THE POLITICAL ECONOMY OF JUST COMPENSATION: LESSONS FROM THE MILITARY DRAFT FOR THE TAKINGS ISSUE

WILLIAM A. FISCHEL*

* Professor of Economics, Dartmouth College. This article was presented at a symposium entitled "Economic and Constitutional Perspectives on Takings," sponsored by the American Enterprise Institute (AEI), Washington, D.C., on March 7, 1996. The financial support of AEI is gratefully acknowledged. Thanks to participants at this event, a seminar at the University of Massachusetts Resource Economics Department, and a joint faculty colloquium of Dartmouth College and Vermont Law School for oral comments. Thanks also to Greg Sidak and Daniel Farber for written comments. Finally, thanks to Robert Ellickson and Robert Litan for their formal written comments. *See* Robert C. Ellickson, *Takings Legislation: A Comment*, 20 HARV. J.L. & PUB. POL'Y 75 (1996); Robert E. Litan, *Comment on Fischel's* Political Economy of Just Compensation, 20 HARV. J.L. & PUB. POL'Y 65 (1996). This Article has not been modified in response to them, in order to preserve the coherence of their work.

I. INTRODUCTION

The military draft was a taking of property—men's property in their own labor—with much less than full compensation. This Article shows that economic analysis of the draft is similar to that of uncompensated regulation of land. It shows that both cause excessive use of the unpaid resource and misallocation in the selection of the resource. It also shows, however, that both may be justified when a large fraction of the resource is optimally employed by the government.

The analytical juxtaposition of the draft and land regulation helps explain why the draft was desirable during World War II but not during Vietnam, and why compensation for widely-shared regulatory burdens is less compelling than for concentrated devaluations. It also lends encouragement to the contemporary property rights movement, for it shows that a large government agency—the U.S. military—was able to adjust efficiently when it had to compensate in full the inputs (labor) it had previously obtained for a low cost. The military experience suggests that if the government paid landowners for concentrated devaluations, it would not necessarily break its budget or suspend all regulation.

II. THE DRAFT AS A TAKING

Few, if any, draw a connection between the military draft and the Takings Clause.[1] In *Economic Analysis of Law,* Judge Richard Posner mentions the draft as an example of a taking, but only to suggest the limitations on the scope of takings jurisprudence.[2] Martin Anderson, an adviser to President Nixon who helped to end the draft in 1973, later collected essays for and against the draft; none of them explored a connection to takings jurisprudence.[3] A recently published history of the draft never

1. The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

2. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 481 (4th ed. 1992). Posner also dealt with the analytically similar issue of jury conscription. *See id.* at 583.

3. *See* THE MILITARY DRAFT: SELECTED READINGS ON CONSCRIPTION (Martin Anderson ed., 1982) [hereinafter SELECTED READINGS]. A separate conference volume edited by Anderson contains an essay that analyzes proposals for compulsory national service under various constitutional doctrines, including the Takings Clause. *See* Philip Bobbitt, *National Service: Unwise or Unconstitutional?, in* REGISTRATION AND THE DRAFT 299, 323-24 (Martin Anderson ed., 1982) (concluding that compulsory, *nonmilitary* national service might be a taking, but not compulsory military service).

hints that a connection might exist between the draft and the Takings Clause.[4] In the leading decision upholding the draft, the Supreme Court does not mention the Takings Clause.[5]

Such neglect warrants caution in using the draft as an example of an uncompensated taking. One problem with the analogy is that it undercuts the distinctions among life, liberty, and property. If such distinctions are made, the draft seems more like a taking of liberty, and potentially life, than of property. Can these two be bought for "just compensation"? The vocabulary of economic efficiency seems too anemic to convey the tension between anxiety about war and patriotic obligation to defend one's country.

Nonetheless, various theories of property suggest that conscripted military service can be cast as a taking of property. For example, John Locke proposed that property rights in natural things arise from mixing one's labor with them.[6] The power of his argument stems from the assumption (which this Article will not dispute) that one has property in one's own body. Margaret Radin argues that an important purpose of property is to promote self-realization and personal development.[7] From this she develops a takings doctrine that would protect one's home and personal possessions more than other types of property.[8] It seems but a short step from these theories to a takings theory that would protect one's interest in choosing the purpose toward which one's work is directed, even in time of war.

Moreover, the history of takings suggests that the development of the common law just compensation doctrine arose, in part, from military conscription.[9] The doctrine cut

4. *See* GEORGE Q. FLYNN, THE DRAFT: 1940-1973 (1993).

5. *See* Selective Draft Law Cases, 245 U.S. 366 (1918).

6. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287-88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

7. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1984).

8. *See id.* at 1002-13. Though not mentioned by Radin, her view is supported by the Third Amendment, which gives the owner of any "house" (and presumably not nonresidential property) the right to refuse to quarter soldiers during peacetime. The special outrage occasioned even by compensated billeting of soldiers during colonial times was the driving force behind the Amendment. *See* William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 393, 394-95 (1991).

9. *See, e.g.*, William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 562-65 (1972) (indicating that national defense issues were among the more prominent occasions for compensation disputes).

both ways. On the one hand, a 1662 English statute required compensation for compulsory land or water transportation for the army and navy.[10] On the other hand, the king had the power to take land for fortifications and mine saltpeter for making gunpowder without compensation to the landowner, under the principle of royal prerogative to appropriate resources to defend the realm.[11]

These examples suggest the principles behind the award of compensation were closely related both to military concerns and to efficiency. They fit neatly into an economic hypothesis for the origins of the compensation principle. Takings of goods whose supply was elastic, either because the goods could be removed from the reach of the king or because they could be withheld from production, were followed by compensation to the owners. After all, if the king did not pay for corn, horses, or boats for his army, then farmers, teamsters, and sailors would make them hard to find or be discouraged from producing them at all.[12] In contrast, land is immovable and useful in its unaltered state. Perhaps as a consequence, takings of land were not originally compensated. Indeed, it was only after the ascendancy of Parliament, whose members were selected by the landowners, that regular compensation was given for land taken for public use.[13]

Under the foregoing hypothesis, soldiers should have been hard to find if they were not sufficiently compensated. Why, then, did the king have an abundant supply of soldiers? One reason is that medieval society was organized purposely along lines that assured the king of military manpower.[14] But an economic parable suggests that a similar outcome should occur in all longstanding societies. People volunteer to fight when it is in their interest to do so. Protection of home and hearth is in one's self-interest. Such self-interest improves soldiers' motivation and reduces the deadweight loss of taxation needed to pay them. Similarly, lack of self-interest makes it costly for

10. *See id.* at 564.

11. *See id.* at 563.

12. The Confederacy relearned this lesson when it attempted to conscript military provisions as well as men. Richmond nearly starved as farmers refused to bring food to places at which their produce might be conscripted without compensation. *See* ELI N. EVANS, JUDAH P. BENJAMIN: THE JEWISH CONFEDERATE 211-12 (1988).

13. *See* Stoebuck, *supra* note 9, at 566.

14. *See* Fields & Hardy, *supra* note 8, at 396.

rulers to engage in wars that do not defend their subjects' or citizens' homes from foreign invasion.[15]

Volunteerism's disadvantage is the free rider problem. People may be sincerely willing to defend their country, but they are also aware that the country may be adequately defended if they do not volunteer. What is in the interest of all often is not in the interest of every individual. Small countries may find this less of a problem. In a small republic, the rewards of patriotism are more direct, and the force of public opinion and other local sanctions may be adequate to deter shirking. No general draft was used in fighting the American Revolution, for example; States and communities recruited volunteer soldiers. In a large country and for wars that do not require the services of all able-bodied people, it will be evident that a compulsory system of taxation may be necessary to obtain recruits. The question then becomes the prosaic issue of just compensation. Should the main burden of the tax be borne by the recruits alone or by the citizens as a whole?

The draft in twentieth century America can be seen as a compromise between the traditions of self-defense and payment of taxes. The draft itself can be analyzed as a tax on young men, but to do so exclusively is to miss the self-defense tradition and the appeals to patriotism that were once adequate to recruit an army. Defenders of the draft in the twentieth century viewed it as a civic duty, an obligation quite different from paying taxes.[16] Indeed, this view persists in proposals for young people to engage in universal public service (in which military service would be just one of several service options).[17] Many people who believe in compensation for property nonetheless may find compulsory military service less offensive. The case for an all-volunteer military force, like the case for compensation for regulatory takings, hinges on some issues that seem to go

15. This view was forcefully articulated in a speech given in 1814 by Daniel Webster, who was instrumental in defeating a proposal to use a draft to fight the War of 1812. *See* Daniel Webster, Speech at the U.S. House of Representatives (Dec. 9, 1814), *in* LETTERS OF DANIEL WEBSTER 56-68 (C.H. Van Tyne ed., 1902), *reprinted in* SELECTED READINGS, *supra* note 3, at 633, 638 ("For the conquest of Canada, the people will not enlist; & if they would, the Treasury is exhausted, & they could not be paid.").

16. *See, e.g.*, FLYNN, *supra* note 4, at 1-8 (providing a general statement of this view).

17. U.S. Congressman Pete McCloskey (R.-Cal.) was a persistent advocate for such programs. *See* Pete McCloskey, *Argument for National Service, in* REGISTRATION AND THE DRAFT, *supra* note 3, at 173, 177. *But cf.* Bobbitt, *supra* note 3, at 323-24 (concluding that such programs would be unconstitutional takings).

beyond conventional economic analysis.

III. LACK OF COMPENSATION AND SUBSTITUTION EFFECTS

Between 1940 and 1973, the United States employed the draft as an important means of obtaining military personnel. If a brief lapse in 1947 is ignored, the thirty-three-year duration of this draft was unprecedented in American history. The draft had been used by both sides during the Civil War (in which it was notoriously unpopular) and during World War I, but it was eliminated soon after each conflict.

The draft was compulsory in much the same sense that eminent domain is compulsory. However, although government is required to compensate landowners whose land has been taken through eminent domain, no court of law has required the government to pay "just compensation" to draftees.[18] Drafted soldiers were paid a wage well below what would have been required to induce many to volunteer. Indeed, President Nixon's Assistant Secretary of Defense pointed out:

> For 13 years, 1952 to 1964, military first termers received *no* pay increases—[even though this was] a period in which virtually every wage and salary earner in our society received at least annual pay adjustments. Until their pay hike of November 1971, the total compensation of military first termers—basic pay plus allowances—was $600 a year less than the minimum wage.[19]

Except during World War II, draftees did not constitute a majority of military personnel. Such counts understate its effect, however. Many men volunteered for a particular branch of the military largely to avoid being drafted and thereby risking assignment to the infantry. Such "reluctant volunteers" have their parallel in modern regulatory schemes. It is likely that many landowners who offer to dedicate portions of their land for wildlife habitat or public open space do so in the hope of

---

18. *See* Leon Friedman, *Conscription and the Constitution*, 67 MICH. L. REV. 1493, 1494-95 (1969) (arguing that the draft itself is unconstitutional and that the Supreme Court has erred in refusing to find it so).

19. Roger T. Kelly, *Letter to the Editor*, THE NEW REPUBLIC, Apr. 21, 1973, at 30. In-service training and post-service educational benefits did not offset the underpayment of conscripted soldiers. The civilian wage earnings of white men who were drafted in the early 1970s were about fifteen percent lower a decade later than those of white men who were not drafted. *See* Joshua D. Angrist, *Lifetime Earnings and the Vietnam Era Draft Lottery: Evidence from Social Security Administrative Records*, 80 AM. ECON. REV. 313, 330 (1990).

forestalling more drastic dedications that otherwise might be compelled by regulation.

Criticisms of the draft by economists center on two inefficiencies, which I label the "substitution inefficiency" and the "misallocation effect."[20] The substitution inefficiency posits that by paying soldiers wages below average wages in civilian occupations, the military would generally overuse labor. Any soldier of the draft era can recount endless hours spent waiting around, doing make-work, or performing tasks—such as washing dishes—that had long since been done by machine both in the private sector and in those government agencies that had to pay competitive wages. During the draft era, soldiers also performed many nonmilitary tasks, such as office work, that are performed by civilian workers in today's all-volunteer army.

The more worrisome substitution was the overuse of labor relative to capital in dangerous tasks. The military produces a good—national defense—with both capital and labor. The artificially lower price of labor probably caused military planners to use too little weaponry and other machinery and too much labor. More lives thereby were put at risk in military actions.

To be sure, the draft did have some offsetting tendencies. Some American observers suggest that the randomness of the draft may have caused the military to be more careful of life. By drafting and thus putting at risk at least a few sons of politically influential families, the military might have been induced by political considerations to be more careful of life than otherwise.[21] In addition, the literature on the influence of the "military industrial complex," which supplied capital, suggests a bleak offset to the tendency to underutilize capital. If the suppliers of military capital did have excessive influence, they might have sold more military capital than otherwise.

There is little need to speculate about the net effect of the foregoing tendencies, however, because the United States has

---

20. For a balanced and straightforward graphical exposition of the substitution inefficiency and misallocation effect, see Edward F. Renshaw, *The Economics of Conscription*, 27 S. ECON. J. 111, 112-13 (1960). For a more passionate work by economists who make many of the same points, see RYAN C. AMACHER, JAMES C. MILLER III, MARK V. PAULY, ROBERT D. TOLLISON, & THOMAS D. WILLET, THE ECONOMICS OF THE MILITARY DRAFT (1973), *reprinted in* SELECTED READINGS, *supra* note 3, at 347-89. *See also* POSNER, *supra* note 2, at 480-81.

21. *See* Joseph A. Califano, Jr., *Doubts About an All-Volunteer Army*, THE NEW REPUBLIC, Mar. 3, 1973, at 9.

had an all-volunteer military since 1973. At least one economic study of military production functions indicates that the end of the draft raised wages, inducing a shift towards capital and away from labor.[22] This shift was in addition to the ongoing and long-standing development of missiles and other capital-intensive weaponry. Apparently, the most recent draft did cause the military to overuse labor.[23]

The overuse of underpaid labor was also evident during the Civil War. After the battle of Gettysburg in 1863, it became apparent that the Confederacy needed more soldiers if it hoped to win the war of attrition. Judah Benjamin, Secretary of State for the Confederacy, seriously contemplated the use of slaves to shore up the ranks. He soon realized, however, that this was financially infeasible. Slaves could be hired for military service from their masters, but the going rate for slaves (paid to their masters, of course) was $30 per month, while Confederate soldiers were paid only $11 per month.[24] It is reasonable to conclude that had slaves been subject to the military draft, more of them would have been employed by the military. As it was, slaves' status as property protected their lives, at least from battle deaths.

The parallel problem in modern regulation is that government agencies overuse private property in the service of environmental protection.[25] The Fish and Wildlife Service (FWS) is an obvious example. Rather than discharge its obligation to preserve endangered species by building zoos or establishing parks and reserves, the agency often requires that

---

22. *See* Larry DeBoer & Paul R. Blackley, *The Structure of Defense Production in the United States, 1929-87*, 1 DEF. ECON. 85 (1990). On the effect of this shift in the Persian Gulf War, see P.J. O'ROURKE, GIVE WAR A CHANCE: EYEWITNESS ACCOUNTS OF MANKIND'S STRUGGLE AGAINST TYRANNY, INJUSTICE AND ALCOHOL-FREE BEER 187-88 (1991).

23. *Cf.* Donald L. Martin, *The Economics of Jury Conscription*, 80 J. POL. ECON. 680, 691 (1972) (finding a similarly excessive use of labor in our major remaining system of conscription, jury duty).

24. *See* EVANS, *supra* note 12, at 232-34. Benjamin also noted other arguments against using slaves as soldiers, among them being the question of loyalty to a cause that enslaved them. Emancipation conditional on military service would reduce that problem, but emancipation would require compensation to slave owners and would also put into question the entire legitimacy of slavery. When Benjamin in late 1864 did publicly propose emancipation of slaves (without compensation to owners) in exchange for military service, one Georgia leader summed up the objection: "If slaves will make good soldiers our whole theory of slavery is wrong." *Id.* at 289.

25. I focus here on environmental protection rather than other regulatory burdens because it is the touchstone of most current debate.

private landowners not disturb the species' native habitat, regardless of the cost to landowners.[26] More generally, regulators without the discipline of having to pay for property devaluations are not inclined to accept any risk to the environment. They prefer to disallow any development that poses even the most speculative or remote risk to their environmental mission. The result is more land devoted to environmental preservation than would occur if compensation were the rule.

The evidence for the foregoing proposition is necessarily anecdotal, because only in a few instances have courts required monetary compensation for excessive regulation. Thus there is no national before-and-after experiment, as there was for the draft. The anecdotes, however, support the substitution inefficiency hypothesis. In *Lucas v. South Carolina Coastal Council*,[27] the Supreme Court held that the owner of two oceanside lots that were rendered undevelopable by the State's beach-protection regulations was entitled to compensation where no economic use remained and no independent "harm-prevention" rationale for the regulation could be discovered outside of the legislature's declaration of harm. In the subsequent settlement of the case, South Carolina acquired title to the lots. The State then sold them as building sites to a developer for the very use it had sought by regulation to prevent. Moreover, the State spurned a financial offer for one of the vacant lots by the owner of a nearby house who said he wanted to keep it open in order to preserve his view.[28]

Evidently, the South Carolina Coastal Council, which had strenuously argued that all beachside development was

---

26. *See* Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings and Incentives*, 49 STAN. L. REV. (forthcoming Apr. 1997) (manuscript at 6, on file with author) ("Both in identifying what species to protect and regulating habitat modification, the FWS is supposed to consider biological needs not economic costs."). Thompson further points out that "political processes have modified this rule, but they have hardly reversed its effect." *Id.*

27. 505 U.S. 1005 (1992).

28. *See* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 61 (1995). The neighbor's offer was spurned because it was only $315,000 for one of the lots, which was about twenty percent below the State's asking price. The lots were approximately one-third of an acre in size. For useful maps of the site and other background, see James R. Rinehart & Jeffrey J. Pompe, *The Lucas Case and the Conflict over Property Rights*, *in* LAND RIGHTS: THE 1990S' PROPERTY RIGHTS REBELLION 67 (Bruce Yandle ed., 1995). For photographs of the site and a first-person account, see DAVID LUCAS, LUCAS VS. THE GREEN MACHINE (1995).

detrimental to the public welfare, was unwilling to leave the lots in an undeveloped condition when the State's money was on the table. The fact that the two lots were among the last spaces along a large and densely developed beachside resort underscores the Council's original inclination to ignore opportunity costs when it thought it was safe from having to pay the landowner (and thus safe from having to bear that cost directly).

The standard developed in *Lucas*, the only modern Supreme Court regulatory takings decision to result in monetary compensation, in fact is highly deferential to regulators. Even total economic wipeouts do not require compensation awards if there is evidence, independent of the legislature's simple declaration of harm, that private use constitutes a nuisance or otherwise is contrary to the State's common law of property. That such a low standard occasioned widespread anxiety on the part of regulatory agencies and environmentalists[29] is itself a testament to the substitution of low-cost regulation for formal acquisition that is endemic to modern land-use and environmental laws.

IV. RANDOMNESS AND MISALLOCATION OF RESOURCES

The other economic problem with the military draft is its randomness, which results in the misallocation effect. The draft placed many men who had a higher value in civilian work into lower-valued military work.[30] Economists have analyzed this situation as if there were a lottery to decide which men would be drafted. It is true that this random method was most prominently used in the waning days of the draft in the early 1970s, but even in the 1950s, when the Selective Service System was more selective, there was a strong element of randomness. A well-known example of the misallocation problem is the treatment of Elvis Presley, who was drafted into the U.S. Army and assigned to drive a truck for two years.

29. *See, e.g.*, DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK 22 (1994).

30. Every time I have seen this statement in the economics literature, I have wondered whether it was colored by the author's own experience with the draft. I will disclose that I was in the U.S. Army in the late 1960s as a result of the draft. That I was not sent to Vietnam is the most positive statement I can make about the whole experience.

The problem was not that the military was entirely insensitive to the skills of draftees. It did attempt to place draftees into military jobs for which they were suited, and it rewarded "reluctant volunteers" by allowing them to choose a branch (Army, Navy, Air Force, or Marines) and, to some extent, their occupation. The problem was that the military chose whom to draft more or less randomly, so that it missed many men (and all women) who would have been better suited for military occupations but who refused to join because of low pay. Instead, it selected many people who had to forego high wages in civilian life (or who greatly disliked military life).

It is important to distinguish the misallocation effect from the substitution effect, which, as previously described, is also induced by setting military wages below a market-clearing level. The two selection inefficiencies are not the same. To see why, consider the possibility that the optimal capital-to-labor ratio in the military is fixed exogenously, so that there is no systematic substitution of labor for capital because of low wages. A random draft still causes social loss because many workers with highly-productive civilian jobs (or whose aversion to military life creates a high level of disutility) will be taken instead of those workers with low-wage civilian jobs (or those who don't mind military life).[31]

The misallocation effect is also present in modern regulatory regimes. Most environmental agencies do not consider the opportunity cost of the land that is conscripted as a wildlife, wetlands, or scenic preserve. Indeed, most government agencies pride themselves on their scientific criteria for designating environmentally sensitive lands—and the science employed does not include economics.[32] Thus, land that harbors an endangered species is not exempted from regulation because it is adjacent to an urban area and is ripe for housing

31. *But cf.* POSNER, *supra* note 2, at 583. Posner regards randomness of selections as a virtue in the closest remaining civilian analogy to the draft, jury service. He explains that assembling jurors by offering a market-clearing wage would result in low-wage jurors and distort the diversity of opinions and backgrounds that he regards as a virtue of the jury system. This argument mirrors the defense of the military draft as a democratizing institution. *See, e.g.*, FLYNN, *supra* note 4, at 262. Posner does not offer any explanation for why conscripted jurors should not be paid their individual opportunity cost, as is ordinarily done for real estate conscripted through eminent domain.

32. *See, e.g.*, Andrew Metrick & Martin L. Weitzman, *Patterns of Behavior in Endangered Species Preservation*, 72 LAND ECON. 1, 1 (1996) ("Indeed, once a species is placed on the endangered species list, cost-benefit analysis is practically precluded.").

development.[33]

The misallocation effects of the draft and of environmental regulation seldom reach the extreme of a truly random lottery. The draft did take only young men, who were arguably the best soldiers and who usually had lower civilian wages than older workers. The selection standards deferred most students until graduation and usually exempted fathers and married men. Men in certain occupations, such as school teachers, scientists, and, in wartime, workers in defense industries, were often exempted on a case-by-case basis by local boards with discretion as to whom to take. The draft also exempted conscientious objectors, so that those with arguably the greatest distaste for military activity would not be taken. Likewise, most environmental regulators are usually not quite as insensitive to opportunity costs as the South Carolina Coastal Council was in *Lucas*. Most environmental administrators have some discretion. Nevertheless, a lottery is not a bad metaphor for either process, except that in real lotteries people are not required to play without their consent.

V. DEADWEIGHT LOSS OF TAXATION VERSUS MISALLOCATION EFFECTS

The two inefficiencies of the draft—the excessive substitution of labor for capital and the misallocation of high-wage workers into the military—are well known. However, only a few commentators point out that both of these problems diminish as the size of the military increases so that it takes a large fraction of the eligible population.

The size exception to the economic inefficiency of the draft seems to have been first remarked upon by none other than one of the most implacable opponents of the draft, Milton Friedman.[34] When the draft takes nearly everyone who would be appropriate for military service, the misallocation effect is nearly

33. Local opponents of housing development might eagerly seek that designation, but that is another story. *See, e.g.*, BERNARD FRIEDEN, THE ENVIRONMENTAL PROTECTION HUSTLE 7-8 (1979). The possibility that a landowner's property will be subject to special environmental attention because the owner seeks to develop it switches the inefficiencies from the misallocation effect (due to the random draw) to the substitution effect (substituting low-cost regulation for eminent domain in acquiring open space).

34. *See* Milton Friedman, *Why Not a Volunteer Army?*, 4 NEW INDIVIDUALIST REV. 3 (1967), *reprinted in* SELECTED READINGS, *supra* note 3, at 621, 623.

eliminated. During an all-out war, most high-wage young men should nonetheless serve in the military, according to this theory. There is no randomness (except in defining the limits of the eligible pool), because everyone is drafted in such a situation. Moreover, such an emergency is likely to require mobilization of nearly all suitable capital and labor, so that relative prices of capital to labor are not important in selecting the mix.

There is yet another side to the economic analysis of the draft that favors its use when a large fraction of the population must serve. Taxes needed to pay soldiers to volunteer impose a deadweight loss on the economy. When military forces are a small fraction of the labor force, the civilian tax rates needed to bring forth an all-volunteer army are modest. When the size of the armed forces grows, however, tax rates need to be raised, leading to increased deadweight loss to the civilian economy. Avoidance of unreasonably large deadweight loss is an additional reason to resort to the draft when a large fraction of the population must serve.[35]

Two points about the deadweight loss of taxes are noteworthy. First, the amount of tax collected is not a measure of deadweight loss. Simply because high income tax rates take a large fraction of a civilian's earnings is not an efficiency reason to transfer the burden of the tax—the lack of compensation—to a person who serves in the army. The true economic loss from high tax rates is measured by the avoidance measures (legal and otherwise) that people subject to higher tax rates undertake in order to reduce their tax bills. People subject to higher income taxes may work less, either choosing more leisure or undertaking more do-it-yourself production. The value of production foregone as a result of this avoidance is the deadweight loss of the tax.

Second, most economists believe that the proportion of deadweight loss in any tax will increase with the rate of taxation.[36] A doubling of tax rates (not an implausible scenario during wartime) almost surely more than doubles the deadweight loss of taxation. Of course, the draft itself is, for

35. *See id.* at 625.

36. *See, e.g.*, RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 284 (1989).

many draftees, a very high rate of tax, and it is apt to cause them to engage in wasteful avoidance activities. This form of tax avoidance does not increase with the size of the army, however, because the individual draftee's "tax rate" remains constant.[37]

The foregoing considerations are summarized in Figure 1 below.[38] The vertical axis is measured in dollars per soldier. The horizontal axis is the percent of the eligible population that is inducted into the military.[39] At the far right-hand side, all eligible men are inducted, regardless of whether they are drafted or lured by pay to volunteer. This section assumes that the demand for soldiers is the same under a draft and under a volunteer system, which precludes concern with the substitution inefficiency. Figure 1 examines only the misallocation effect and the deadweight loss of taxation.

The upward-sloping line in Figure 1 represents Marginal Deadweight Loss (*MDWL*). *MDWL* is the cost to society of using the best available tax-financing to obtain volunteers. This cost is initially low because the small number of soldiers needed requires only modest civilian tax rates. It rises with the number of volunteer soldiers who must be attracted. During a major war, a large number of soldiers are required, and the *MDWL* of the high taxes needed to pay them are quite large.[40] Patriotic appeals may reduce this deadweight loss by encouraging volunteer soldiers and by inducing civilians to donate time and money to war efforts.[41] It is also possible that during war, high

37. The "tax rate" in this case is the difference between military pay and the draftee's civilian pay.

38. *See infra* p.37. The subsequent analysis in this section is a distillation of the model developed in Dwight Lee & Richard McKenzie, *Reexamination of the Relative Efficiency of the Draft and the All-Volunteer Army*, 58 S. ECON. J. 644 (1992).

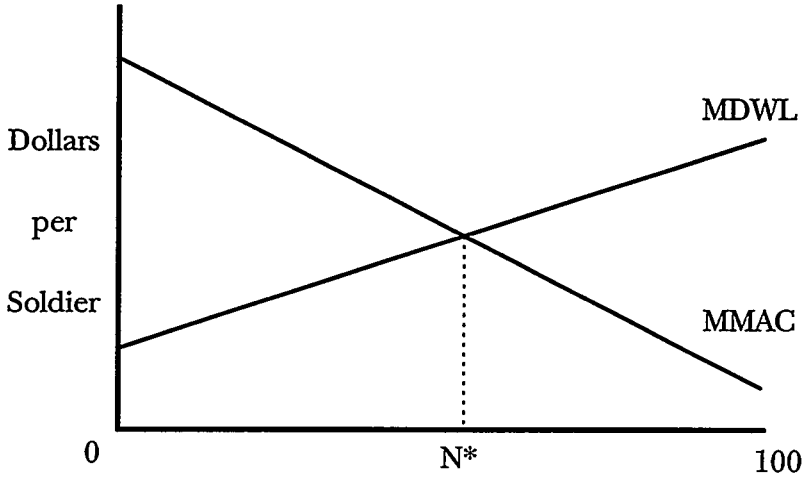
39. Let us assume that the eligible population is mainly comprised of post-adolescent young males, without chronic diseases or disabilities, who pass some minimum intelligence test. The inefficiencies of neglecting to compel service by women, older men, and people with disabilities or low intelligence will not be considered here.

40. It is likely that the wages paid per soldier would also rise during a war, due to the greater risk of injury. For any given size of army, there would thus be a family of MDWL lines, with the higher lines occurring during a war. One can neglect this effect, as I did in Figure 1, by invoking one of two assumptions: (1) The risk of any war is entirely unforeseeable and its duration is randomly determined, so that volunteers (who are assumed to serve a fixed length of time) have the same expectation of injury regardless of whether a war is currently being fought; (2) The risk of war (and resulting injury) is directly proportional to the size of the army, so that the single rising MDWL curve incorporates the higher civilian taxes caused by having to pay more per soldier and for more soldiers.

41. World War II liberty bond sales are an example of the latter type of donation.

civilian taxes cause less deadweight loss than the same tax rates cause during peace. Nevertheless, it is reasonable to assume that *MDWL* rises continuously with the number of soldiers who must be induced to volunteer.

FIGURE 1. DEADWEIGHT LOSS AND MISALLOCATION COSTS



The downward sloping line in Figure 1 represents Marginal Misallocation Costs (*MMAC*). These are found by adding the net economic losses caused by selecting soldiers through a random draft and paying them only a subsistence wage.[42] These losses include the inefficiencies of selecting high-productivity civilians to do lower-productivity military work, and the draft avoidance and shirking that arise from the government's attempt to obtain people's labor on a less than voluntary basis.

MMAC initially are very large. When the size of the army is small, the market-clearing military wage (the hypothetical benchmark for this curve) is relatively modest. There are some

42. The analysis could be made more complicated by supposing that draftees' wages could be set in such a way as to minimize the difference between Deadweight Loss and Misallocation Costs for any percent of the eligible population taken by the draft. Such an exercise seems unlikely to upset the point made here, and would assume a degree of political rationality that would have made most debates about the draft unnecessary.

people for whom military life is not unpleasant or who otherwise have a comparative advantage in soldiering. Thus, the difference between average civilian wages and military wages is largest at this point. A truly random draft would select an army whose opportunity cost was approximately the average civilian wage of those eligible for the draft.[43] The large difference between average civilian wages and average military wages under a draft is a measure of the misallocation cost.[44]

As the size of the army increases, however, the difference between average civilian wages and the market-clearing military wage narrows.[45] The hypothetical, efficient military wage rises as more soldiers are required, while the average civilian wage does not rise as fast.[46] Hence, the difference narrows and *MMAC* fall. They reach zero in the extreme case hypothesized by Milton Friedman, in which all eligible men are taken. It also seems likely that draft avoidance declines as the size of the military grows, if for no other reason than that draft evaders are more obvious.

The intersection of these two curves, N^*, determines whether it is efficient to have a draft or an all-volunteer force. To the left of N^*, the marginal misallocation costs of using a draft are greater than the deadweight loss of paying taxes for an all-volunteer force. In this situation, when only a small fraction of the eligible pool is required, an all-volunteer force is economically preferable. To the right of N^*, however, the draft is less costly to society. In this region, the misallocation costs of having a draft are less than the deadweight loss of high rates of taxation.

Lee and McKenzie, whose model is largely described here, make a rough calculation of the costs involved and conclude

43. To be more precise, the expected wage of a truly random draftee would be the median wage of those eligible for the draft, since there is an equal chance for high- and low-wage individuals. Only if the distribution of wages is symmetrical would the median equal the mean wage.

44. This measure is a lower bound measure of the misallocation, because it does not account for any personal distaste for military life not offset by military wages and benefits.

45. Note that the market-clearing military wage is never paid, because our example assumes in drawing the *MMAC* line that there is always a draft.

46. The civilian wage would probably also rise with a much larger army because there would be fewer civilian workers left. This rise is smaller than the rise in market-clearing military wages, however, because a larger pool of workers (women and older men) can be employed to satisfy nonmilitary production.

that N^* was about 55% of the cohort of men aged 18 to 26.[47] They point out that over 70% of the American male cohorts born between 1922 and 1927 actually served in World War II. But during Vietnam, near the end of which the draft was eliminated, far less than 50% of the eligible male cohorts served. Thus, according to Lee and McKenzie, the draft was an inefficient means of obtaining soldiers for that latter conflict.

The persistence of the draft among all North American Treaty Organization (NATO) countries except Britain is also consistent with this analysis. Most NATO countries require a larger fraction of their populations to maintain military forces, and most also have higher tax rates. Switching to an all-volunteer force might not be economically efficient in many countries. For example, in Israel it is rational for almost all young people to be drafted, because the population is small and the level of taxation, already high for other reasons, would be overwhelming if soldiers were required to be paid a market-clearing wage. Israel may endure emigration—or lack of immigration—by young people because of the draft, but a similar migration problem by potential taxpayers would exist if Israel instituted even higher tax rates to pay for a volunteer army.

VI. SETTLEMENT COSTS VERSUS DEMORALIZATION COSTS

The purpose of describing the factors that enter into the efficiency of military conscription is to set up a comparison with the efficiency considerations in regulatory takings. The most widely invoked economic framework for analyzing takings was presented by Frank Michelman.[48] It considers a government project producing benefits, *B*, that accrue to members of the public in more or less equal measure and for which the costs of charging each member are prohibitive. In other words, *B* is a pure public good, the textbook paradigm of which is national defense.[49] Against these benefits, Michelman proposed to weigh three distinct categories of costs. The most pedestrian category is *C*, the immediate, market-valued opportunity costs of the resources devoted to the project. The *C* costs remain regardless

47. *See* Lee & McKenzie, *supra* note 38, at 650.

48. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

49. For a description of the characteristics of a public good, see Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POL'Y 85, 93 (1996).

of whether compensation is made.

The other two costs are contingent on whether compensation is expected to be made to the owners of the factors accounted for by *C.* If the owners are not compensated, they and society as a whole endure *D,* demoralization costs. These costs may be divided into two components, disappointment costs and precautionary costs. Resource owners' disappointment costs are the immediate disutility of being coerced to surrender what they thought was theirs. Precautionary costs are the net present value of future production foregone both by the disappointed owners and by others who alter their plans as a result of the anxiety that the government might again snatch the fruits of their investments without paying for them.

Precautionary anxiety does not necessarily cause underinvestment. Owners who see that a neighbor's undeveloped land was devalued by open-space regulation may rush to invest in a building before the regulations are applied to them, assuming that once the capital is in place they must be compensated for any removal. However, such shifts in the timing of investment are also inefficient. Housing developed solely to beat the anticipated rezoning or to preempt official searches for endangered species may be left vacant for a time because demand for it has not yet materialized. Thus, the long-run manifestation of precautionary costs arising from demoralization is best called suboptimal investment.[50]

If the government offers compensation for takings, demoralization costs are avoided for the most part.[51] When it becomes known that compensation will be made, however, the government endures settlement costs, *S.* These are the transaction costs of making compensation. In the eminent domain context, the most obvious settlement costs are those

50. Recent economic models have found that suboptimal development induced by uncompensated regulations may be large. *See* Timothy J. Riddiough, *The Economic Consequences of Regulatory Takings Risk on Land Value and Development Activity,* 41 J. URB. ECON. (forthcoming Jan. 1998).

51. Of course, some sources of *D* remain even if full compensation is made simply because there is no market equivalent possible. This issue is neglected in this Article because it is endemic to all remedies that involve monetary damages, and because the Constitution has cut this knot by the clear implication that just compensation is the only remedy. For some historical evidence that the Framers were aware that monetary compensation was low but nonetheless deliberately chose it rather than consent, see William A. Fischel, *The Offer/Ask Disparity and Just Compensation for Takings: A Constitutional Choice Perspective,* 15 INT'L REV. L. & ECON. 187, 193 (1995).

involved in negotiating with condemnees and, if negotiations fail, conducting and participating in an eminent domain trial. Other important settlement costs include the deadweight loss of additional taxes to finance the compensation and the negotiations, and the losses from moral hazard on the part of property owners who anticipate that compensation will be made.[52]

Moral hazard arises when owners anticipate that their property may be taken, but are dissuaded from efficient actions (such as disinvestment) by the prospect of compensation.[53] This type of moral hazard is well known in the contract and tort literature that deals with efficiency of legal remedies.[54] When the building contractor and the prospective owner-occupant realize that the new house may not be completed at the promised time, a judicially-imposed remedy for a breach of contract should take into account the prospective occupant's ability to avoid the harm of the breach by not making plans on its timely completion. Similarly, the owner of a completed building who knows (with some probability) that the government will take it and demolish it for a highway may overinvest in maintenance in order to enhance the compensation award.[55]

The economic efficiency criterion for government projects is, within Michelman's framework, to maximize the expression

52. In addition, Daniel Farber has suggested that settlement costs include losses from disutility on the part of *environmentalists* who may feel disappointed that people they regard as undeserving are being compensated. *See* Letter from Daniel Farber to William A. Fischel (Mar. 13, 1996) (on file with author). Because this disutility arises when compensation is made, it should be calculated as a settlement cost rather than a demoralization cost. Such environmentalist disutilities do not simply cancel out property-owner demoralization. The money needed to pay compensation is raised from all taxpayers, not just from environmentalists. If environmentalists' feelings are widespread, however, the regulation would not warrant compensation under the "normal behavior" standard advanced later in this section.

53. The baseline for efficient actions is the conduct owners would undertake if their property were protected by a property rule—the right to just say no—rather than, as in eminent domain, a liability rule. *See* William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269, 275 (1988).

54. For a discussion that makes the analogies explicit, see Robert Cooter, *Unity in Tort, Contract and Property: The Model of Precaution*, 73 CAL. L. REV. 1, 19-29 (1985). The first systematic application of moral hazard to takings by economists is Lawrence E. Blume, Daniel L. Rubinfeld, & Perry Shapiro, *The Taking of Land: When Should Compensation Be Paid?*, 99 Q.J. ECON. 71 (1984).

55. With property-rule protection, owners would not overinvest, since their bargaining position vis-à-vis the highway department would be unimprovable—owners could hold out for their reservation prices regardless of whether their existing buildings had deteriorated or not, and they would have no incentive to overmaintain them.

$B - (C + D + S)$ over all projects.[56] One reason that analogies between takings and other areas often are not pursued is that the discussion gets hung up on comparing demoralization costs with settlement costs in the usual context of eminent domain and regulation. Most discussions of the just compensation issue usually accept that government projects are chosen on $B - C$ (benefit-cost) lines. In a more general context, however, the obligation to pay may cause the agency proposing the project to conclude that it is not worth doing at all, as the behavior of the South Carolina authorities after the settlement of *Lucas* so clearly illustrated.

Michelman's introspective list of sources of demoralization costs does, however, include the possibility that benefits do not exceed costs.[57] Uncompensated government actions are especially demoralizing when settlement costs are low, because people feel worse about not being compensated if it would have been easy to avoid amoral redistributions; when losers perceive that their burdens are large relative to others, so that there is disproportionate impact; when the efficiency gains of the project itself are so doubtful that the project looks like a thin veil for unprincipled redistribution; when the loss is not likely to be recouped by reciprocal benefits tied in some way to the project;[58] and when losers lack the political power necessary to extract concessions to mitigate their future burdens.

The foregoing analysis is generally familiar to students of the takings issue. The variation proposed here initially focuses on

---

56. It might be objected that the separation of C from other costs that is proposed here is too neat. It is probable that the magnitude of C will be affected by the extent of compensation that is offered. However, property owners may suspect that compensation is not offered precisely in order to make it appear that $B>C$. This in itself is a source of demoralization costs. One way to break this circle is to calculate C as the resource cost that would arise in a world where settlement and demoralization costs were zero. For example, assume that all of the resources involved in C are already owned by the government, so that neither S nor D can arise. C is thus the true opportunity cost of the resources, assuming the government is aware that it could sell them or use them for a different project.

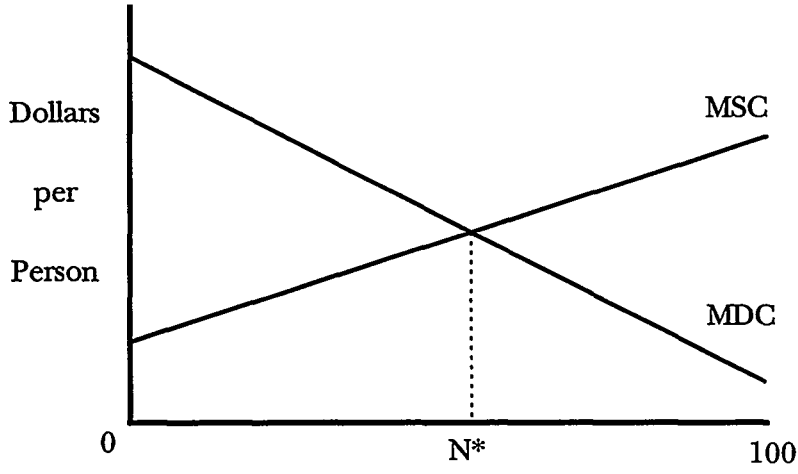
57. *See* Michelman, *supra* note 48, at 1217-18; *see also* FISCHEL, *supra* note 28, at 151-57 (discussing Miller v. Schoene, 276 U.S. 272 (1928)).

58. *Compare* Selective Draft Law Cases, 245 U.S. 366, 378 (1918) ("[T]he very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it.") (citation omitted) *with* Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922) (finding acceptable a regulation—at issue in a previous case—that imposed a duty to leave coal in place in adjacent mines for their mutual safety, on the grounds that the regulation involved an "average reciprocity of advantage").

the disproportionate impact component of demoralization costs, which is most clearly (and inversely) related to settlement costs. To be specific, it is assumed that the *marginal* settlement and demoralization costs usually change as a larger number of owners of the resource in question are subject to the government's regulation. This can be explained with reference to Figure 2 below.

Consider, for example, government regulation of visible smoke emissions from private property. The horizontal axis in Figure 2 measures the percentage of smoke eliminated. The units, however, are owners of property rather than amount of smoke. That is, the first five percent of smoke elimination comes entirely from that small group consisting of the property owners who account for five percent of the smoke.[59]

FIGURE 2. SETTLEMENT COSTS AND DEMORALIZATION COSTS



59. This ordering is, of course, an odd way for an economist to set up the problem. The more familiar way to conceive of a five percent smoke reduction would be to imagine that the first smoke reduction would be done in a way such that the greatest net benefit would be achieved. Smoke near dense residential areas and hospitals is implicitly the first to target. However, even this more rational process usually imposes substantial costs on some owners and none on others, so that a disproportionate allocation of the burden still exists. The example used here is intended to clarify the result of that disproportionate burden-bearing by using an even more extreme case.

Figure 2 is intended to capture the possibility that identifiable owners of property bear disproportionate costs in reducing smoke when only some is being reduced. Disproportionate burden is a source of demoralization cost.

The Marginal Settlement Cost (*MSC*) curve rises in Figure 2 for much the same reason that *MDWL* rises in Figure 1. In order to quell demoralization costs, the government must provide just compensation—and the government must raise taxes in order to finance this compensation. When only a few parties need to be compensated for the sacrifice, the deadweight loss of taxation is small because the taxes are low.[60] In addition, the other elements of settlement costs are apt to be low. The moral hazard problem is more easily controlled, because difficulty in dealing with dubious claimants for compensation is reduced when only a few are obliged to comply.

The Marginal Demoralization Cost (*MDC*) curve starts high and then declines. When only a few are selected to bear the cost of pollution control, the burden is especially disproportionate, as the graph illustrates. However, other sources of demoralization costs (from the Michelman list) arguably are also high toward the left side of Figure 2. Settlement costs (mainly the deadweight loss of taxation) are obviously low when only a handful of owners are obliged to desist. But demoralization costs from the feeling of political powerlessness are high, because the small size of this group leads those in it to suspect that they were selected because they have less political influence. Reciprocal benefits are apt to be small when few of one's neighbors are obliged to sustain the same burden. Official reports that the regulations meet a benefit-cost test will be treated more skeptically when many others in a similar situation are exempted. In short, demoralization costs of uncompensated regulation are, like the misallocation costs of the draft, especially high when only a few are selected to bear the burden.

I deliberately began with an example that involves an environmental "harm," namely pollution, to make a point. One reason that smoke abatement is not regarded as compensable is that nowadays nearly all property owners are obliged to refrain from emitting visible smoke that might irritate their neighbors.

60. Recall that the deadweight loss of taxation rises more rapidly than the rate of the tax. *See supra* note 36 and accompanying text.

That is to say, at present we are mostly to the right of N^*, so that compensation is not called for under the Michelman utilitarian criteria. The settlement costs (including the deadweight loss of higher taxes) of compensating everyone to refrain from polluting the air would be enormous, and the demoralization costs of conforming to what now is regarded as normal behavior—not polluting the air—are trivial.

This was not always the case. In *The Economics of Welfare*, A.C. Pigou discussed the spillover problem of smoke from factories and used it as an example of a divergence between social and private cost.[61] Modern economics refers to this divergence as an externality. Pigou advocated legislation to abate smoke by *subsidizing* factory owners. In *The Problem of Social Cost*, Ronald Coase infers from this that Pigou regarded emitting smoke as something that owners had a right to do, and that foregoing that right required compensation in the form of subsidies.[62] This seems consistent with the present analysis. When smoky chimneys are the norm, imposing a special burden on some should be compensable.

Another example that can be examined in this context is air rights with respect to aircraft. Nearly everyone's air space is invaded by high-flying aircraft. Despite the *ad coelum* rule,[63] private citizens do not have a right to exclude from their property airplanes that are flying at a great altitude above the earth's surface. One reason these takings are uncompensated is that it is highly efficient to forego payment. The benefits of the invasions almost always exceed the minuscule costs, and the settlement costs of making all owners whole would be immense.

The demoralization costs of uncompensated high-altitude overflight are correspondingly tiny. There is no disproportionate burden because almost everyone must endure such invasions, and there are clear reciprocal benefits, because most people fly in airplanes at some time and nearly all benefit indirectly from the lower product prices facilitated by a system of low-cost air transport. And if the high-altitude invasions threatened to become serious—as they did when ear-splitting

61. *See* A.C. PIGOU, THE ECONOMICS OF WELFARE 184 (4th ed. 1932).

62. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 35 (1960).

63. The *ad coelum* (literally, "to heaven") rule formerly held that landowners had a right to control not only their land but also all the air rights above it. The introduction of air flight caused the rule to be limited as described in the text.

Supersonic Transport (SST) was proposed in the 1970s—property owners are aware that the democratic political process will take their concerns into account. The American political process, not a court of law, was responsible for seeing to it that the SST remained an expensive Anglo-French toy with which to cross the oceans, not the North American continent.

A final example for which Figure 2 can be employed is the more conventional land-use issue of suburban zoning.[64] At the right-hand side of Figure 2, all landowners, regardless whether their property is already built up or yet to be developed, are subject to the same standards (e.g., the same minimum lot size). In this situation, demoralization costs are low. No one is singled out, reciprocity is obvious, and efficiency is arguable from comparisons to privately planned communities. Settlement costs are correspondingly high. The costs of compensating landowners who desire more intensive development than is normal for the rest of the community would be prohibitive, given the deadweight loss of taxation. Indeed, the current lack of activity on national takings legislation reflects the fact that the same members of Congress who want to compensate for regulation also want to lower taxes.

On the left-hand side of Figure 2, however, where only a few owners of undeveloped land are subject to the rigors of regulation, and those in control of the political machinery—resident homeowner-voters—are not, the situation is reversed. Both the small size of the group especially burdened by large-lot regulations and their political powerlessness in the face of majoritarian sentiment indicate that settlement costs are low and demoralization costs are high.

VII. DEMORALIZATION COSTS OF TAKINGS AND THE DRAFT

The development of economic arguments for and against uncompensated takings of civilians for military purposes and of land for environmental purposes is intended to show the generality of the Michelman analysis. It can also throw more light on the economic analysis of military conscription.

64. The analysis follows Professor Ellickson's model. *See* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977) (discussing the possible effect of constitutional doctrine and economic theory on civil actions seeking to restrict suburban housing development).

The analysis of the costs of conscription described in Sections IV and V had a denatured quality to it. The two major costs are the foregone private productivity of randomly drafted soldiers (the misallocation effect) and the overuse of labor relative to capital (the substitution inefficiency). In contrast, analysis using the notion of demoralization cost not only captures both of those costs but also incorporates a wider set of reasons for dissatisfaction with the draft. The utility of such an analysis is suggested by the following puzzle.

Proposals to end the draft became most serious during the 1960s, a period when the size of the army and the number of draftees dramatically increased.[65] Based on the conventional efficiency analysis summarized in Figure 1, the draft should have been more at risk during the 1950s, when the army was small, than during the 1960s, when it was growing. The misallocation costs summarized by Figure 1 were going down in the late 1960s, not up. Furthermore, taxes would have had to rise to pay an all-volunteer force, so the deadweight loss would have been even higher than it was already.[66] Nevertheless, opposition to the draft increased during the 1960s.

The solution to this puzzle—the reason for the increased opposition—is that demoralization costs of being drafted increased. The real value of military pay fell considerably during the Vietnam war as the risks of injury and death rose.[67] Moreover, because the economy was prospering, draftees also perceived a disproportionate burden from being selected for military service while others enjoyed high-paying, low-tax jobs. These sources of demoralization costs overlap with the misallocation costs of Figure 1.

Other less-measurable demoralization costs can add to our understanding of the demise of the draft. During a major war

65. From 1955 to 1964, draft inductions averaged about 100,000 per year. In 1965, that number more than tripled, and inductions from 1965-69 averaged about 300,000 per year. *See* FLYNN, *supra* note 4, at 169-71. These numbers do not count reluctant volunteers. Active-duty military personnel numbered 2,655,000 in 1965 and 3,500,000 in 1968. *See id.* at 170.

66. Recall that marginal tax rates were 70% at that time. *See* 1 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 1.1.7 (1989) (noting that the highest marginal tax rate for individuals was lowered from 90% to 70% in 1964).

67. Only during 1944 and 1945 did the number of casualties among American soldiers in World War II exceed the number killed in 1968. *See* DeBoer & Blackley, *supra* note 22, at 90.

with widespread public support, the privations of military life are more acceptable because those bearing them recognize both that most other people in their situation must also endure them and that enduring them secures an important goal. But by the late 1960s, conscripted military service was no longer regarded as an unquestioned norm. The widespread skepticism of the national benefits of fighting in Vietnam further increased demoralization costs. In addition, there was a growing belief that underpaid military service yielded few reciprocal benefits. During World War II, a plausible case could be made that the personal well-being of the draftee and his family depended fairly directly on his service. Development of a similar feeling of reciprocal benefit from the Vietnam War required a number of dominos to fall before any direct threat to home and hearth materialized. Yet another source of demoralization costs was the feeling of political powerlessness of the draftees. Until 1971, draftees under age twenty-one could not even vote. It may be more than a coincidence that the passage of the Twenty-Sixth Amendment corresponded with the success of the political movement to end the draft.

The Michelman framework is also useful in articulating a potential cure for the inefficiencies of the draft (as an alternative to eliminating it). In this scheme, draftees would have the option of paying someone else to serve in their place. This scheme is not so far-fetched as it may seem, as it loosely describes the operation of the draft in the Civil War.[68] If such a scheme were in place, a labor market would spring up in which the suppliers would be those willing to serve for a wage less than the amount that the high-wage but unlucky draftee was willing to pay not to serve. As a result, the misallocation problem that is the basis for *MMAC* in Figure 1 would disappear. Elvis could have just paid for someone else to drive the army truck, and the music world would have had that many more of his ballads. There is still some deadweight loss from this scheme in that the bearer of the tax—the draftee—has some incentive to avoid it by emigrating, but this loss is no larger than the loss resulting from shirking in a system in which draftees must personally serve.

Misallocation of individual talents is not the only inefficiency

68. *See* JOHN O'SULLIVAN & ALAN M. MECKLER, THE DRAFT AND ITS ENEMIES 57-58 (1974).

that could be cured by a frankly selective tax on randomly-selected young men. The military could be induced to correct the substitution inefficiency—its tendency to overuse conscripts of all abilities—by a variation on this scheme. Instead of allowing a private market for stand-ins to develop, the military could insist that, at its option, a draftee could be excused from serving by paying the military an amount equal to the difference between his civilian and military wage. (To correct for the moral hazard of potential draftees understating their civilian wages, the military could develop an index of potential civilian wages based on previous education, parental income, and other more-or-less immutable predictors of private-sector earning capacity.) With this source of revenue at its disposal, the military would have no incentive to use more labor than would be used by a profit-maximizing firm required to pay its workers at a market rate. The opportunity cost of employing too much labor would be perceived by military authorities as revenue foregone rather than as wages paid out.[69]

The obvious analogy in regulation is land-use exaction. Imagine that the government has a general regulation preventing developers from employing their property in its most profitable use.[70] This is an inefficient state of affairs if the value to the public of the regulation is less than the value to the developers of receiving an exemption from the regulation. In an exchange that could be initiated by either party, the developers could pay the authorities some amount between the loss to the public stemming from the exemption and the gain the developers receive by avoiding the regulation. This leaves both parties better off than they were with the regulation in place.[71] Again, as in the draft, even the most random set of regulations can be converted by voluntary transactions into more efficient outcomes.[72]

---

69. The argument for the efficiency of this scheme is essentially the same as the argument that a perfectly discriminating monopolist is efficient, the difference between it and perfect competition being only the distribution of consumers' surplus. *See* DONALD N. MCCLOSKEY, THE APPLIED THEORY OF PRICE 393-95 (1985).

70. Let us also imagine that the regulation leaves developers with some minimal use, so that they will not receive compensation for the effect of the regulation on their property.

71. A change in entitlements that leaves both parties better off is called "Pareto superior," or simply "more efficient." A situation in which all Pareto superior exchanges have been exhausted is called "Pareto optimal" or simply "efficient."

72. Of course, Coase points out that this aspect of the theory only holds true if

The reason many people find both of these schemes objectionable despite their efficiency is the element of demoralization costs that economists often find difficult to grasp. Ordinary people readily understand this concept, however, for it is the cost of being singled out to bear a burden that most other members of the community do not bear, in order to benefit the community more than oneself. People experience disutility from such blatantly unfair treatment, and this disutility is not necessarily outweighed by the higher level of utility gained by those who do not bear the burden.

Those bearing this disutility may manifest it through activities that are directly harmful to society at large. Even if they do not, this disutility must be counted in the utilitarian calculus that undergirds economics. People in all societies have a willingness to pay for fair treatment, and this demand is independent of the usually-visible productive benefits of fairness. That the dollar value of this demand is more difficult to estimate than the foregone income from soldiering or habitat preservation is no reason for economists to neglect this aspect of demoralization costs. An analysis incorporating this demand reinforces the prudence of takings decisions such as *Nollan v. California Coastal Commission.*[73]

In *Nollan,* the California Coastal Commission offered Mr. Nollan a seemingly Pareto-superior exchange. The Commission offered to approve Mr. Nollan's application for a permit to build a larger house on his beachfront property on the condition that he grant a pedestrian easement along his privately owned beach. The Commission asserted that it had the authority to deny the permit because Mr. Nollan's house, when combined with other houses already situated along the beach, would further block public view of the ocean. Some of Mr. Nollan's neighbors had acceded to the deal in the past. Mr. Nollan refused. Instead of granting the easement, he sued the Commission, arguing that the conditional approval was a taking.

The Supreme Court held for Mr. Nollan on the specious

---

transaction costs are sufficiently low. *See* Coase, *supra* note 62, at 15-16. For a demonstration of the workings of the Coase theorem in the land-use context, see WILLIAM A. FISCHEL, ECONOMICS OF ZONING LAWS 82-101 (1985). For a general treatment of attempts by the government to exact resources from private owners, see RICHARD A. EPSTEIN, BARGAINING WITH THE STATE (1993).

73. 483 U.S. 825 (1987).

grounds that there was no "nexus" between the purpose of the regulation and the easement.[74] I submit, however, that the real reason for the decision was the unfair burden of the regulation. Nollan's proposed house would not have caused some extraordinary harm. It was just a house, like many thousands of other houses built along the beach in California. To single Nollan out to bear a burden that most other homeowners did not have to endure—allowing strangers to trespass on his land—involved high demoralization costs akin to those caused by demanding that one class of persons pay a special tax to escape a public obligation—the draft—that is not widely shared.

VIII. COMPENSATION AND REVELATION OF PUBLIC DEMAND

The formal analysis of the draft and of regulations so far has neglected the issue of the elasticity of public demand for the resource in question. In the diagrammatic presentation of the theory of compensation for soldiers and for landowners, it was assumed that the amount of the resource to be taken was not dependent upon whether the government had to pay. This section returns to that issue, which was introduced in Section III as the draft's substitution inefficiency.

Two issues are mixed in the notion that the government, if it had been forced to pay, would not have taken so many men into the army or so many acres into wildlife habitats. The one already considered is that the costs of making compensation—the settlement costs, including the deadweight loss of taxation—would be so high that otherwise efficient projects might not be undertaken. The second issue is the substitution effect of low prices. When wages of soldiers are below the market rate, soldiers will be employed too often. Political authorities may be tempted to use war rather than diplomacy, and military planners may substitute soldiers' labor for military hardware and other capital. Likewise, environmental interests will seek to reserve too much land for natural preserves if land is cheap. This could be avoided if there were some disinterested way to calculate what

74. *See id.* at 837. The problem with "nexus" is that it restricts the terms of trade between regulators and landowners and thus forecloses some Pareto-superior exchanges. For a more complete analysis of *Nollan*, see FISCHEL, *supra* note 28, at 57-59, 347-50 (arguing that a later decision, *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), remedied some of the inefficiencies of the *Nollan* "nexus" test with a "rough proportionality" test, which does not restrict the terms of trade).

size army or land preserve would be desired if there were no deadweight loss from taxation and other settlement costs. In the absence of such calculations, those who bear the uncompensated burdens may suspect that the benefits are overstated. More insidiously, the uncompensated owners may suspect that the reason the public benefits are overstated is to avoid compensation.[75] These issues are considered first for the draft and then for environmental regulations.

Public acceptance of the unprecedented continuation of the draft after World War II was promoted by the belief that a large standing army was essential for national security. Communist threats in Europe were the occasion for the renewal of the draft after it briefly lapsed in 1947. Repeated instances of communist expansionism persuaded many Americans that a large army was essential. The acceptance of the term "Cold War" to describe a period in which no shots were fired was a mark of public anxieties. Indeed, national defense considerations were so persuasive that largely unrelated programs piggy-backed on them. For example, our major roads were built as the National System of Interstate and Defense Highways, and federal subsidies for higher education arrived under the National Defense Education Act of 1958.

Widespread concern about national security despite the lack of war suggests that the public's demand for a large army was inelastic. This justified the implicit weighing of the inefficiencies and demoralization costs of the draft against the deadweight loss and other settlement costs of an all-volunteer force. Moreover, the general acceptance of the draft in World War II carried over. Although the fraction of the eligible population who had to serve during the 1950s was smaller than during World War II, the notion that conscripted service was a normal risk of male citizenship was not widely challenged. It might have been regarded as part of a generational social compact. In this it would be similar to the social security system, in which the present generation pays taxes to support the older generation with the understanding that the next generation will support it. Furthermore, being drafted or induced to volunteer in the 1950s and early 1960s, when an overseas tour of duty often was

75. *Cf.* FLYNN, *supra* note 4, at 108 (arguing that President Truman deliberately played up the threat of Communism to get the draft renewed in 1948).

spent in lands where war seemed remote and a dollar went a long way, may not have been especially demoralizing.

Acceptance of the necessity of a large standing army eroded in the 1960s. Critics of the draft argued that the public demand for a large military force was overstated. The Vietnam War brought to the fore a host of scholars who viewed America's military might as something other than a defense against an implacable foe. Many suspected that this war would not have been fought, or at least would have been much shorter, but for the draft.

Such speculations are controversial. As mentioned earlier, some argue that the war was shortened because the draft began taking the sons of influential people. But such arguments always neglect the effect of higher taxes that come with an all-volunteer military. President Johnson's decision to escalate the war in Vietnam was influenced by the low-cost source of potential soldiers whose ranks were swelled by the "baby boom" that began in 1946.[76] Because of the draft, Johnson could fight wars against both poverty and communism without raising tax rates. It seems unlikely that the Vietnam War would have lasted long if an army had had to be raised on a volunteer basis. Higher taxes to support such an extended adventure would have led to political resistance by people who could not easily be branded radicals and subversives.

The necessity of widespread acceptance of the need for a large army in order to justify the draft has a parallel in environmental regulation. Uncompensated environmental regulation cannot be justified simply by pointing out that a good environment is a desirable thing. Environmentalists have attacked recent compensation proposals as leading to environmental catastrophe. Those to be compensated are characterized as polluters undeserving of public solicitude. Characterizing environmental regulations as exercises of the police power—which does not require the government to compensate for the takings it permits—is justified by environmental advocates on the grounds that such regulations are really for the purpose of harm prevention, not benefit

76. *See id.* at 168-70. Presidents Truman and Eisenhower were also induced to renew and maintain the draft, respectively, because of its salutary effect on the visible federal budget. *See id.* at 108, 139.

extraction.

The distinction between harm prevention and benefit extraction is an area in which ordinary economic analysis proves too much. It is true that one can characterize any beneficial activity as preventing the "harm" of foregoing it. This ignores the fact that the vast majority of people are not persuaded that chaste individuals are "harming" would-be indiscriminate sexual partners. In other words, in order to get the law of regulation on your side in liberal societies, it helps to convince lawmakers and their constituents that something plausibly characterized as harmful will happen absent the regulation.[77]

The importance of characterizing environmental regulations as harm prevention may explain the aversion of many environmental activists to economics.[78] What bothers environmentalists most about economists is the latter's inclination to point out the demand for a pleasant environment is highly income-elastic. Rich nations, rich towns, and rich people are all more willing to pay for high-quality, low-risk environments than the poor.[79]

Environmentalists dislike this observation because it characterizes environmentalism as providing a "benefit" to the public. Most people regard benefits as things for which compensation should be made to those who provide them.[80] It is this sentiment that has made physical invasions of property compensable in almost all societies. Most physical invasions are the result of the government (or an authorized private party) undertaking an activity that places the public ahead of the status quo. Construction of roads, schools, and dams is almost always

77. Some economic analysis has attempted to explain why implicit norms, to which "harm" and "benefit" give voice, have developed and are efficient. *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 779-80 (1973); Donald Wittman, *Liability for Harm or Restitution for Benefit?*, 13 J. LEGAL STUD. 57, 71-72 (1984).

78. Practical environmentalists, however, welcome many of the devices proposed by economists. Today, ideas such as trading pollution rights are only occasionally attacked as "selling the environment."

79. Rich towns also have to be paid more than poor towns to accept commercial uses that are environmentally unpopular. *See* William A. Fischel, *Determinants of Voting on Environmental Quality: A Study of a New Hampshire Pulp Mill Referendum*, 6 J. ENVTL. ECON. MGMT. 107, 116 (1979). Low-income voters' greater willingness to accept such uses, rather than top-down "environmental racism," may account for the higher prevalence of environmentally controversial facilities in low-income areas.

80. *See, e.g.*, ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 541 (1904).

characterized as providing public benefits, not preventing harmful use of private land.

Proof of this are the rare instances in which physical invasions have gone uncompensated. Such instances include demolitions to prevent the spread of urban conflagrations, and destruction of civilian facilities to prevent them from assisting the enemy in wartime.[81] All such invasions were regarded as immediate harm-prevention activities, and the costs they imposed—demolished houses and destroyed refineries—were left uncompensated despite the owners' lack of harmful intent.

In defending a system of uncompensated regulation, therefore, it is important to characterize the regulations as harm prevention. This perhaps accounts for the popularity among environmentalists of doomsday scenarios, the green equivalent of the communist conspiracy. Such scenarios offer the public a rationale for widespread regulation without compensation. Without regulation, the implicit story goes, the whole world will fall into an ecological abyss that only could be characterized as "harmful." Scenarios of catastrophe prevented generally have the effect of making the public's demand for environmental regulation inelastic.[82]

This is why cases such as *Lucas* are so educational. The Supreme Court does not have the political capital or the expertise to strike down all unfair regulations. But it does have the power to conduct some revealing experiments. When it requires an especially enthusiastic regulatory body to pay, the public gets a glimpse of the true elasticity of demand for environmental quality. Judging from *Lucas,* in which the settlement costs of paying for the regulation were nil, the demand is highly elastic.

IX. WOULD THE SHIRKING PROBLEM INDUCE COMPENSATION?

The previous sections showed that economic analyses of the

81. *See* U.S. v. Caltex (Phil.), Inc., 344 U.S. 149 (1952); Respublica v. Sparhawk, 1 Dall. 357 (Pa. 1788). Both are discussed in this context in FISCHEL, *supra* note 28, at 355-57.

82. *See* GREGG EASTERBROOK, A MOMENT ON THE EARTH: THE COMING AGE OF ENVIRONMENTAL OPTIMISM (1995). The hostile reception by environmentalists to this book, which praises the successes of environmental policies, is evidence that catastrophe scenarios function to make demand inelastic. *See, e.g.*, Michael McCloskey, SIERRA, Sept.-Oct. 1995, at 90 (book review). In this dismissive review, McCloskey grudgingly notes that Easterbrook publicly opposed congressional attempts to provide compensation for regulatory burdens.

draft and regulatory takings are similar in many ways, and that the similarities deepen one's understanding of the issues involved in both cases. This and the next section ask whether the similarities could be used to forecast the denouement of the regulatory takings issue.

This section considers whether the agencies and political forces who prefer the status quo of uncompensated regulation themselves might wish to adopt compensation. Compulsion has disadvantages that might persuade those who benefit from it to surrender it voluntarily or at least weaken their resistance to compensation schemes. Indeed, while military authorities generally favored continuing the draft, at least some generals were aware of its drawbacks.[83] The brief (two-year) period of active service for draftees meant that most soldiers were inexperienced and a disproportionate amount of resources had to be devoted to training. Desertion and discipline problems are more likely among an army of conscripts, as men who were drafted (and felt underpaid) would shirk more often. The culture of shirking is the flip side of economists' "efficiency wage," the above-market wage supposedly offered by large organizations to keep employees loyal and well-motivated.[84]

Parallel problems for environmental regulators arise when landowners can forestall regulation by modifying their land in advance of the government's actions. For example, landowners might scour their property to eradicate endangered species in advance of an investigation by government biologists. The scouring might take the form of clearing for farmland or cutting timber, both perfectly legal, but it might also involve illegal but difficult to detect actions specifically aimed at eliminating the endangered species.[85] Places subject to wetlands regulation can also be modified in advance of protected-status designation by legal means such as sinking wells, modifying streams, or

83. It is perhaps most telling that by the 1980s there was no pressure by military leaders in the United States to re-institute the draft. *See* DAVID R. SEGAL, RECRUITING FOR UNCLE SAM: CITIZENSHIP AND MILITARY MANPOWER POLICY 16 (1989).

84. *See* George Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q.J. ECON. 543, 560 (1982).

85. This practice is so widespread that it has a well-understood name: "shoot, shovel, and shut up." An example that would probably not have come to light but for the fame of the landowner was Ross Perot's attempt to eradicate habitat for the endangered golden-cheeked warbler on his valuable but undeveloped tract on the outskirts of Austin, Texas by clearing more pasture for goats. *See* David Wright, *The Vanishing Goats of Ross Perot*, SACRAMENTO BEE, June 28, 1992, at F6.

trapping beavers. Perhaps the most dramatic cases are the destruction of old buildings in order to prevent their uncompensated designation as unmodifiable historic treasures.[86]

Would the foregoing drawbacks be sufficient to induce government agencies to desire a compensation rule? The answer for the military was no. Nearly all of the pressure for an all-volunteer force came from outside the armed services. It seems equally unlikely that environmental agencies would seek to adopt a compensation rule out of pure rationality. The considerations described above would be overwhelmed by the benefit to the agency of uncompensated regulation. Rather than forestall adverse landowner response to regulation by offering compensation, it is usually cheaper for the agency to impose stiffer penalties for noncompliance.

Comprehensive regulation also allows the agency to overcome the greatest disadvantage of regulation: the rule that physical invasion by the public or formal acquisition of title by the agency always requires compensation. Overregulation allows the agency to trade exceptions to those regulations that are less valuable to the agency and its supporters for easements or outright transfers of title. Thus, even if the agency is aware that regulation without compensation has drawbacks, it will be inclined to use regulation as much as possible. Although the ability of government agencies to turn regulation into ownership has been trimmed by Supreme Court decisions, the power of comprehensive regulation makes most landowners willing to cut deals quietly with government agencies.

X. POLITICAL FORCES AND THE END OF THE DRAFT

Even if the rational self-interest of regulators is insufficient to persuade them to adopt compensation, it is possible that the political process might help those subject to regulation. There is now an active property-rights movement, and one might foretell its success by looking at how the political process handled the draft.[87] The circumstances that led to the end of the draft in the United States shed some light on this issue.

---

86. *See, e.g.*, Jack Taylor, *In Landmark Fires, Answers Prove Elusive*, N.Y. TIMES, Apr. 10, 1995, at A14 (pointing out suspicious fires at three privately-owned landmark sites).

87. For a useful collection of essays describing the origins and issues of the movement, see LAND RIGHTS, *supra* note 28.

College students probably did the most to oppose the draft. Prior to the Vietnam War, most college students could defer being drafted. Moreover, they could extend their deferment with graduate work, often avoiding service altogether. Marriage and fatherhood virtually eliminated induction notices, as did employment in an exempted occupation such as teaching. College students could also participate in Reserve Officers Training Corps (ROTC), which, prior to Vietnam, led to a year or two of active duty with relatively few risks and privations. For those with a strong desire not to serve, there were a number of appeals that could be undertaken to defer service until the local draft board got tired of the pursuit and drafted the more compliant 18-year olds with no college inclinations.

Young men who did not attend college had few means of organizing to protest the draft. The escalation of the Vietnam War required more men, and the lowering of the real military wage (by inflation and higher risk) made it even more difficult to obtain recruits. To obtain more men, the dodges available to college students had to be greatly limited.[88] This brought the draft to the attention of a group that had the potential for political organization. College provided an anti-war ideology and the network of contacts which reduced the transaction costs that normally forestall concerted political action.[89]

What may have been the turning point in the draft was a well-publicized event in 1965. After a nationwide protest involving illegal sit-ins at draft boards, General William Hershey, director of the Selective Service System since World War II, wrote to local boards suggesting that college students who engaged in illegal protests against the Vietnam War should have their deferments revoked.[90] This action revealed the draft as involuntary

88. The Military Selective Service Act of 1967, which was the first major reformation of draft laws since the Universal Military Training and Service Act of 1951, had as its major feature the removal of exemptions for nonmedical graduate study and sharp limitations on other exemptions. For a detailed analysis, see DAVID F. BRADFORD, DEFERMENT POLICY IN SELECTIVE SERVICE 42-49 (1969).

89. *See* MICHAEL USEEM, CONSCRIPTION, PROTEST, AND SOCIAL CONFLICT: THE LIFE AND DEATH OF THE DRAFT RESISTANCE MOVEMENT 136-37 (1973) (describing how draft resistance was organized at college campuses, specifically contrasting it with the lack of organization by men not in college).

90. *See* Letter from Lewis B. Hershey, Director, Selective Service System, to all Members of the Selective Service System (Oct. 26, 1967), *in* COMPULSORY SERVICE SYSTEMS (1968), *extracted as The Basic Purpose and Objective of the U.S. Selective Service System*, SELECTED READINGS, *supra* note 3, at 523. Of this event, Flynn said: "If any one incident could be isolated as the starting point for the dismantling of the draft, the

servitude, a punishment in lieu of prison for disobeying the laws. Men who did not attend college had known this all along. The 18-year old who committed a minor crime was often given the choice of jail or enlistment. But such men did not belong to groups that might help them organize opposition. College students, however, reacted with continual national protests.

In his 1968 presidential campaign, Richard Nixon proposed an end to the draft. This was a purely political position which he thought would defuse anti-war protests and help his electoral chances.[91] After being elected, President Nixon appointed a special commission headed by General Thomas Gates to study the feasibility of an all-volunteer army. He stacked the committee with members who were favorable to eliminating the draft and with open-minded generals. Although the military was largely opposed to ending the draft, some had reservations about making draftees fight in Vietnam.

It would be unseemly for an economist such as myself to point out that the economics profession also had an important role in ending the draft. For this reason, I will quote a historian who likes the draft and apparently does not care for economists. According to George Flynn: "[n]o one played a more important role in selling the idea [of an all-volunteer force] to members of the government and the public than Milton Friedman, Chicago economist, free-market advocate, and [Gates] commission member."[92] Friedman was not the only economist to devote much energy to ending the draft. Martin Anderson, who was an advisor to President Nixon, had educated the President about the issue and suggested the Gates Commission. Political figures opposing the draft were oddly split, with the radical left joining hands on the issue with the libertarian right, but nearly all economists advocated replacing the draft with an all-volunteer force.

This history has both optimistic and pessimistic lessons for advocates of compensation for regulatory takings. The most optimistic parallel is also the most obvious. The uncompensated taking of men for military service was eliminated once a

---

reclassification . . . would merit priority." FLYNN, *supra* note 4, at 184.

91. *See* FLYNN, *supra* note 4, at 261.

92. *Id.* at 265; *see also* Martin Anderson, *The Making of the All-Volunteer Armed Force, in* COLD WAR PATRIOT AND STATESMAN: RICHARD M. NIXON 171 (Leon Friedman & William F. Levantrosser eds., 1993).

sufficiently well-organized group made it a paramount political issue. This is grounds for hope for property-rights advocates, because the last few years have seen a groundswell of political activism by property-rights organizations which have pressed both the States and Congress to act. Congress and many political leaders are interested in the takings issue, even though it has been sidetracked by budget issues.

The pessimistic point for advocates of property rights reform is the lack of consensus about the proper scope of reform. Reformers of the draft proposed only two serious alternatives. One was universal military training, which would have reduced the unfairness costs of the selective draft.[93] But universal service could not have met a benefit-cost analysis in a large country with a sophisticated military machine. Even many military leaders were opposed to it. The other alternative was the all-volunteer force, whose benefits and costs could be weighed by commissions, politicians, and the public. Once it was decided that the draft was no longer politically tolerable, the all-volunteer force became the obvious reform.

In contrast, ideas for resolving the regulatory takings issue are even more numerous than economists. Economists cannot even agree that compensation for physical invasion is desirable.[94] Legislative proposals for compensation range from modest review of newly-imposed land-use regulations to wholesale compensation for any regulation, past and future, that devalues any asset. The cacophony of proposed reforms may be simply the start-up frictions of what could be a highly effective, unified political movement. But it may be caused by something more fundamental.

The major problem with political approaches to regulatory takings is the heterogeneity of property itself. It is that same heterogeneity that has created many of the problems with federal government regulation. What might be a reasonable and widely acceptable regulation of land in one part of the country is often unreasonable and unacceptable elsewhere. Control of wetlands and endangered species by a single bureaucracy acting

93. Both Truman and Eisenhower had endorsed universal training. *See* FLYNN, *supra* note 4, at 135.

94. *See* Lawrence E. Blume & Daniel L. Rubinfeld, *Compensation for Takings*, 72 CAL. L. REV. 569, 610 (1984); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 602 (1986).

under a lone cabinet member pursuant to a single law is an invitation to arbitrariness.

One possible solution suggested by the draft is to decentralize the regulatory system by allocating power to state and local governments. Rather than undertake a review of the benefits and costs of regulatory federalism,[95] this section will close with a historical note. Most social scientists have analyzed the draft as if it were a national lottery administered by a central bureaucracy located in Washington. In fact, however, the draft was administered by local, volunteer boards. Such boards supposedly followed orders from Washington, but local boards always had a significant amount of discretion.[96] The granting of deferrals, hearing of appeals, and dealing with members of the public occupied the boards to a large extent. They could and did respond to individual claims and local public opinion.

Although the Defense Department and the central bureaucrats were often unhappy with the system of local boards,[97] local control was seen as necessary for public acceptance of the draft. Having this enormous tax imposed on draftees by people in their own communities apparently made it more acceptable. The possibility that a young man could appeal his 1-A classification to people selected from his own community apparently reduced the inefficiencies and demoralization costs of the draft. Employers often succeeded in obtaining a deferral for important employees, and young men with a strong aversion to service often were deferred for other reasons. By permitting men whose opportunity costs were high to obtain deferrals, the local boards mitigated the economic inefficiencies of the draft and perhaps accounted for its persistence long after the Korean War.

The soothing effects of localism suggest a possible point of compromise between environmentalists and property-rights

95. For an extensive discussion of regulatory federalism, see FISCHEL, *supra* note 28, at 253-88.

96. *See* FLYNN, *supra* note 4, at 4, 53-62, 129, 173; *see also* JAMES W. DAVIS, JR. & KENNETH M. DOLBEARE, LITTLE GROUPS OF NEIGHBORS: THE SELECTIVE SERVICE SYSTEM 17-18 (1968) (emphasizing the discretionary power of local boards).

97. The Defense Department decried the lack of uniformity among boards as both unfair, because many men were deferred for ad hoc reasons and therefore similarly-situated men from different areas of the country were treated differently, and wasteful, because the local classification process took a long time. But it was never politically possible to get rid of local boards.

activists. A dispersion of regulatory authority to locally accountable review boards might respond to many of the demands to rein in arbitrary decisions yet still promote national environmental goals.

XI. CONCLUSION: COMPENSATION WORKS

This Article has endeavored to analogize the economic analysis of takings to the economic analysis of the military draft. This academic exercise could cause the reader to overlook the most important lesson from the draft and its replacement by an all-volunteer military: compensation works, at least if it is given a fair chance. The U.S. military does not now overuse labor, and the labor it uses appears to be well suited to its tasks and upbeat in its mission.[98] Contrary to the fears of opponents to the all-volunteer force, minorities are not disproportionately represented, at least when compared to comparable civilian jobs.

Perhaps more important, the military itself is not an object of scorn among a large fraction of the eligible population, as it was during the draft era. There is little anti-military sentiment among college students. For example, when the faculty at Dartmouth College voted against reinstituting ROTC in the middle 1980s, the vote was overridden by the Board of Trustees. The trustees were influenced by the widespread support among Dartmouth students for having a military career option, part of whose compensation is a generous college scholarship. Perhaps the Environmental Protection Agency could become as well-regarded among owners of property if it were willing to pay for devaluations that were locally regarded as burdens that "in all fairness and justice, should be borne by the public as a whole."[99]

The more subtle lesson to be drawn from the comparison of regulatory takings to the military draft is the possibility of a

98. At least one reporter has remarked on the upbeat, highly-motivated attitude of professional U.S. troops during the Persian Gulf War, in explicit contrast to the mostly-conscripted soldiers who served in Vietnam. *See* O'ROURKE, *supra* note 22, at 215. Flynn, however, derogated the success of the U.S. military in the Gulf War, pointing out that "American electronic air power made a shambles of Saddam Hussein's Iraqi forces in Kuwait," thus providing ground forces with only a weak test. FLYNN, *supra* note 4, at 281. Flynn stares without recognition at the right answer: it was precisely because America's all-volunteer troops were costly labor that American military planners years ago put most of their dollars in high-tech capital like "electronic air power." DeBoer & Blackley, *supra* note 22, at 93.

99. Armstrong v. United States, 364 U.S. 40, 49 (1960).

balancing test for questions of just compensation. The draft was an economically efficient and arguably fair way to assemble an army during a national emergency of the magnitude of World War II. When nearly every resource is to be impressed in the nation's service, and the value to the nation of that service is not doubted, it makes little sense to offer just compensation in the form of market-clearing wage payments. The settlement costs (chiefly the inefficiencies of higher taxes) of offering compensation dwarf the demoralization costs to conscripted young men. When only a fraction of the nation's labor resources are to be taken, as in the Vietnam War, and the value of such service is less than universally appreciated, full compensation makes more sense—and produces a more desirable outcome.

It likewise follows that it would make little sense to offer all owners of land compensation for every devaluation caused by environmental programs with widespread burdens and substantial national benefits. While the Clean Air Act, for example, is certainly not beyond fine-tuning, there is little evidence to suggest that compensation for those adversely affected thereby is warranted. Settlement costs from higher taxes and enormous administrative costs would be immense, and demoralization costs of affected owners ought to be low in nearly all cases. The late twentieth-century norms of an affluent America have made air pollution as much despised, if not as catastrophic, as the threat of a German and Japanese victory in 1941.

The Endangered Species Act is more problematic, however, and more closely resembles the war in Vietnam. The property owners whose land is conscripted in the service of species-preservation constitute a small fraction of landowners. The benefits of species protection are often difficult for most Americans to understand, especially because less-cuddly creatures often dominate the list. When designation of land for endangered species habitat preservation is not random, it often appears to be driven by a local desire to preserve open space by the low-budget means of regulation rather than by eminent domain. In many of these cases, demoralization costs for landowners seem quite high, and the settlement costs of compensation do not seem unreasonable. It may be time to recognize that compensation for such regulations would do for the environmental movement what the end of the draft did for the military: make it more popular and more effective.