.41,  $p < 0.001$ ) dominate sentimental judgments (beta = 0.24,  $p < 0.001$ ) in an equation that explains 31% of the variance in willingness to accept decisions.

105. While respondents are making a priori judgments, those judgments are the same among respondents who have prior experiences resolving issues using the courts.

These findings suggest that, in addition to considering revising court procedures so that judges are seen as acting fairly by displaying particular elements of fairness when they conduct their proceedings (through features that provide opportunities for voice, a showing of respect, and reflecting neutrality),<sup>106</sup> it might be worthwhile to combine court litigation (the most preferred process and one that does relatively well in protecting monetary value) with processes that are stronger in protecting other values, such as a referendum process, which is perceived as much stronger in protecting sentimental values. Related, these findings help us to understand the pull of referendums. People like them because they leave authority in the hands of the public and are a way to protect sentimental value. What would the world look like if people chose procedures based upon the desire to protect sentimental value? People would choose a referendum as a way to make decisions.<sup>107</sup>

Interestingly, the respondents do not view negotiation as similar to referendums. Those who do not trust government are not supportive of resolving conflicts via negotiation. In this respect, negotiation is similar to the courts, both of which are distinct from referendums. Why might this be true? Discussions of negotiation emphasize that private transactions are responsive to market forces. Hence, a negotiation is unlikely to be a situation in which one party pays another more for their home due to

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106. We are making these suggestions at a framework level. We are not recommending specific procedures for providing voice or other features that our findings suggest are important. We note that the search for useful procedures at an implementation level will be challenging. Our findings that public hearings are held in very low regard, for example, raise questions about voice of the sort provided in such hearings. See Tyler & Markell, *supra* note 10 (commenting on public's voice displayed in public hearings); *supra* note 86 and accompanying text (displaying in Table 1 results about public hearings as conclusive). Concerns about the disconnect between lawyers and their clients, in terms of the interests they hold and seek to validate through litigation, similarly raise questions about the utility of allowing lawyers a voice as a strategy to give such voice to clients. See Gillian K. Hadfield, *In Framing the Choice Between Cash and Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645, 645-49 (2008) (recounting utility of validation through litigation); Tamara Relis, "It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims, 68 U. PITT. L. REV. 701 (2007) (discussing theory that giving voice to lawyers gives voice to clients).

There is also a broader issue raised by these findings. One reason that monetary value is important is that claims are third-party funded with lawyers seeking monetary damages to recover the resources they have used to support the litigation. A focus on sentimental value, or on other things people might want in litigation such as an apology, may make the parties happy but lawyers are less likely to be willing to facilitate litigation without the prospect of a tangible monetary settlement.

107. There is a substantial literature on referendums, their advantages and disadvantages. See Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1476-77 (2008). Heller and Hills propose use of referenda as part of their "land assembly districts" proposal for reducing the use of eminent domain authority. See *id.* at 1491-92 (explaining proposal for referenda use). Other than briefly discussing how our findings might bolster the Heller and Hills proposal, we do not delve into the referendum literature in this Article.

sentimental attachment. Consequently, the courts and negotiation are alike in the sense that they are processes in which sentimental value is likely to be unprotected.

Consider another example of market solutions in a community cooperating to manage a disputed resource: water use during a water shortage.<sup>108</sup> In this study, the respondents considered a variety of procedures for allocating water. The respondents rejected market solutions because they believed that water should be allocated by principles of need while markets reflected the ability to pay. Interestingly, the respondents indicated that a market solution would be an effective way to allocate water. They rejected it on justice grounds. Here, too, respondents were indicating that a negotiated solution would not take account of issues beyond the ability to pay. This is consistent with other findings suggesting that people may be skeptical about market mechanisms of allocation where they feel that justice issues are at stake.<sup>109</sup>

More generally, these findings suggest that there is a benefit from expanding our focus beyond trying to effectively estimate and commoditize the sentimental value attached with homes or land in an effort to compensate people adequately to create satisfaction. We argue that it is important to focus upon identifying a procedure that produces outcomes that people will accept as a way of resolving conflicts.<sup>110</sup> And, as we note, courts are generally recognized as such a procedure. But, courts are not always equally acceptable and our findings both identify a set of conditions under which courts have problems being authoritative and propose a procedural remedy based upon: (1) judging following procedures that build legitimacy and (2) using other procedures, such as referendums, which are more responsive to sentimental value.

A key related issue posed by our findings concerns what the legal system would look like in situations in which sentimental value is the orienting principle guiding institutional design. One clear suggestion is that it would lead people to place power in the hands of the public rather than experts. In this respect, we see possible parallels between our findings and the recent discussion of “death panels” in the debate on health care re-

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108. See Tom R. Tyler & Peter Degoey, *Collective Restraint in Social Dilemmas: Procedural Justice and Social Identification Effects on Support for Authorities*, 69 J. OF PERSONALITY AND SOC. PSYCHOL. 482 (1995) (using water management as example of community conservation of scarce resources); Tom R. Tyler, *Duties Under the Law, in HUMAN RIGHTS AND DUTIES: PSYCHOLOGY'S CONTRIBUTIONS, THE LAW'S COMMENTARY* 137 (Norman J. Finkel & Fathali M. Moghaddam eds., 2005) (giving examples of community conservation).

109. See generally Harris Sondak & Tom R. Tyler, *How Does Procedural Justice Shape the Desirability of Markets?*, 28 J. OF ECON. PSYCHOL. 79 (2007) (arguing perceptions of justice may be impacted by market mechanisms like allocation).

110. This study looks at the willingness to put in place a procedure for resolving disputes before those disputes occur. As such, it is really about governance. A separate question is why the parties to a dispute accept a resolution after it occurs. There is a large literature suggesting that procedural justice is equally central to post-decision acceptance.

form. What the public feared in that debate was giving power over decisions about whether they or their family would live or die to untrustworthy, uncaring experts who would essentially be neutral and fact-based in their medical decisions. In contrast, people themselves wanted the power to take account of their feelings when making such decisions. For example, they might want to try to save the life of a loved one by spending money to supply an untested drug with no record of success. An insurance company, in contrast, would deny this use of money on factual grounds, citing the lack of evidence that the drugs would work and were therefore worth the expense. To allow such sentimental values to be considered, the public wants a decision-making system in which the decision-makers share their sentimental values and, in the case studied here, that is a referendum. A referendum places power in the hands of the people in the community, not experts.

The ideal of a trust-maximizing process raises its own set of issues that deserve attention. A problem with a system based upon sentiment is that it may lack the virtues of neutrality and factuality in which a decision-maker applies general rules consistently and without partiality. In a series of provocative studies, C. Daniel Batson demonstrated that people can allow their sentimental feelings to override principles of right and wrong when faced with choices involving sentiment.<sup>111</sup> In one study, Batson asked people to consider moving a cute, young child ahead of others in line for an organ donation. He determined that people are moved by their sympathy for a likable victim to violate general rules of fairness and move that person up beyond others who, according to neutral factual rules, are more deserving of help.<sup>112</sup> Hence, a legal system that gives weight to sympathy is one that can potentially undermine the rules of a neutral fact-based allocation system. People are encouraged to compete on a playing field of compassion, shaping their situation so as to tug upon emotional strings in an effort to increase the empathy they can encourage in others. Who is to say how much losing a home in which one raised children is worth, but a sympathetic picture of a grey-haired, elderly couple tending their family garden is likely to elicit high evaluations. Of course, people's emotional heartstrings are already tugged in courts, with lawyers making emotional appeals to juries. Such appeals are generally unsuccessful in courts and juries are found to overwhelmingly rely upon a neutral evaluation of the facts.<sup>113</sup>

Further, a system focused on sentimental values has the potential to incentivize less-than-ideal behavior. As we noted, in such a system people are rewarded for allowing their self-interested motivation to exaggerate their own desires and needs to run free.<sup>114</sup> The stronger sense of exagger-

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111. See C. Daniel Batson, *Justice Motivation and Moral Motivation*, in *THE JUSTICE MOTIVE IN EVERYDAY LIFE* 91 (Michael Ross & Dale T. Miller eds., 2002).

112. See *id.*

113. See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986).

114. See Batson, *supra* note 111, at 91-93.



ated entitlement people have, the more likely they are to receive. This point has been noted in studies of the role of need in social welfare decisions.<sup>115</sup> When allocations are based upon need, peoples' motivation to exaggerate their needs is encouraged. A key issue then becomes recognizing true need. Ironically, this leads to the *need* for a neutral factual decision-maker, such as a judge, who can sift through claims. More generally, these considerations highlight a central point of this Article: the difficulty in making decisions based upon subjective valuations. It is for this reason that we emphasize the importance of having a procedure that people find acceptable. Of course, part of that procedure has to be a mechanism for making valuations. However, rather than focusing exclusively upon the issue of valuations, we think that law reform efforts should also focus on ensuring acceptable procedures through which this task can be accomplished.

Our argument is for a contextually based balance. We believe that both neutrality and trust are important, with their balance depending upon the nature of the values involved. A process that is strong on sentimental values may be better in contexts where those values predominate, while a process that is strong on monetary values may be better in contexts where they predominate. Thus, knowing one's audience is critical to effective process design. Related to this, it may improve process legitimacy to combine elements of different procedures or to offer multiple mechanisms for participation, or to revamp mechanisms to add features. We also believe that as trust in government declines it will be more and more important for authorities to build trust. As our findings suggest, they can do so by using the principles of procedural justice when conducting judicial proceedings and when articulating reasons for their decisions, among other possibilities. At the same time, it is essential to maintain a reputation for neutrality and consistency.

A final implication involves the salience of exogenous factors to process design. In recent discussions of civic discourse, public distrust of government has emerged as a key theme.<sup>116</sup> Our findings reflect that this issue is important in our discussion. Our survey respondents who distrusted government did not believe that the courts would protect their values, sentimental or monetary. They became interested in referendums—a procedure they believed does protect those values. It is also interesting that when people distrusted government they did not distinguish between monetary and sentimental value. They thought that the courts were less likely to protect either monetary or sentimental value. This goes beyond the prior argument that people distrust courts to protect sentimental value. It suggests that when people distrust government they distrust judges to protect their values overall.

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115. *See id.*

116. *See supra* notes 22-29.

E. *Conclusions*

People value items, including their property, in different ways. People have a monetary interest in property, of course, but they may also attach a sentimental value, broadly defined, as well. Our study shows that, in contexts related to disputes involving land use, people's views about the effectiveness of different types of decision-making processes in protecting their interests change depending on the salience of these different types of values. Moreover, within this framework, different aspects of the procedures (e.g., neutrality and trust) control respondents' views. To us, the obvious conclusion that flows from this finding is that process design is a very contextual task, assuming (as we do) that one goal in process design is to leave both involved parties and other participants with the sense that the process has been fair and has given due weight to the values they hold. This seems essential for stakeholders to accept the legitimacy of decisions.<sup>117</sup> Our case study of the eminent domain realm in Part V illustrates how policy makers and others interested in process design might internalize this perspective as they consider how best to make decisions with public consequences that will enjoy public support.<sup>118</sup>

## V. CONSIDERING OUR FINDINGS IN THE CONTEXT OF EMINENT DOMAIN

The findings from our study are interesting in the abstract in highlighting the important role process may play in promoting good governance and enhancing legitimacy. Our findings suggest: that peoples' values affect their process preferences; that, while judicial litigation fares well when monetary values predominate, it does not fare well in protecting sentimental values; and that bolstering trust through opportunities for voice and respect is particularly important for people to be satisfied with a process when sentimental values are salient.<sup>119</sup> Our hope is that these insights will contribute to an improved understanding of public percep-

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117. Cf. JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* (2002).

118. These findings suggest that particular attention needs to be paid to the procedures through which federal government authorities make decisions when those decisions concern issues in which sentimental values predominate, such as social security and health care eligibility or homes and land. Given the extreme polarization that seems to have emerged in politics, it is important to examine the degree to which the use of such procedures can transcend party loyalties, as well as a general distrust of government.

119. For a further discussion of the survey results, see *supra* notes 86-118. Professor Relis discusses the "pervasive economic assumptions of the civil justice system." Relis, *supra* note 106, at 708. To the extent that this is true and remains so and that peoples' objectives are non-material, disaffection seems unavoidable. To the extent that the civil justice system continues to focus on economic issues, procedural refinements responding to other interests seem to hold promise for reducing dissatisfaction. While we think this is a good thing in general, there are downsides to focusing exclusively on process-oriented reforms. See *supra* note 102.

tions of different types of process design, and ultimately to a use of procedures that enjoy enhanced public acceptability.

In this Part, we consider these findings in a real world dispute resolution context to which people often bring a range of non-monetary values, notably the exercise of eminent domain authority. In common parlance, an eminent domain proceeding entails the government's providing "fair" or "just" compensation as the quid pro quo for taking ownership of someone's property.<sup>120</sup> The Fifth Amendment, which prohibits takings of private property for public use without just compensation,<sup>121</sup> provides the legal framework for the exercise of eminent domain authority. A wide range of prominent scholars have recognized that the exercise of eminent domain authority implicates both monetary and non-monetary values, and the courts have done so as well.<sup>122</sup>

The reality is that the public has not enthusiastically embraced, or even calmly acquiesced in, the government's use of eminent domain authority in many cases. The scholarly commentary is replete with references to the enormous controversy eminent domain has engendered despite its incorporation of just compensation as a core feature. Professor Ilya Somin notes that the *Kelo v. City of New London*<sup>123</sup> decision, a case in which the Court signaled its acceptance of widespread use of eminent domain authority,<sup>124</sup> "was greeted with widespread outrage that cut across partisan, ideological, racial, and gender lines."<sup>125</sup> Professor Nicole Stelle Garnett observed that *Kelo* set off a "firestorm of popular outrage."<sup>126</sup> The

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120. See U.S. CONST. amend. V.

121. See *id.* (providing that "nor shall private property be taken for public use, without just compensation"). The Fifth Amendment is made applicable to the states through the Fourteenth Amendment. See U.S. CONST. amend. XIV.

122. For a recent effort to unpack these non-monetary values, see Nadler & Diamond, *supra* note 31, at 725 (reporting on experiment that focused on nature of values at issue in eminent domain setting and setting forth research on impacts of "degree of attachment" to property involved and perceived legitimacy of purposes for which land is being taken).

123. 545 U.S. 469 (2005). In *Kelo*, the Supreme Court, in a 5-4 decision, upheld a condemnation of ten residences and five other properties as part of a "development plan" in New London, Connecticut. *Id.* at 475, 489. The Court gave broad deference to "legislative judgments" on the meaning of "public use." *Id.* at 480-81. The Court noted that courts should not "second-guess the City's considered judgments about the efficacy of its development plan." *Id.* at 488.

124. See Garnett, *supra* note 31, at 103 (noting that Court ruled that "the public use limitation . . . rarely prevents the government from taking property by eminent domain and transferring it to a private beneficiary").

125. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2108 (2009).

126. Garnett, *supra* note 31, at 103. Professors Somin and Garnett are by no means alone in their characterization of the response to *Kelo*. See, e.g., *The Kelo Decision: Investigating Takings of Homes and Other Private Property—Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 106, 106 (2005) (testimony of Thomas W. Merrill, Charles Keller Beekman Professor of Law, Columbia University School of Law) (suggesting that *Kelo* "is unique in modern annals of law in terms of the negative response it has evoked"); Nadler & Diamond, *supra* note 31, at 714 (not-

ABA Section of Real Property, Probate and Trust Law review of condemnation law suggests that most Americans “were aghast” about the condemnation that the Supreme Court upheld in *Kelo*: “[t]he backlash . . . was unprecedented” and the public was “outraged.”<sup>127</sup>

At first glance, at least, there are reasons to wonder why eminent domain has triggered such public outrage. In a sense, eminent domain is the flip side of regulatory takings law and, when viewed through that lens, seemingly has some advantages for the party whose property rights are being uprooted.<sup>128</sup> In the regulatory takings context, the government may, as a practical matter, dramatically curtail an individual’s ability to enjoy his property while hoping *not to pay* for the privilege.<sup>129</sup> The government pays up, reluctantly, when a court directs it to do so (or when the threat of such provides sufficient motivation). In contrast, in the eminent domain arena the government is not seeking to avoid compensating the landowners. Instead, the government is offering to make the landowners economically whole.<sup>130</sup> The government is not taking something for nothing nor seeking to do so. From a landowner’s perspective, in short, being on the receiving end of an eminent domain action might in some cases be preferable to having one’s property rights limited through regulation.

Further, in many circumstances critical public policy objectives (e.g., providing essential infrastructure such as roads, sewer systems, utilities, or

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ing that *Kelo* is “[o]ne of the most controversial U.S. Supreme Court cases of the past several years”).

127. See Michael Rikon, *Bulldozers at Your Doorstep: The Debris of Kelo v. City of New London*, in CURRENT CONDEMNATION LAW: TAKINGS, COMPENSATION, AND BENEFITS 1, 6 (Alan T. Ackerman & Darius W. Dynkowski eds., 2d ed. 2006); see also Nadler & Diamond, *supra* note 31, at 720 (noting that decision prompted “widespread dismay”—disapproval of decision was “around 80%-90%”); Daniel R. Mandelker, Commentary, *Kelo’s Lessons for Urban Redevelopment: History Forgotten*, 88 WASH. U. L. REV. COMMENTARIES (Nov. 24, 2008), <http://lawreview.wustl.edu/commentaries/kelos-lessons-for-urban-redevelopment-history-forgotten/> (noting that “[n]o Supreme Court case created more backlash than *Kelo v. City of New London*”).

128. See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 70-72 (1986) (discussing relationship between police power and exercise of eminent domain authority and noting that “[l]egitimately exercised, the police power requires no compensation”).

129. There are, of course, arguments that in many cases government regulation that impinges on property rights benefits the property owner. While there are different branches of regulatory takings law, regardless of the branch involved, a central claim raised by opponents of the government’s action is that the government body involved needs to pay affected parties for diminishing the value of their property. The government’s posture in such cases often is that *no* compensation is required. See, e.g., *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-40 (2005); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). It is not our purpose in this Article to address the appropriateness of takings law and we leave such issues aside.

130. We offer this proposition with the qualifications discussed *infra*. For a further discussion of whether compensation is appropriate, see *Heller & Hills*, *supra* note 107, at 1476-77.

community resources such as hospitals) cannot be accomplished without the government's intervening in private property rights.<sup>131</sup> Undoubtedly because of this reality, virtually every contemporary government includes in its toolbox the power to take private property for public purposes.<sup>132</sup>

Finally, there should be a degree of public acceptance of the use of eminent domain authority since, in theory, a government should only exercise it when the social utility of transferring the property exceeds the social utility of not doing so. As Professors Janice Nadler and Shari Seidman Diamond put it:

From one economic perspective, government takings of private property are theoretically unproblematic because the owner is entitled to just compensation under the Fifth Amendment. The assumption is that government will only force the sale of property if the benefit is higher than the cost of compensating the owner. Thus, if the owner is fully compensated and the public is left better off, there will always be an overall social improvement resulting from a taking.<sup>133</sup>

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131. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 493 (2005) (concluding that eminent domain can be indispensable when depressed economic conditions exist and progress in addressing them is jeopardized by handful of property owners); Garnett, *supra* note 31, at 138 ("The primary objection to substantive limits on the eminent domain power is that holdouts may impede socially beneficial projects.").

132. David L. Callies, *Phoenix Rising: The Rebirth of Public Use*, in *EMINENT DOMAIN USE AND ABUSE: Kelo in Context* 49, 65-66 (Dwight H. Merriam & Mary Masaron Ross eds., 2006).

133. See Nadler & Diamond, *supra* note 31, at 714; cf. Heller & Hills, *supra* note 107 (discussing situations in which eminent domain may lead to inefficient results that do not maximize welfare and suggesting use of "land assembly districts" to minimize holdouts). As Professor Nicole Garnett and others have pointed out, determining whether a project is efficient "is difficult at best" and "would-be beneficiaries . . . have a substantial incentive to engage in rent-seeking" because eminent domain may reduce transaction costs and generate a substantial economic surplus that beneficiaries need not share. Garnett, *supra* note 31, at 139. Local governments may have an incentive to respond favorably to such rent-seeking as well, adding to the argument for monitoring the scope of eminent domain and not "over-using" it. Professor Garnett also makes the point that government may favor overinvestment in some projects and they overestimate the benefits of condemning property. See *id.* at 140. This is a reason to be cautious about increasing compensation since such increases may not deter governments and put the public fisc at greater risk. See *id.* at 140-41. In *Kelo*, for example, the New London Development Corporation planned to lease the condemned property to a private developer for one dollar per year for ninety-nine years. *Kelo*, 545 U.S. at 476 n.4.

Further, in some cases the "takers" are spending other governments' money, so the takers have little incentive to behave rationally economically. The Poletown project, in which the City of Detroit was receiving non-fungible financing (it was available only for this project) almost entirely from federal and state governments, is an example. See William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 943-44 ("Most of the financing for the Poletown project, however, came from the United States government. . . . Thus, the voters and elected officials in Detroit had little financial interest in determining whether the Poletown project made

What accounts for the “unprecedented” and “outraged” public backlash that the exercise of eminent domain authority has nevertheless engendered? Scholars and others have offered several explanations. First, there is what Professor Garnett and others have referred to as “dignitary harms.”<sup>134</sup> For example, people are suspicious that the government is playing favorites and advantaging some private parties at the expense of others.<sup>135</sup> In *Kelo*, many critics believed that the government was giving a break to a powerful actor.<sup>136</sup> Some scholars have suggested that this partiality can cause resentment.<sup>137</sup> To some extent related, owners may feel that they are being required to give up something of importance even though they will not share any benefits of the new use, because the owners’ displacement makes it unlikely they will enjoy the benefits of the project.<sup>138</sup> Further, Professor Garnett suggests “[o]wners may feel unsettled and vulnerable when they learn that the government plans to take their property. Eminent domain . . . eviscerates the physical autonomy” inherent in ownership of private property and it deprives an owner of the

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economic sense.”); see also Garnett, *supra* note 31, at 141-42 (noting that *Kelo*, in which state funds were significant part of financing, is another example and that eminent domain would become “much less attractive economic development tool” if local governments internalized cost of their takings).

134. See Garnett, *supra* note 31, at 109-11 (referring to emotional reactions stemming from condemnations that depart from traditional public uses as “dignitary harms”).

135. See *id.* at 145 (characterizing this favoritism as “expressive harm,” as owner may perceive taking as insult). The ultimate use involved obviously affects the existence and extent of this type of dignitary harm. In their study, Professors Nadler and Diamond hypothesized that it mattered to people whether their property was being taken for an archetypal public use like a school or hospital rather than for a use that benefits private parties. Nadler & Diamond, *supra* note 31, at 726.

136. See Rikon, *supra* note 127, at 6 (“The beneficiaries [of the decision] are likely to be those citizens with disproportionate influence and power . . .”). The focus of much of this criticism has been that the government has inappropriately expanded the concept of “public use” and that existing procedures, including judicial review, do not provide adequate constraints. See, e.g., D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 295-97 (2006) (noting surprise that Court in *Kelo* did not take opportunity to consider applying higher scrutiny in eminent domain cases involving taking of homes); Somin, *supra* note 125, at 2101 (“*Kelo*’s holding that the Public Use Clause of the Fifth Amendment allows the taking of private property for transfer to new private owners for the purpose of promoting ‘economic development’ was denounced . . .”). However, there also is evidence that the plaintiffs were “holdins”: they simply wanted to sit in their homes because of their strong, subjective attachment to the property. See Nadler & Diamond, *supra* note 31, at 721.

137. See Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 579 (2001) (“While people can view windfalls that befall another with sanguinity, when the windfall arrives as a result of a strategic and deliberate decision of the government, the reaction may turn to resentment and frustration.”).

138. See Garnett, *supra* note 31, at 145 (noting that when individuals are displaced, their displacement makes it unlikely they will be able to enjoy benefits of prosperity promised by economic redevelopment projects).

“‘most essential right’ to exclude others.”<sup>139</sup> In short, “the nature of the government’s action” provides several grounds as to why its exercise of eminent domain authority may be of concern to citizens.<sup>140</sup>

Second, concerns about the fairness of eminent domain may be amplified because eminent domain disturbs peoples’ “subjective attachment” to their property, especially homes. There is a growing literature on the special status of homes in American culture and the “sentimental value” people attach to them. The concept of “[h]ome” evokes thoughts of . . . family, safety, privacy, and community.”<sup>141</sup> The common-law adage that “a man’s home is his castle” captures the cultural attachment to homes; Professor D. Benjamin Barros suggests that the “psychology of home” has roots beginning in the Middle Ages.<sup>142</sup> He also suggests that because homes are “sources of feelings of rootedness, continuity, stability, permanence, and connection to larger social networks, . . . dislocation from a home can have a strong, negative psychological impact on many people.”<sup>143</sup> Feelings of loss may be particularly significant or severe when the move is involuntary.<sup>144</sup> Some scholars have argued that retaining possession of a home represents a particularly important value that deserves embodiment in the law. Margaret Jane Radin’s “personhood theory,” for example, urges that possession of homes deserves priority against competing interests because of the personal connection people form to their homes.<sup>145</sup> Lending empirical support for the idea that people often at-

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139. *Id.* at 109-11. Justice O’Connor’s comment in her dissent in *Kelo* captures this concern over the decision’s impact the nicely: “The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.” *Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O’Connor, J., dissenting).

140. *See* Garnett, *supra* note 31, at 109-11 (explaining that individuals whose property is taken may suffer more from nature of government’s action than actual subjective attachment to property).

141. Barros, *supra* note 136, at 259-60. Barros points to special constitutional protections for homes, special tax treatment, and special protections under debtor-creditor law and landlord-tenant law. *See id.* at 259-63.

142. *See id.* at 270 (“The modern home owes its physical form to the emergence of the bourgeois class in the Middle Ages.”).

143. *Id.* at 277; *see also id.* at 277-80 (discussing Radin’s thesis and arguing Radin overstates personal connection people have to homes). Barros also points out that different people relate to homes differently and in some cases people may not suffer from dislocation. *Id.* at 279-80. For a further discussion of Professor Radin’s views, *see* Radin, *supra* note 61.

144. *See id.* at 281 (“This feeling of loss is greater when the move is not voluntary because the sense of dislocation is more severe and the positive factors that lead to a voluntary move are absent.”); Radin, *supra* note 61.

145. *See* Barros, *supra* note 136, at 257 (noting that “the pervasiveness of the special treatment of homes . . . suggests the existence of a strong cultural consensus that homes are uniquely important when issues of security, liberty, and privacy are at stake”); Radin, *supra* note 61, at 1005-06, 1014-15 (explaining that if personhood was expressed in law, one would expect special treatment of things like family homes).

tach subjective value to property, in their experiments Professors Nadler and Diamond found that “it is clear that a significant portion of the participants [in their experiments] did view the land as possessing substantial additional subjective value.”<sup>146</sup>

In a wide range of areas of the law, our legal system tailors its treatment of homes to the special affinity we attach to them. In other words, we give special legal status to homes in a broad spectrum of settings.<sup>147</sup> Thus, to name a few, constitutional protections against searches have special salience when a search involves a home,<sup>148</sup> the tax code affords special treatment of homes in order to encourage home ownership,<sup>149</sup> and post-foreclosure laws protect possession of a home.<sup>150</sup> Courts in divorce cases have recognized the sui generis nature of homes, in some cases making it clear that they want the custodial parent to retain the home to minimize the disruption the divorce causes to children. As one court put it:

The value of a family home to its occupants cannot be measured solely by its value in the marketplace. The longer the occupancy, the more important these noneconomic factors become and the more traumatic and disruptive a move to a new environment is to children whose roots have become firmly entwined in the school and social milieu of their neighborhood.<sup>151</sup>

Professor Barros concludes that “the pervasiveness of the special treatment of homes in [multiple areas of law] suggests the existence of a strong cultural consensus that homes are uniquely important.”<sup>152</sup> In short, the subjective value that people attach to homes may be another reason for the outrage that the governments’ exercise of its eminent domain authority

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146. Nadler & Diamond, *supra* note 31, at 731; *see also* Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CALIF. L. REV. 75, 77 (2004) (noting that property may be worth more or less because of sense of community and that property should not be viewed atomistically).

147. *See generally* Barros, *supra* note 136 (providing in-depth coverage of situations in which homes are treated differently (and more favorably) than other property).

148. *See id.* at 263-69 (pointing to special constitutional protections for homes, special tax treatment, and special protections under debtor-creditor law and landlord-tenant law).

149. *See id.* at 304 (“A focus on home ownership and citizenship is reflected in the favorable treatment given to homes in the Internal Revenue Code, most notably by the deduction allowed for interest on home mortgages and by the large exemption given to capital gains realized on the sale of homes.”).

150. *See id.* at 283 (“All states recognize the debtor’s right to purchase the home prior to foreclosure and many states have redemption statutes that allow the homeowner to buy the home back from the foreclosure-sale buyer within a period of time after the foreclosure sale is completed.”).

151. *In re Marriage of Duke*, 161 Cal. Rptr. 444, 446 (Cal. Ct. App. 1980); *see also* Barros, *supra* note 136, at 292-95.

152. *See* Barros, *supra* note 136, at 257.



sometimes occasions, particularly when a government uses its authority to uproot inhabitants from their home.

A third commonly invoked explanation for disaffection with the use of eminent domain authority is the limited amount of compensation paid. In eminent domain cases, fair market value is typically the benchmark or measure used to determine the amount of compensation paid to the owner.<sup>153</sup> Fair market value may undercompensate owners for several reasons, as many scholars have emphasized.<sup>154</sup> First, fair market value may not include relocation costs, goodwill (for businesses), or various displacement costs, such as the unavailability of comparable housing.<sup>155</sup> In addition, the “inability to say no” prevents an owner from enjoying the ability to hold out if the owner thinks that the property may increase in value in the future and this expectation affects the owner’s valuation of the property. Under a property rule, owners would have the ability to insist on negotiating this expectation into the purchase price and to reject a deal if the terms did not do so.<sup>156</sup> Fair market value also excludes compensation for dignitary harms.<sup>157</sup> In addition, fair market value typically does not include more sentimental factors that lead owners to attach value to a home that differs considerably from the market price. As Professors Nadler and Diamond and many others have pointed out, “[i]n many instances . . . the value of the property to the owner, or the subjective value, might exceed—and in some cases, greatly exceed—the fair market value of the

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153. See CAL. CIV. PROC. CODE § 1263.310 (West 2012) (“Compensation shall be awarded for the property taken. The measure of this compensation is the fair market value of the property taken.”); FLA. STAT. § 73.071 (2012); *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (Posner, J.) (“‘[J]ust compensation’ has been held to be satisfied by payment of market value.”). The IRS defines fair market value as “the price that property would sell for on the open market. It is the price that would be agreed on between a willing buyer and a willing seller, with neither being required to act, and both having reasonable knowledge of the relevant facts.” INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, PUBLICATION 561, DETERMINING THE VALUE OF DONATED PROPERTY 2 (2007), available at <http://www.irs.gov/pub/irs-pdf/p561.pdf>. But see Garnett, *supra* note 31, at 103, 121-28, 130, 143-48 (noting that fair market value is what is required but in at least some cases payments exceed fair market value).

154. See, e.g., Fischel, *supra* note 133, at 932 (noting that “[m]uch ink has been spilled in articles pointing out that eminent domain practices fall short of ‘just compensation’”); Garnett, *supra* note 31, at 106-07 (noting that compensation awards “can fail to indemnify owners fully”); Nadler & Diamond, *supra* note 31, at 724 (noting that “compensation for a taking pegged to fair market value almost inevitably will undercompensate the owner of the property”); Parchomovsky & Siegelman, *supra* note 146, at 84 (noting that fair market value may lead to “gross undercompensation”);

155. See Garnett, *supra* note 31, at 106-07 (discussing how “[a] fair market value award does not compensate an owner for relocation expenses, goodwill associated with a business’s location, or the cost of replacing the condemned property”).

156. See *id.* at 107 (“Property rule protection provides complete protection against undercompensation in the normal market setting by enabling owners to hold out for their reservation price.”).

157. See *id.* at 101 (explaining problems with fair market valuation).

property.”<sup>158</sup> Or as they put it more pithily, “[a]lthough market pricing sees real property as fungible, people do not always share that view.”<sup>159</sup> Nadler and Diamond offer a series of reasons why a property owner might attach to a home subjective value that exceeds the fair market value, including:

the improvements they have made over the years using their own labor and design ideas; the memories inexorably connected with the property, including milestones like births, birthdays, and weddings, along with mundane but no less important memories of everyday living; proximity to friends and family; connections with others in the neighborhood that leverage social capital; expression of personality; and the ability of a home to provide the opportunity to maintain and express personal and group identity.<sup>160</sup>

In sum, law in the eminent domain arena not only does not “protect possession of a home”<sup>161</sup> because it inherently rejects a property rule approach, its liability rule underpinnings sometimes enables governments to undercompensate the owner by paying only fair market value when requiring the owner to give up his property.<sup>162</sup> The valuation of property taken by eminent domain is “problematic” because it fails to address subjective value, dignitary harms, and other values.<sup>163</sup>

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158. Nadler & Diamond, *supra* note 31, at 715; *accord* Merrill, *supra* note 128, at 84 (advocating that courts should be hesitant to condemn property when owner’s subjective losses are high).

159. *See* Nadler & Diamond, *supra* note 31, at 747 (explaining that homes are particularly likely to attract subjective value).

160. *Id.* at 721 (citations omitted). For a discussion of the impact of community on property values, see Parchomovsky & Siegelman, *supra* note 146. Some of the variables that commentators have suggested increase sentimental value include its use as a residence and the length of time of ownership. *See, e.g.*, John Fee, *Reforming Eminent Domain*, in *EMINENT DOMAIN USE AND ABUSE: Kelo in Context*, *supra* note 132, at 125, 133 (“It is common for many people, particularly those who have lived in their home for many years, to value their own homes at significantly more than assessed market value.”).

161. As indicated, eminent domain turns on its head the property rule concept that a person has autonomy to make decisions concerning ownership and possession of a home. *See supra* note 68. In upholding a broad definition of public use in *Kelo*, the Court made it clear that states have the flexibility to impose more stringent limits on public use than required by the Fifth Amendment. *Kelo v. City of New London*, 545 U.S. 469, 482-83 (2005).

162. Nadler & Diamond, *supra* note 31, at 724 (noting that “compensation for a taking pegged to fair market value almost inevitably will undercompensate the owner of the property,” citing several leading scholars); *see also* Kirby Forest Indus. v. United States., 467 U.S. 1, 10 (1984) (holding that just compensation typically means fair market value of property).

163. *See* Nadler & Diamond, *supra* note 31, at 723 (noting that valuation is problematic because it tends to set compensation at fair market value, which does not consider subjective value and dignitary harms). *But see* Garnett, *supra* note 31, 105, 121-26 (suggesting that “the risk of undercompensation has been overstated,”

In fact, courts in eminent domain cases have recognized that fair market value does not fully compensate an owner in many cases because of the owner's sentimental values. Judge Posner, for example, notes that "[c]ompensation in the constitutional sense is therefore not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to his property."<sup>164</sup> Even as it has upheld the market value standard, the Supreme Court has recognized that this standard fails to provide full compensation to the owner.<sup>165</sup>

In light of these concerns with the use of eminent domain authority, it is no wonder that the eminent domain legal regime has spawned disaffection with the legal system.<sup>166</sup> Reflecting this disaffection, forty-three states have adopted post-*Kelo* revisions purportedly to limit eminent domain authority.<sup>167</sup> The "*Kelo* backlash," as one scholar has characterized it, "probably resulted in more new state legislation than any other Supreme Court decision in history."<sup>168</sup> Yet disaffection persists.<sup>169</sup>

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questioning whether undercompensation is serious problem, and also summarizing various federal and state "legal entitlements to above-market compensation").

164. *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988); see also Barros, *supra* note 136, at 299 ("When the taken property is a home . . . market value compensation fails to compensate the owner for the personal interest in the home.").

165. See *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) ("Although the market-value standard is a useful and generally sufficient tool for ascertaining the compensation required to make the owner whole, the Court has acknowledged that such an award does not necessarily compensate for all values an owner may derive from his property." (footnote omitted)).

166. See generally Timothy J. Dowling, *How to Think About Kelo After the Shouting Stops*, in *EMINENT DOMAIN USE AND ABUSE: Kelo in Context*, *supra* note 132; Nadler & Diamond, *supra* note 31, at 736 (noting that term of ownership and type of proposed use affected extent to which participants thought government's motives were good). Those who owned the property for a long time were especially likely to believe that the government's motives were bad when the use was a mall or unspecified, rather than a hospital. See *id.*

167. See *Enacted Legislation Since Kelo*, CASTLE COALITION, [http://www.castlecoalition.org/index.php?option=com\\_content&task=view&id=510](http://www.castlecoalition.org/index.php?option=com_content&task=view&id=510) (last visited Mar. 4, 2012) (explaining limitations adopted by various states). But see Somin, *supra* note 125, at 2114 ("With some important exceptions, the legislative response to *Kelo* has fallen short of expectations. At both the state and federal level, most of the newly enacted laws are likely to impose few, if any, meaningful restrictions on economic-development takings.").

168. Somin, *supra* note 125, at 2102; see also Nadler & Diamond, *supra* note 31, at 714 (noting that "[a] multitude of reform laws in many states followed quickly on the heels of the [*Kelo*] decision, with the declared purpose to limit the government's ability to exercise its power of eminent domain"). For another review of responses to *Kelo*, see Steven J. Eagle & Lauren A. Perotti, *Coping with Kelo: A Potpourri of Legislative and Judicial Responses*, 42 REAL PROP. PROB. & TR. J. 799 (2008).

169. See *Heller & Hills*, *supra* note 107, at 1490 (noting that eminent domain is "an increasingly embattled concept at both the state and federal levels"); see also Somin, *supra* note 125, at 2103-04 (finding that "the majority of the newly enacted

Our findings about the salience of procedural justice features, discussed in Part IV, offer an alternative framework for reducing dissatisfaction with governments' exercise of eminent domain power to the normative recommendations for reforming eminent domain law that are commonly in play.<sup>170</sup> We briefly summarize below three other options for reducing disaffection before offering some thoughts about how our findings might help to ameliorate concerns.

One strategy to reduce dissatisfaction with eminent domain is to abandon use of such authority. Conceptually, eminent domain transforms property ownership from what one might characterize as a property rule to a liability rule.<sup>171</sup> That is, instead of a property owner's ability to make the decision to retain or sell his property on his own (a property rule), eminent domain divests an owner of the power to make this threshold decision, leaving the owner with a liability rule-based remedy of compensation. As Nadler and Diamond have nicely described it:

The vulnerability associated with being targeted for a non-traditional condemnation violates the traditional understanding of land that gives the owner a right to exclude all others, to give up ownership only if she chooses and to set the price at which she is willing to sell. . . . Eminent domain, as a general matter, violates that expectation by both forcing the sale and setting the price. The property owner faced with an exercise of eminent domain has a right only to compensation—a liability rule that entitles the injured party to damages—rather than the right to prevent the transfer—a property rule that would enable the property owner to avoid being injured at all.<sup>172</sup>

An extreme default position is to flip the status quo completely from a liability rule to a property rule on the ground that personal interest in property should trump other interests and, therefore, only willing sales

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post-*Kelo* reform laws are likely to be ineffective," although also noting that some states have enacted effective reform laws).

170. Cf. 2009 REPORT TO CONGRESS, *supra* note 7, at 35-37 (discussing variability in "behaviorally informed approaches" thus highlighting importance of paying attention to context in formulating possible fixes). Jurisdictions differ in the procedures they use for eminent domain, and also in the alternative procedures they have established. *See id.* Actions to operationalize our proposed procedural justice-based framework in particular contexts obviously should occur with this variability in mind. To extend Professor Garnett's observation, jurisdictions have developed processes for eminent domain that incorporate several procedural justice features of the sort we discuss in this Article. We do not purport to evaluate particular procedures in use in different jurisdictions, or the extent to which such procedures address the issues we raise in this Article. *See* Garnett, *supra* note 31, at 104.

171. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (discussing two rules and differences between them).

172. Nadler & Diamond, *supra* note 31, at 723.

should be allowed.<sup>173</sup> This “fix” would effectively eliminate use of eminent domain authority. Such an approach raises obvious efficiency concerns, as has been discussed elsewhere.<sup>174</sup> This extreme default position, which has won few adherents, seems unlikely to be adopted and we do not spend more time on it.<sup>175</sup> Our focus, instead, is on whether there are ways to “save” eminent domain in terms of public acceptability without abandoning it as a policy option.

Professor Garnett notes that the fixes attempted to date to address complaints about eminent domain authority have primarily focused on one of two strategies: narrowing the scope of eminent domain authority (e.g., by defining “public use” narrowly) or making it more expensive for governments to exercise such authority by increasing the amount of compensation required.<sup>176</sup> Beginning with the former, the Fifth Amendment only allows a government to take private property for “public uses.”<sup>177</sup> Commentators have offered a broad range of creative approaches to limit the public uses for which governments may use eminent domain authority.<sup>178</sup> Professor Barros, for example, cites arguments that eminent do-

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173. Radin seems to argue for this default position. *See* Radin, *supra* note 61, at 959-60; *see also* Barros, *supra* note 136, at 281 (“Radin makes a broad moral claim that the personal interest of an individual possessing a home should trump competing fungible interests.”). Professors Nadler and Diamond speculate that the lack of a property rule, and the resulting limits on an owner’s leverage, may explain the “general antipathy to eminent domain and why the public found *Kelo* so objectionable.” Nadler & Diamond, *supra* note 31, at 723.

174. *See, e.g.*, Heller & Hills, *supra* note 107, at 1467, 1469, 1489-90 (2008) (proposing that land assembly districts replace eminent domain in some contexts, but also noting that “[f]rom an efficiency standpoint, we need eminent domain to consolidate overly fragmented land” and discussing notion of “anticommons—the wasteful underuse caused by too-abundant entitlement holders”); Parchomovsky & Siegelman, *supra* note 146, at 77 (summarizing literature that identifies concerns with property rule and favors liability rule approach). Despite the significant amount of legislative activity following the *Kelo* decision, relatively few jurisdictions have acted to circumscribe use of eminent domain authority significantly. Somin, *supra* note 125, at 2105. Professor Garnett alludes to this fix in the limited context of properties with high subjective value. Garnett, *supra* note 31, at 111-19 (noting that “third possibility” is that governments “simply may avoid taking properties with high subjective value”).

175. We acknowledge the possibility that the use of a liability rule rather than a property rule, and the power distribution it represents, may be a significant cause of dissatisfaction. *See* Nadler & Diamond, *supra* note 31, at 723 (“The difference in power . . . makes it understandable that property owners prefer a property rule to a liability rule. It may also explain the general antipathy to eminent domain and why the public found *Kelo* so objectionable”). We also acknowledge, but do not discuss, innovative ideas that would transform the nature of a property rule. *See, e.g.*, Heller & Hills, *supra* note 107.

176. Garnett, *supra* note 31, at 110-11 (“Academic discussions tend to assume that there are two ways to minimize the risk of undercompensation. The first solution is substantive limits on the use of eminent domain. . . . The second solution . . . is more money.” (footnotes omitted)).

177. *See Kelo v. City of New London*, 545 U.S. 469, 545 (2005).

178. *See, e.g.*, Barros, *supra* note 136, at 297-300; Nadler & Diamond, *supra* note 31, at 724; *see also* Parchomovsky & Siegelman, *supra* note 146, at 130-32. Pro-

main could be made available only after a finding that the property could not be purchased voluntarily and that there is no reasonable alternative course of action that would achieve the same public goal (this is in some ways similar to the “no practicable alternative” approach pursuant to section 404 of the Clean Water Act).<sup>179</sup> In *Kelo*, the government exercised its eminent domain authority to pave the way for a redevelopment project with multiple uses by buying out private land owners whose homes could in no way be considered “blighted.”<sup>180</sup> These facts embody some of the variables that critics have recommended be addressed in urging that use of eminent domain authority be restricted: no resales to private parties, a requirement that properties be blighted as a condition precedent for use of eminent domain, etc.<sup>181</sup> Conceptually, limiting the scope of eminent domain by narrowing the circumstances in which a government may exercise such authority qualifies as a *property rule* approach to reform because it enables an owner not to sell his property unless he chooses to.<sup>182</sup> While narrowing the scope of “public uses” for which eminent domain may be used is clearly an option and has received considerable attention,<sup>183</sup> Professors Nadler and Diamond’s finding that respondents were “only moderately sensitive to the purpose of a taking” raises questions about the extent to which reforms based on limitations in uses may be enough on their own to address disaffection.<sup>184</sup>

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fessor Garnett suggests that “most of the state and federal proposals under consideration would impose substantive limits on the eminent domain power.” Garnett, *supra* note 31, at 105.

179. See generally 33 U.S.C. § 1344 (2006).

180. *Kelo*, 545 U.S. at 473-74. For one of many summaries of the *Kelo* facts, see Nadler & Diamond, *supra* note 31, at 718-19.

181. See Garnett, *supra* note 31, at 103 (noting that *Kelo* “prompt[ed] federal and state efforts to impose legislatively the restrictions on eminent domain that the Supreme Court rejected in *Kelo*”). See generally Somin, *supra* note 125 (discussing legislative responses to decision).

182. See Garnett, *supra* note 31, at 137; Nadler & Diamond, *supra* note 31, at 723.

183. See Garnett, *supra* note 31, at 103 (noting that *Kelo* “prompt[ed] federal and state efforts to impose legislatively the restrictions on eminent domain that the Supreme Court rejected in *Kelo*”). See generally Somin, *supra* note 125 (discussing legislative responses to decision).

184. Nadler & Diamond, *supra* note 31, at 715, 742-45 (noting that they found “little effect of the purpose of the taking on willingness to sell” and “that the plaintiffs’ relationship to their property in *Kelo*, even more than the nature of the public purpose at issue, may have encouraged public outrage”). Along the same lines, they suggest that the owners’ relationship to the property may be more salient than the public purpose at issue in the taking. See *id.* at 745. Other commentators have similarly suggested that narrowing public use will not ameliorate dissatisfaction with use of eminent domain by authorities because the “real problem” has to do with the requirement of just compensation. Fee, *supra* note 160, at 126 (suggesting “current injustices in eminent domain are not primarily the product of an unreasonably broad concept of public use. Rather, the root of the problem lies with the current system’s failure to require adequate compensation”).

A third strategy to address disaffection involves a normative fix to eminent domain law that focuses on the other key requirement in the Fifth Amendment for use of eminent domain authority, notably the requirement that “just compensation” be paid.<sup>185</sup> Increasing compensation qualifies as changing the content of the *liability rule* that governs use of eminent domain authority.<sup>186</sup> This fix involves changing how just compensation is measured. A variety of prominent scholars have suggested that “more money” is an answer to the eminent domain conundrum.<sup>187</sup> Scholars have offered alternative approaches to addressing the valuation issue.<sup>188</sup> Some have recommended using a “premium” approach, or a fair market value methodology in which compensation would exceed fair market value by some percentage, such as 125 or 150 percent.<sup>189</sup> Others have looked to various indicia of ownership, such as time of ownership, to determine compensation.<sup>190</sup> Still others have claimed that we should determine compensation based on the proposed use of the parcel.<sup>191</sup>

With some exceptions, however, proposed fixes to this valuation conundrum have largely foundered to date.<sup>192</sup> Because of the significant

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185. Fee, *supra* note 160, at 126.

186. See Garnett, *supra* note 31, at 137; Nadler & Diamond, *supra* note 31, at 723.

187. See, e.g., Barros, *supra* note 136, at 300 (suggesting as possible additional sources of compensation: providing moving expenses, providing reasonable attorney’s fees if owner successfully challenges government’s valuation, and providing sliding-scale premium based on length of residence in home). Barros contends that each approach would “come closer to making the homeowner whole” and would “provide incentives for governments to obtain property through voluntary market transactions rather than through eminent domain and to take homes only when truly needed for the public interest.” *Id.*; see also Fee, *supra* note 160, at 134 (suggesting “tort”-like, case-by-case approach or “statutory formula that approximates certain damage elements,” such as formula that establishes emotional damages as percentage of market value based on length of ownership). But see Garnett, *supra* note 31, at 104 (concluding that “universal disregard for how eminent domain works outside of the courtroom may have led previous commentators—again, including me—to overstate the undercompensation problem.”).

188. See Nadler & Diamond, *supra* note 31, at 724 (summarizing several proposals); Merrill, *supra* note 128, at 84 (same).

189. See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY & THE POWER OF EMINENT DOMAIN 174-75 (1985); John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 815-17 (2006).

190. Nadler & Diamond, *supra* note 31, at 724.

191. See *id.*; see also James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 865-68 (suggesting that compensation should be tied to “publicness” of project—if more public, then less compensation should be provided). For one review of laws that require payment of more than fair market value, see Garnett, *supra* note 31, at 105.

192. There are, of course, some exceptions. For a further discussion of the variability in eminent domain processes and in valuation approaches, see *supra* note 83. For examples of several communities that provide for compensation well above market value, see Timothy J. Dowling, *How to Think About Kelo After the Shouting Stops*, 38 URB. LAW. 191, 198 (2006). Professor John Fee, however, has noted: “Some eminent domain statutes provide additional elements of compensation,

challenges in incorporating sentimental value and other factors into the eminent domain process,<sup>193</sup> the Supreme Court has been reluctant to switch from the obviously second-best extant scheme of market valuation. In *United States v. 564.54 Acres of Land*,<sup>194</sup> the Court highlighted the “serious practical difficulties in assessing the worth an individual places on particular property at a given time” and justified using market value as a proxy as a result.<sup>195</sup> Judge Posner makes this point as well:

Many people place a value on their homes that exceeds its market price. But a standard of subjective value in eminent domain cases, while the correct standard as a matter of economic principle, would be virtually impossible to administer because of the difficulty of proving . . . that the house was worth more to the owner than the market price.<sup>196</sup>

Process changes that bolster legitimacy may be helpful even if changes in valuation formulae are implemented that lead to more compensation and increased satisfaction as a result. Nadler and Diamond opine that while increased compensation might help defuse public outrage, *Kelo* and “its accompanying backlash suggest that the divide between the law of property and the psychology of property is about more than just money.”<sup>197</sup> Based on their experiments, they conclude that, for some people, increasing compensation to incorporate subjective valuation was “wholly insufficient.”<sup>198</sup>

The bottom line is that, to date, none of these three fixes seeking to ameliorate public outrage with the exercise of eminent domain authority

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such as relocation expenses, but even these usually come far short of fully compensating affected owners.” Fee, *supra* note 160, at 136 n.25.

193. See, e.g., Garnett, *supra* note 31, at 147; Heller & Hills, *supra* note 107, at 1479.

194. 441 U.S. 506 (1979).

195. *Id.* at 511. The Court also acknowledged that fair market value is not necessarily the appropriate standard. See *id.*; see also JACK L. KNETSCH, PROPERTY RIGHTS AND COMPENSATION: COMPULSORY ACQUISITION AND OTHER LOSSES 37 (1983) (discussing “intuitive appeal” of “notion of value-to-the-owner” but stating “courts have had difficulty giving the concept specific or definitive meaning”); Merrill, *supra* note 128, at 82-85 (offering “refined model”). See generally Shelley Ross Saxer & David L. Callies, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in Kelo*, in EMINENT DOMAIN USE AND ABUSE: *Kelo* in Context, *supra* note 132, at 137, 148-54 (discussing Court’s jurisprudence on appropriateness of fair market value standard and reviewing state flexibility to include additional factors beyond fair market value in calculation of just compensation).

196. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 531 (6th ed. 2003); accord Merrill, *supra* note 128, at 83 (identifying “subjective premium” that owners may place on their property).

197. Nadler & Diamond, *supra* note 31, at 715.

198. See *id.* at 715, 723 (concluding that in some cases “no amount of money” would compensate for loss of person’s property, and finding that strength of owner’s ties to property, including length of time of ownership, was significant factor concerning willingness to sell).



has succeeded.<sup>199</sup> We have not eliminated use of eminent domain in order to save it. Efforts to limit use of eminent domain authority have been uneven and there is some evidence that such a strategy is not likely sufficient by itself to significantly ameliorate disaffection.<sup>200</sup> Further, the methodological challenges associated with increasing compensation have complicated use of such an approach.

Our findings, discussed in Part IV, suggest that revamping eminent domain processes so that participants and others view them as more fair or just may help to promote satisfaction.<sup>201</sup> Rather than focus exclusively on the concepts that have received most of the attention to date, notably adjustments to property rules (e.g., limits on public use) or liability rules (e.g., changing regimes for determining compensation),<sup>202</sup> attention to process holds potential for ameliorating high levels of dissatisfaction with

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199. See Fee, *supra* note 160, at 136 n.25.

200. See Nadler & Diamond, *supra* note 31, at 723. Professor Somin concluded that many of the responses to *Kelo* have been “largely symbolic in nature, providing little or no protection for property owners,” although Somin also noted that other responses had considerably more promise. See Somin, *supra* note 125, at 2105, 2138-48.

201. As Professor Garnett suggests, given the variability of eminent domain practices and their opaqueness, “[m]ore study is needed to understand how eminent domain works in practice,” and, in particular, how jurisdictions are developing specific plans for reform. See Garnett, *supra* note 31, at 149. Many eminent domain situations are resolved through pre-condemnation proceedings, in some cases because the law obligates the government to negotiate before using eminent domain. See *id.* at 126 (noting that what compensation owner receives “almost always results from a bargain between the owner and a Taker, rather than a judicial determination of the property’s fair market value. State and federal laws require Takers, in most instances, to seek to purchase property on the market before resorting to eminent domain” (footnote omitted)).

202. For a further discussion of liability rules, see *supra* notes 170-83 and accompanying text.

eminent domain procedures,<sup>203</sup> and others that involve highly salient sentimental values.<sup>204</sup>

Professors Michael Heller and Rick Hills offer an innovative proposal for revamping use of eminent domain that ties in nicely with some of our findings about process features that may enhance a sense of fairness.<sup>205</sup> They argue for the creation of “Land Assembly Districts” as an alternative to eminent domain in some circumstances. Their proposal includes a referendum feature that would empower members of a district to vote to determine whether to accept a proposal to buy the property that comprises the district. Our findings about the value of referenda for building trust and engendering a sense of fairness, particularly when sentimental values are salient, offers empirical support for their idea for incorporation of a referendum process as part of a potential sale in order to enhance a sense of fairness.<sup>206</sup> Further work is needed to evaluate the likely acceptability of the particular voting mechanisms they proposed.

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203. Our approach is not exclusive. We are not proposing an either/or set of strategic options in which policy makers have to choose between changing their methodologies for calculating a just compensation, restricting the use of eminent domain authority, or our third approach. Instead, we view our approach as complementary in the sense that it gives policy makers an additional tool to consider in attempting to improve decision-making when sentimental values are highly salient. It goes without saying that the value of new or revised procedures in bolstering the procedural justice of the procedures used depends on the extant procedures as well as on the changes made. As indicated above, procedures vary considerably throughout the country. *See supra* notes 73-117 and accompanying text; *see also* NICHOLS ON EMINENT DOMAIN, *supra* note 31, § G2A.03 (listing variation of procedures in different states); Garnett, *supra* note 31, at 105, 126-30. Our Article provides a framework-level review of litigation as a procedure rather than a review of particular procedures used in particular jurisdictions. As Professor Garnett states, “Because the negotiations between property owners and Takers are opaque and decentralized, it is difficult to obtain information about how the bargaining process works.” Garnett, *supra* note 31, at 130. Garnett suggests that “quick-take” procedures, which permit the government to obtain title before the final judgment in an eminent domain action, may be particularly problematic from a procedural justice perspective because they do not include a right to be heard before the government acts and may “preclude the effective exercise of ‘voice.’” *Id.* at 128. In terms of possible complementarity of approaches, Garnett recognizes that more money may often not be enough when dignitary harms are high, such as when the government requires the sale of land from one private party to another. *See id.* at 137.

204. It is well established that plaintiffs in a wide range of settings often have non-monetary interests, including in the medical malpractice, torts, divorce, general injury, and small claims arenas. *See, e.g.,* Hadfield, *supra* note 106, at 3 (describing reasons why 9/11 victim compensation fund is another arena in which non-monetary values are of substantial importance). *See generally* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631, 631-32, 650-51 (1981).

205. *See generally* Heller & Hills, *supra* note 107.

206. For a further discussion of our findings about the value of referenda for building trust and engendering a sense of fairness, *see supra* notes 75-118 and accompanying text. Professor Somin’s finding that “[t]he major exceptions to the pattern of ineffective post-*Kelo* reforms are the eleven states that recently enacted reforms by popular referendum” seems to offer some support for our respondents

Nadler and Diamond suggest the promise of a procedurally oriented approach as well, while acknowledging that much remains to be learned to determine which changes will be most effective. After concluding that subjective attachment affects perceptions of justice, and in particular “re-veal[s] the limits of case law and traditional economic analysis in understanding *Kelo* and eminent domain,” they suggest that “a more democratic model for the law and policies dealing with takings” holds promise for enhancing legitimacy.<sup>207</sup>

Our study lends support to this conclusion and offers some specific guideposts about the types of procedural changes that are likely to be most effective in persuading people that the process is fair and protects sentimental as well as monetary values. As we discuss in Part IV, those features should include meaningful opportunities for voice, respectful treatment, and neutrality.<sup>208</sup> Beyond this, our findings suggest that the search for voice must be a careful one because there are pitfalls if the “wrong” types of processes are adopted. Some opportunities for voice appear to be remarkably ineffectual, notably the types of voice provided by public hearings. Our respondents viewed public hearings to be relatively unacceptable as mechanisms for making decisions. Further, their view was that such hearings did not do an effective job of protecting either monetary or sentimental value.<sup>209</sup>

Other scholars have offered insights about the types of voice that may be effective as well. Professor Tamara Relis, for example, in a study of different types of litigation, found a significant disconnect between the objectives of plaintiffs and their attorneys.<sup>210</sup> This suggests that simply allowing a party’s lawyers a voice may not be enough to satisfy the party that

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who thought highly of referenda as protective of their interests. See Somin, *supra* note 125, at 2105. Somin’s further finding that citizen-initiated referendum initiatives “have led to the passage of much stronger laws than those enacted through referenda initiated by state legislatures” highlights the need for further analysis that unpacks the value of different types of referenda processes. See *id.*

207. See Nadler & Diamond, *supra* note 31, at 748.

208. See *supra* notes 74-117 and accompanying text. Compare HIBBING & THEISS-MORSE, *supra* note 117 (raising questions about efficacy of voice), with Markell & Tyler, *supra* note 10, at 3 (“Rhetoric in support of extensive and meaningful public engagement has not necessarily matched reality.”).

209. For a further discussion of how such hearings did not do an effective job of protecting monetary or sentimental value, see *supra* notes 84-117 and accompanying text, especially Table 1.

210. See Relis, *supra* note 106, at 702. Professor Relis found a significant disconnect, or “discontinuity,” between plaintiffs’ objectives and those of their lawyers. The plaintiffs’ objectives “were thickly composed of extra-legal aims of principle,” such as acknowledgements of harm and admissions of fault, while lawyers conceived the goal to be “solely or predominantly for money.” See *id.* In Relis’s words, claimants’ desires “remain invisible” to their lawyers in many cases. *Id.* at 707. Relis found that “[p]laintiffs’ articulations of their litigation objectives rarely correlated with what legal actors perceived as their prime litigation aims.” *Id.* at 721. Plaintiffs want non-monetary relief while lawyers want money and think that is what the cases are about.

his or her views have been heard. Professor Relis's findings that a client's sentimental values are especially likely to receive short shrift from the client's lawyers and, as a result, from the relevant tribunal, reinforce the need to think twice before concluding that voice for a lawyer will be deemed by a client to be voice for the client.<sup>211</sup> A party for whom sentimental value is important is unlikely to have those issues vetted effectively by his or her attorney and is unlikely to feel he or she has had a voice.<sup>212</sup>

Gillian K. Hadfield makes some of the same points regarding administration of the 9/11 fund. She reported finding that potential claimants (people who had been injured by the 9/11 terrorist attacks or lost a family member) "saw much more at stake than monetary compensation."<sup>213</sup> Hadfield noted that some, including Ken Feinberg, who served as special master for the Victim Compensation Fund (VCF), had effectively "equat[ed] . . . litigation interests with monetary interests" and suggested that such a characterization is "increasingly common in the legal profession."<sup>214</sup> Like Professor Relis, Professor Hadfield suggested that while lawyers often see issues in terms of a "financial calculation," for some potential claimants that was not the case.<sup>215</sup> Instead, Hatfield suggests that in the VCF context "litigation represents more . . . than a means to satisfying private material ends; it represents principled participation in a process that is constitutive of a community."<sup>216</sup>

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211. *See id.* Professor Relis found that even when plaintiffs' putative objectives are "transformed" into aims that their lawyers believe are legally realistic, "plaintiffs' extra-legal aims of principle do not dissipate after dispute transformation by their lawyers." *Id.* at 706; *see also id.* at 728 (noting that findings "negate arguments that lawyers' conditioning of plaintiffs on legal system 'realities' results in claimants materially revising the aims of principle they seek from the justice system"). Relis acknowledges that the data, while providing "one of several windows on motivation," adds to the "scant depth of research on the needs of plaintiffs and why they sue." *Id.* at 708 n.15. Our study should be viewed in a similar light: we provide a window into peoples' perceptions that adds to the research on the perceptions of stakeholders.

212. *See id.* at 706. Relis suggests pre-litigation fixes to these issues, including direct dialogue early on in litigation between defense counsel and plaintiffs so that plaintiffs can articulate their extra-legal objectives. *See id.* at 709.

213. Hadfield, *supra* note 106, at 645.

214. *Id.* at 646.

215. *See id.* at 662 ("It was clear that for [some] respondents, litigation was not about pursuing a pot of gold. . . . Rather, the choice as they saw it was it was about relinquishing gold in favor of something they saw as more important."). People chose to litigate, rather than be compensated for losses from the victims' compensation fund, because they wanted information about the terrorist attacks and related events, wanted accountability for wrongdoing that had enabled the attacks to occur, and wanted to promote change so that the "system" worked better. *See id.* at 662-65. Fairness or reasonableness of fund payments played a relatively small role in at least some of the respondents' decisions as to whether to accept such payments. Non-monetary payments played a much more significant role. *See id.*

216. *Id.* at 649. Hadfield's focus is on prospective plaintiffs in litigation, which is, to use her term, a different framing than for owners in eminent domain situations.

Our study both supports and builds on the foundation that Nadler and Diamond have laid in the eminent domain context, and which Relis and Hadfield have helped to create in other legal arenas in which sentimental values are salient. Their work, in different arenas, suggests that a reality of the legal process is that it does not focus particularly well on non-monetary values and that this led to dissatisfaction by participants. Our findings both lend support to that view and also offer a promising path for improvement by suggesting that careful incorporation of key procedural justice features may help to reduce disaffection.

## VI. CONCLUSIONS

The findings of our study provide support for several important insights into policy design. First, process design needs to be approached contextually. Stakeholders' value processes differently depending on the values at stake. As a result, the values held by relevant stakeholders should influence policy design. Second, as a normative matter, when sentimental values are important, procedural justice is particularly important to stakeholders. Moreover, a particular aspect of procedural justice, notably trust in the decision-maker, is especially important to engender satisfaction with the procedures used. In contrast, when monetary values predominate, a different aspect of procedural justice, notably neutrality, stands out in importance in influencing satisfaction. Third, our findings indicate that people do not view the acceptability of decision-making procedures in a vacuum. Instead, an exogenous variable, notably a person's degree of trust in government, affects the person's satisfaction with resolving disputes using a particular type of decision-making process. A person with low levels of trust in government is likely to distrust a process that vests power in a government decision-maker; instead, processes that vest power elsewhere are likely to be attractive (such as the referendum process we asked about). We consider our findings in the context of a particularly contentious legal arena, eminent domain law, and suggest that they offer a framework based in the procedural justice literature for reducing extant levels of public outrage that may complement the search for outcome-based reforms that has received the vast majority of attention so far.