

**LET MY PEOPLE GO FISHING: APPLYING THE LAW  
OF “GIVINGS” TO PRIVATE FISHING PRESERVES,  
EXCLUSIVE FISHING RIGHTS, AND STATE-  
STOCKED RIVERS**

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## INTRODUCTION

Most fishermen are probably not thinking about the law on a normal day on the water. But perhaps they should if they are one of the anglers paying a fee to fish the private waters of the Douglaston Salmon Run (DSR) or Harmel's Ranch Resort ("Harmel's"), private fishing preserves where anglers pay an access fee to enjoy exclusive fishing rights on some of the nation's most productive waters. While all may be well for the paying angler seeking the idyllic—high populations of fish, low populations of people—a novel legal problem may be lurking in the deep. And it is simply this: by charging anglers for exclusive fishing rights these private landowners receive a pecuniary gain from exploiting a public resource—fish. The private landowner receives a substantial benefit from a public resource because the fish are raised and stocked by the state at the public's expense. Framing this issue in terms of equity and fairness, this Note applies the property concept of "givings," the converse of takings, to suggest that this legal problem can be solved if such a landowner reimburses the state for the impermissible use and distribution of government property.

Part I of this Note frames the issue by providing two real-world examples of compensable givings. Part II provides relevant background information and a discussion of the concept of givings and how it may be analyzed. Part III examines and applies the givings framework to the factual scenarios set forth in the Introduction. Finally, this Note concludes by suggesting that, in certain situations, a private fishing preserve that charges the public to fish for a state resource must compensate the state.

## I. A TALE OF TWO GIVINGS

A. *Douglaston Salmon Run*

Among serious steelhead and salmon fly fisherman in the Great Lakes region, upstate New York's Salmon River is their proverbial Mecca. The Salmon River runs seventeen miles through pristine natural scenery, starting at Lighthouse Hill Reservoir in Altmar and emptying into Lake Ontario, the smallest, but second-deepest of the Great Lakes, at the shores of Port Ontario in Pulaski.<sup>1</sup> The River is notable for two

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1. *Salmon River*, N.Y. ST. DEPARTMENT OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/outdoor/37926.html> (last visited Sept. 13, 2011); *Lake Ontario*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/glnpo/lakeont/aboutlko.html> (last visited

fish records, including the Great Lakes record Chinook salmon, tipping the scales at forty-seven pounds, thirteen ounces and the world record Coho salmon, weighing in at thirty-three pounds, four ounces.<sup>2</sup> The reasons for this fishery's success are plentiful and include increased water quality, invasive species control, and an "extensive fish stocking program."<sup>3</sup> Indeed, the fisheries management program is robust. On a yearly basis the Salmon River is stocked with approximately "300,000 Chinook salmon, 80,000 Coho salmon, 120,000 Washington strain steelhead, 40,000 skamania strain steelhead and 30,000 Atlantic salmon."<sup>4</sup>

A significant portion of the river, twelve miles to be certain, is open to the angling public through the prolific use of Public Fishing Rights.<sup>5</sup> Importantly, however, the lower part of the river (that closest to Lake Ontario) is privately owned.<sup>6</sup> The DSR is a two and a half mile stretch of water "at the lower end of the river, where the fish first enter the river from the Estuary in Port Ontario and where they are the most fresh and undisturbed."<sup>7</sup> To control access and population on this private section, the DSR limits daily access to 350 anglers at a charge of forty-five dollars per day.<sup>8</sup> Additionally, "[t]he DSR has its own riverkeepers on patrol . . . checking to make sure that state and DSR regulations are enforced."<sup>9</sup>

The legal birth of the DSR occurred in a groundbreaking decision by the New York Court of Appeals where the court determined that the right to fish in New York is not absolute.<sup>10</sup> "[I]n [*Douglaston Manor, Inc. v. Bahrakis*], the New York Court of Appeals [held] that the rights of New York's more than one million anglers are subservient to the

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Sept. 13, 2011).

2. *Salmon River*, *supra* note 1.

3. N.Y. STATE DEP'T OF ENVTL. CONSERV., DIV. OF FISH, WILDLIFE AND MARINE RES., 2009 ANNUAL REPORT: BUREAU OF FISHERIES 1 (Mar. 2010), *available at* [http://www.dec.ny.gov/docs/fish\\_marine\\_pdf/lorpt09.pdf](http://www.dec.ny.gov/docs/fish_marine_pdf/lorpt09.pdf).

4. *Salmon River*, *supra* note 1.

5. *See id.*

6. *See A History of Greatness*, DOUGLASTON SALMON RUN, <http://www.douglastonsalmonrun.com/default.aspx?PageID=10> (last visited Sept. 13, 2011).

7. *Id.*; *see also* Gary Edwards, *Four Seasons of Steelhead*, FLY FISHERMAN, Feb.-Mar. 2011, at 44, 47.

8. *Rules and Regulations*, DOUGLASTON SALMON RUN, <http://www.douglastonsalmonrun.com/default.aspx?PageID=30> (last visited Sept. 13, 2011); *Pick Up a Pass*, DOUGLASTON SALMON RUN, <https://www.secureacc.com/douglastonsalmonrun/default.aspx?PageID=13> (last visited Sept. 13, 2011).

9. Edwards, *supra* note 7, at 47.

10. *Douglaston Manor, Inc. v. Bahrakis*, 678 N.E.2d 201, 203 (N.Y. 1997).

rights of landowners whose lands contain nontidal, navigable-in-fact rivers.”<sup>11</sup> In *Douglaston*, the court ruled that the plaintiff-appellant, operator of the DSR, had “exclusive right of fishery” to a certain section of the Salmon River.<sup>12</sup> The court ultimately concluded that “while the public has the right of navigation over the privately-owned bed of a navigable-in-fact river, the public does not have the right to fish in such a waterway.”<sup>13</sup>

The facts of this case are straightforward. The DSR owned a mile-long section of river including both shorelines and the riverbed along the Salmon River.<sup>14</sup> The DSR claimed good title on the property “back to a conveyance from the pristine State of New York in 1792.”<sup>15</sup> The DSR’s “property encompass[ed] the shoreline properties, the riverbed, and [ten] islands within and along the Salmon River.”<sup>16</sup> At this time, the DSR operated the Salmon Run within the confines of its property and “managed [a] private sport fishery from which the general public is excluded and for which users pay [DSR] a fee.”<sup>17</sup> DSR claimed an exclusive right of fishery because it owned the riverbank and both sides of the river.<sup>18</sup> Furthermore, because of this right, the DSR sought judicial relief to enjoin “commercial fishing guides[] from future anchoring upon and fishing in [the DSR’s] privately owned section of the [river].”<sup>19</sup>

Ultimately, the court sided with the DSR finding that common-law principles in New York recognize certain rights that a private landowner may acquire and assert in “nontidal, navigable-in-fact rivers and streams.”<sup>20</sup> These certain rights, the court concluded, trump “public trust protections generally associated with waters deemed navigable-in-law or tidal navigable-in-fact waters . . . .”<sup>21</sup> In short:

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11. Robert W. Malmshemer & Donald W. Floyd, *Fishing Rights in Nontidal, Navigable New York State Rivers: A Historical and Contemporary Perspective*, 62 ALB. L. REV. 147, 147 (1998).

12. *Id.* at 202, 205.

13. *Id.* at 148; *see Douglaston*, 678 N.E.2d at 204.

14. *Douglaston*, 678 N.E.2d at 202.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Douglaston*, 678 N.E.2d at 202.

20. *Id.* at 203.

21. *Id.*; *see* N.Y. NAV. LAW § 2 (McKinney 2004) (“A river is defined as ‘navigable in its natural or unimproved condition, affording a channel for useful commerce of a substantial and permanent character conducted in the customary mode of trade and travel on water . . . hav[ing] practical usefulness to the public as a *highway for transportation*.”). The common law more particularly distinguishes and

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[this] decision now means that a landowner can maintain a trespass action against anglers, who while fishing, simply drift or troll over their lands, despite the fact that the angler has no contact with the privately owned riverbed, is harvesting a state resource, and has the right to pass over those lands.<sup>22</sup>

The seminal law review article on the *Douglaston* decision lays out three potential economic impacts that the decision may have on the State of New York.<sup>23</sup> First, authors Robert Malmshemer and Donald Floyd argue that the decision could impact the state's economy by "thwart[ing]" the fishing practices of New Yorkers and forcing people to "fish less, or not at all . . . ."<sup>24</sup> Second, they argue that the public fishing and access rights acquired by the New York State Department of Environmental Conservation (NYSDEC) may become obsolete since these rights "allow anglers ingress and egress over private lands . . . [and the NYSDEC] did not purchase the fishing rights."<sup>25</sup> Finally, and surely most relevant to this note, Malmshemer and Floyd argue that:

[t]he court's decision raises an important public policy question in taxation. If fishing rights are indeed part of the bundle of property rights held by the owner, then they must be subject to property taxes. In this case, [the DSR] receives a substantial private benefit as the result of a public investment. Salmon and steelhead fish would not be present in the Salmon River without a multimillion dollar public fish restoration program. This is the classic example of a "giving," in which some private party profits from a public program.<sup>26</sup>

In sum then, the *Douglaston* decision solidified the DSR's legal right to use one of property law's most powerful sticks in the bundle: the right to exclude.<sup>27</sup> By way of this exclusion then, the DSR is within its full legal right to enforce its exclusive right of fishery and allow only

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considers a river, in which the tide ebbs and flows, an arm of the sea, and as navigable, and devoted to the public use, *for all purposes, as well for navigation as for fishing*. It, also, considers other rivers, in which the tide does not ebb and flow, as navigable, but does not so far belonging to the public as to divest the owners of the adjacent banks of their exclusive fisheries therein.

*Douglaston*, 678 N.E. 2d at 203 (quoting *Hooker v. Cummings*, 20 Johns. Ch. 90, 100 (N.Y. Sup. Ct. 1822)).

22. Malmshemer & Floyd, *supra* note 11, at 149.

23. *Id.* at 178.

24. *Id.* at 180.

25. *Id.* at 179-80.

26. *Id.* at 178-79.

27. See JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 4-5 (2d ed. 2007) ("It is common to describe property as a 'bundle of rights' in relation to things . . . the most important sticks in the bundle are: (1) the right to exclude; (2) the right to transfer; and (3) the right to possess and use.").

those anglers who pay to fish in its exclusive zone.

*B. Harmel's Ranch Resort*

Although its past is not as colorful as that of the DSR's, another private fishing club in Colorado operates in a similar manner. For a daily fee of one hundred dollars, an angler has exclusive access to "[g]old [m]edal [fly] [f]ishing [o]n [t]he Taylor River."<sup>28</sup> Harmel's Ranch Resort in Almont, Colorado is a dude ranch offering a variety of activities, including "world-class gold medal fly-fishing."<sup>29</sup> Very similar to the operation of the DSR in New York, Harmel's fishery includes a one-mile private section on the well-known Taylor River.<sup>30</sup> Like the DSR, the river on which Harmel's operates is stocked by the state.<sup>31</sup> Indeed, from 2000 through 2010, Colorado stocked the Taylor River with over 17,000 pounds of trout.<sup>32</sup>

Similar the DSR, Harmel's has been subjected to the mercy of the law, although no issue regarding Harmel's exclusive right of fishery has been litigated. But the issues of navigability and exclusion in general are relevant to Harmel's. In March 2010, the Colorado House of Representatives introduced a bill that sought to clarify the issue of whether whitewater rafters could lawfully navigate certain private waterways without fear of civil or criminal liability.<sup>33</sup> Specifically, House Bill 1188 had three purposes: first, to recognize that Colorado had established a right to navigation stemming from the common law of England; second, to expressly proclaim that a river guide who floats over a certain section of river is not subject to liability so long as he gained such access through public or private land with consent; and, finally, to clarify the criminal trespass statute.<sup>34</sup>

In February 2010, Steve Roberts, whose family owns and operates Harmel's, wrote a letter to *The Denver Post* proclaiming his opposition to the bill. Roberts lamented that he and his family have invested over \$100,000 into their private stretch of the Taylor River and that the proposed bill "would scrap a basic, historic property right—to defend

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28. *Gold Medal Fishing on the Taylor River*, HARMEL'S RANCH RESORT, <http://www.harmels.com/harmels/html/Fishing.html> (last visited Sept. 13, 2011).

29. HARMEL'S RANCH RESORT, <http://www.harmels.com/html/index.html> (last visited Sept. 13, 2011).

30. *Gold Medal Fishing on the Taylor River*, *supra* note 28.

31. *See* COLO. DIV. OF WILDLIFE, DOW FISH DISTRIBUTION TICKETS 2000 THROUGH 2010 (Feb. 2011) (fish stocking report on file with the author).

32. *See id.* at 6.

33. H.R. 1188, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010).

34. *See id.*

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our land against trespassers—by forcing us to let large-scale commercial rafting destroy our fishing habitat and degrade our land.”<sup>35</sup> Roberts continued: “House Bill 1188 would take away our ability to protect ourselves in court against the commercial rafting industry. Commercial rafters no longer would have to get permission to cross private land.”<sup>36</sup> More troubling, according to Roberts, was the potential ramifications the new bill would have on property owners. He added, “[i]f the legislature adopts HB 1188, it is going to be kicking a hornets’ nest. Landowners across the state will be adversely affected if they lose their right to enforce their boundaries, and there’s talk that some may sue the state to recover their land’s lost value.”<sup>37</sup> And in this respect, Roberts is not alone. A lawyer commenting on the new bill claimed that “if the state legislates in favor of the rafters, they’ll have to pay landowners’ compensation for lost land value and business. ‘The public has no right to float through private property without the consent of the landowner . . . [t]hat’s the law. You can’t change that without paying just compensation.’”<sup>38</sup>

In the end though, nothing was made of House Bill 1188 as the Colorado Senate ultimately failed to pass the bill.<sup>39</sup> Although the right to exclude has been contemplated by the Colorado legislature, Harmel’s exclusive right of fishery has not. Notwithstanding that fact, Harmel’s continues to enforce its property right by charging anglers a fee for exclusive fishing access on the state-stocked Taylor River.

## II. BACKGROUND INFORMATION AND PRINCIPLES

### A. *A Brief History of . . .*

The concept of givings is a relatively new and unexplored area of the law.<sup>40</sup> While eminent domain and takings jurisprudence are grounded in the Federal Constitution and fleshed out in well-known

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35. Steve Roberts, Op-Ed., *Why Favor Rafters?*, DENVER POST, Feb. 28, 2010, at D4.

36. *Id.*

37. *Id.*

38. Jessica Fender, *Rafters, Landowner Drift Apart—on Taylor River—Legislation May Have to Settle a Fight Over Water Navigation Rights*, DENVER POST, Jan. 31, 2010, at B1.

39. See COLO. H. JOURNAL 67-1805, 2d Sess., at 1860 (2010); *Winners & Losers*, DENVER POST, May 13, 2010, at A13 (noting that the bill “[w]ould have created the right to float on rivers that run through private property, a thorny legal question that now could be addressed by Colorado voters”).

40. See Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 549 (2001); see also Reza Dibadj, *Regulatory Givings and the Anticommons*, 64 OHIO ST. L.J. 1041, 1045 (2003) (“‘givings’ are understudied”).

cases, givings jurisprudence cut its teeth in a groundbreaking article published by the *Yale Law Journal*. In *Givings*, authors Abraham Bell and Gideon Parchomovsky comprehensively set forth and explain the concept of givings jurisprudence.<sup>41</sup> In short, they argue, a giving is the converse of a taking.<sup>42</sup> Thus, while a taking is a “government seizure[] of property,” a giving constitutes “government distribution[] of property.”<sup>43</sup> When the government bestows a benefit to a private entity, a giving has occurred.<sup>44</sup> To more fully understand the concept of givings it is first necessary to chart a short course through the history and meaning behind givings’ “celebrated twin,” the venerated takings.<sup>45</sup>

### 1. Takings

The government’s authority to take private property for public use is generally known as eminent domain and that power is rooted in the Fifth Amendment.<sup>46</sup> The final clause of the Fifth Amendment expressly states “nor shall private property be taken for public use, without just compensation.”<sup>47</sup> Taken on its face, “the Takings Clause only restricts the federal government. But its provisions have been held equally applicable to state and local governments through the conduit of the Fourteenth Amendment.”<sup>48</sup>

Analytically, the Takings Clause becomes important because it serves as a guide for when the government must reimburse a private property owner for the unjust seizure of their property. To this end, “the

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41. See generally Bell & Parchomovsky, *supra* note 40.

42. See *id.* at 550.

43. *Id.* at 549. Parallel theories echoing the same concern exist. See, e.g., John Martinez, *Getting Back the Public’s Money: The Anti-Favoritism Norm in American Property Law*, 58 BUFF. L. REV. 619, 625-26 (2010). The idea of anti-favoritism mirrors that of a giving,

[t]he proposed doctrine [of anti-favoritism] allows the government to assert a claim for recapture of public funds or assets transferred to private parties for private purposes in violation of the anti-favoritism norm. The doctrine further provides that if the government does not recapture such funds or assets on its own, then private parties can assert a claim to force the government to do so.

*Id.* at 625.

44. Wallace Wen-Yeu Wang & Jian-Lin Chen, *Bargaining for Compensation in the Shadow of Regulatory Giving: The Case of Stock Trading Rights Reform in China*, 20 COLUM. J. ASIAN L. 298, 327 (2006).

45. Bell & Parchomovsky, *supra* note 40, at 549 (“[e]clipsed by their celebrated twin, takings, givings occupy a crucial yet barely visible role in the universe of constitutional property law”).

46. Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1426 (2006); U.S. CONST. amend. V.

47. U.S. CONST. amend. V.

48. SPRANKLING, *supra* note 27, at 658.



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government is required to pay compensation to the private property owner only when its action is classified as a taking. Otherwise—insofar as the Constitution is concerned—the property owner must simply bear the cost.”<sup>49</sup> To determine whether a valid constitutional taking has transpired, and thus just compensation due, the Supreme Court has carved out four broad categorical rules and one ad hoc factual inquiry.

The first broad categorical rule concerns government-authorized permanent physical invasions of private property. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court ruled that a New York law requiring landlords to permit a cable television company to install its cables on their property amounted to a compensable taking under the Fifth Amendment.<sup>50</sup> The Court concluded that “a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.”<sup>51</sup> The Court reasoned that government-authorized permanent physical invasions of property, no matter how slight, are “the most serious form of invasion of an owner’s property interests.”<sup>52</sup> From *Loretto* then comes the first bright line rule of takings jurisprudence: all government authorized permanent physical occupations of property are compensable takings.<sup>53</sup> These types of government actions are typically referred to as physical takings.<sup>54</sup>

In *Lucas v. South Carolina Coastal Council*, the Supreme Court created a second categorical takings rule: any government regulation that “wipes out the value of a [landowner’s] property, unless ascribable to nuisance prevention, is a taking.”<sup>55</sup> In this case, Lucas had purchased beachfront property in South Carolina for \$975,000, planning to develop the land for the building of single-family homes.<sup>56</sup> Two years later, the state legislature passed an act that completely barred Lucas from developing the property, thus rendering it valueless.<sup>57</sup> The Court held that this regulation constituted a compensable taking because the “regulation denie[s] [Lucas of] all economically beneficial or productive

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49. Bell & Parchomovsky, *supra* note 46, at 1426.

50. 458 U.S. 419, 421, 441 (1982).

51. *Id.* at 426.

52. *Id.* at 435.

53. *Id.* at 426.

54. Bell & Parchomovsky, *supra* note 40, at 560 (“[R]egarding physical takings, the Court has consistently treated permanent physical invasions, trivial as they may be, as takings.”).

55. *Id.* at 560; 505 U.S. 1003, 1029 (1992).

56. *Lucas*, 505 U.S. at 1006-07.

57. *Id.* at 1007.

use of land.”<sup>58</sup> The Court reiterated that “the Fifth Amendment is violated when land-use regulation ‘does not substantially advance legitimate state interests or denies an owner economically viable use of his land.’”<sup>59</sup>

The third categorical rule concerning takings relates to the “nuisance” or “noxious use” exception.<sup>60</sup> In these scenarios, “government regulations that prevent the noxious use of property do not work a regulatory taking and thus do not require compensation.”<sup>61</sup> For example, a statute banning alcohol manufacture was not considered a compensable taking even though the statute vastly reduced the value of plaintiff’s property.<sup>62</sup> Likewise, a city ordinance that prohibited brick manufacturing, and thereby greatly reducing the value of plaintiff’s property, did not amount to a compensable taking because the ordinance was a valid use of the city’s police power to protect its citizenry from noxious fumes.<sup>63</sup>

Finally, the fourth categorical rule involves government exactions. In essence, if an exaction lacks an “essential nexus . . . between the condition and the original purpose” of the exaction, a compensable taking is realized.<sup>64</sup> “In other words, there must be a sufficient connection between the end (the state interest) and the means used to achieve that end (the exaction).”<sup>65</sup> The Court took the “essential nexus” requirement one step further. In *Dolan v. City of Tigard*, the Court held that an exaction must exhibit a “rough proportionality” and that a government entity “must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”<sup>66</sup> In short, there must be a “rough proportionality between the government action and its

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58. *Id.* at 1015.

59. *Id.* at 1016 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

60. See SPRANKLING, *supra* note 27, at 676 (“[P]olice power regulation that prevents harm to the public is not a taking. [T]his doctrine is often called the ‘nuisance’ or ‘noxious use’ exception . . .”).

61. *Bell & Parchomovsky*, *supra* note 40, at 560; see also *Lucas*, 505 U.S. at 1022 (1992) (“[M]any of our prior opinions have suggested that ‘harmful or noxious uses’ of property may be proscribed by government regulation without the requirement of compensation.”).

62. *Mugler v. Kansas*, 123 U.S. 623, 657, 668-69 (1887) (holding that “[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.”).

63. *Hadacheck v. Sebastian*, 239 U.S. 394, 404, 405, 408, 410 (1915).

64. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

65. SPRANKLING, *supra* note 27, at 695.

66. 512 U.S. 374, 391 (1994).

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goal.”<sup>67</sup>

If an alleged taking does not neatly fit into one of the four categorical rules, then it must be evaluated on an “ad hoc” factual basis using a framework developed by the Supreme Court in *Penn Central Transportation Co. v. New York City*.<sup>68</sup> Under this standard, to determine if a regulation amounts to a compensable taking, a three-part balancing test should be employed. First, consider “[t]he economic impact of the regulation on the claimant”; second, determine “the extent to which the regulation has interfered with distinct investment-backed expectations . . .”; and finally consider “the character of the governmental action.”<sup>69</sup>

The foregoing discussion outlines the basic tenets of takings law. Any government ordered physical occupation of private property is automatically deemed a physical taking.<sup>70</sup> With respect to laws that render an owner’s property valueless, such actions constitute compensable regulatory takings.<sup>71</sup> In cases where the government wields its police powers to curb a noxious use or a nuisance, a non-compensable taking has been executed.<sup>72</sup> Government exactions must have an “essential nexus” between the exaction and the purported interest it serves.<sup>73</sup> Additionally, the exaction must be roughly proportional to its desired impact.<sup>74</sup> Finally, if none of the per se rules are triggered, to determine if a compensable taking has occurred, a court must use a three-part balancing test that considers a property owner’s investment-backed expectations, the nature of the government’s actions, and the loss in property value.<sup>75</sup>

## 2. *Givings*

It is true that “[t]he Fifth Amendment bars only uncompensated takings; there is no ‘Givings Clause.’”<sup>76</sup> Constitutional silence however is to no avail, as it is impossible to have an existing body of takings law without concomitant givings.<sup>77</sup> In a taking, the government captures

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67. Bell & Parchomovsky, *supra* note 40, at 561.

68. 438 U.S. 104, 124 (1978).

69. *Id.*

70. *See supra* Part II.A.1.

71. *See supra* Part II.A.1.

72. *See supra* Part II.A.1.

73. *See supra* Part II.A.1.

74. *See supra* Part II.A.1.

75. *Penn Central*, 438 U.S. at 124.

76. Bell & Parchomovsky, *supra* note 40, at 551.

77. *Id.* at 552 (“[T]akings and givings are so inextricably related that one cannot have

private property. Conversely, in a giving, the government grants property. Like their takings counterpart, givings broadly fall into three major categories: physical givings, regulatory givings, and derivative givings.<sup>78</sup>

Physical givings are perfected when a private actor receives a government distribution of property.<sup>79</sup> “Examples of physical givings include the granting of cattle grazing rights, mineral rights, and logging rights on public land to private interests, and the transfer of public land to private entities such as professional sports franchises.”<sup>80</sup>

“[R]egulatory giving[s] occur[] when a government enhancement of property value by means of regulation goes ‘too far,’” for example in zoning, land variances, and use exceptions.<sup>81</sup> In these cases, the two most obvious givings occur when the government supports infrastructure and limits, or in some cases expands, land use.<sup>82</sup> When the government limits land use, they increase property values “by minimizing the harms that might otherwise affect landowners, especially those arising from incompatible land uses.”<sup>83</sup> Additionally, land use restrictions can cause a concomitant increase in property values because they restrict the supply of land for a limited use.<sup>84</sup> Here, simple market forces show that a diminished supply creates an increase in demand and thus a rise in value.<sup>85</sup> One commentator argues that regulatory givings are most pervasive in farmland preservation, “where conversion pressure and enhanced land values are the result of government support.”<sup>86</sup>

Lastly, a derivative giving exists when a taking or giving results in the increased value of surrounding property, even though that property received no direct giving.<sup>87</sup> For example, a land use restriction that

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a coherent takings jurisprudence without an attendant givings jurisprudence.”).

78. *Id.* at 563.

79. *Id.*

80. *Id.*

81. Bell & Parchomovsky, *supra* note 40, at 563-64; *see also* Martinez, *supra* note 43, at 623 (“[G]overnment favoritism . . . involves government regulatory conduct on a favored basis. For example, government zoning of a single lot for apartments . . . . [Another] government favoritism setting occurs when government infrastructure improvements . . . enhances the value of the surrounding properties . . .”).

82. Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 *ECOLOGY L.Q.* 187, 234 (1997).

83. *Id.* at 235.

84. *Id.*

85. *See id.*

86. Mark W. Cordes, *Takings, Fairness, and Farmland Preservation*, 60 *OHIO ST. L.J.* 1033, 1073 (1999).

87. Bell & Parchomovsky, *supra* note 40, at 563.

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increases the value of neighboring property is properly seen as a regulatory giving.<sup>88</sup>

If the main purpose of the takings doctrine is to determine when the government must pay for the taking of private property for public use, “givings doctrine seeks to determine under what circumstances beneficiaries of government actions must be charged for received benefits.”<sup>89</sup> But before sketching out the analytical framework used to determine when a chargeable giving has occurred, it is prudent to briefly outline the policy behind givings law.

The idea of givings is predicated on the same fairness and efficiency principles that govern takings law.<sup>90</sup> For example, if a chief concern of the Takings Clause is:

“to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” [then it follows that] fairness concerns should bar the government from allowing some people alone to enjoy benefits that in . . . “all fairness and justice” should be enjoyed by the public as a whole.<sup>91</sup>

Equitable principles suggest that isolated bestowals of public property for private gain would “create distributive injustice by allowing a select few to benefit disproportionately from the public’s limited resources.”<sup>92</sup> In short, “no individual should be improperly ‘singled out’ by the government.”<sup>93</sup> If, for example, an individual is protected from this “singling out” in the context of federal and state eminent domain law, then it seems fair that property rights of individuals should not be “unfairly enhanced at the expense of the public.”<sup>94</sup> Furthermore, when the government exacts an uncompensated giving, in effect it’s forcing the public to unfairly subsidize the benefactor’s gain.

The fairness and equity backbone of givings jurisprudence are

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88. See Cordes, *supra* note 82, at 1073.

89. Wang & Chen, *supra* note 44, at 327.

90. See Bell & Parchomovsky, *supra* note 40, at 578. One commentator advances this argument even further, concluding that in some cases there is an inextricable link between givings and anti-commons. Dibadj, *supra* note 40, at 1051. “[T]he benefit administrative law bestows as a regulatory giving is frequently the ability to exclude, ironically often under the guide of the ‘public interest.’ This anticommons, in turn, breeds both economic and social exclusion.” *Id.*

91. Bell & Parchomovsky, *supra* note 40, at 578 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

92. Bell & Parchomovsky, *supra* note 40, at 578.

93. Martinez, *supra* note 43, at 620.

94. *Id.* at 621-22 (discussing the concept of the “anti-favoritism norm” of American property law which “seeks to prevent . . . unfair enhancements.”).

implicitly supported by state constitutions. “Unlike the express prohibitions in Federal and state Just Compensation Clauses against governmental imposition of unfair burdens . . . [s]tate constitutions . . . contain provisions such as the prohibition against the gift of public funds for private purposes which prohibit government favoritism [or, a giving].”<sup>95</sup> To this end, the constitutions of New York and Colorado expressly disclaim using public funds for private purposes.<sup>96</sup>

In Colorado, the courts have construed the state constitutional provision barring public funds for private use “to prohibit the state . . . from transferring public funds to a private company or corporation without receiving any consideration in return.”<sup>97</sup> Likewise, in New York, the provision “was intended to curb raids on the public purse for the benefit of favored individuals or enterprises furnishing no corresponding benefit or consideration to the State.”<sup>98</sup>

On a final policy note, givings jurisprudence, like takings law, assumes that for efficiency purposes, a government would only bestow a benefit when the overall effect of such a gift would exceed the total cost of giving it in the first place.<sup>99</sup> If economic efficiency considers both costs and benefits, then givings law seeks “to guarantee an accurate accounting of benefits.”<sup>100</sup> The purpose here is to show the potential problems that “uncharged givings” create.<sup>101</sup> First, failure to properly account for benefits bestowed “may lead to failure to undertake economically efficient projects.”<sup>102</sup> Second, “[t]he absence of government compensation or charge may lead individuals to make inefficient investment decisions.”<sup>103</sup>

### *B. To Charge or Not to Charge? A Framework to Account for Compensable Givings*

To recap, the concept of givings mirrors that of takings. Thus, just

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95. *Id.* at 624.

96. *See* N.Y. CONST. art. VII, § 8, cl. 1 (“The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking . . . .”); COLO. CONST. art. XI, § 2 (The state shall not “make any donation or grant to . . . any corporation or company . . .”).

97. *City & Cnty. of Denver v. Qwest Corp.*, 18 P.3d 748, 758 (Colo. 2001) (citation omitted).

98. *Teachers Ass’n, Cent. High Sch. Dist. No. 3 v. Bd. of Educ., Cent. High Sch. Dist. No. 3, Nassau Cnty.*, 312 N.Y.S.2d 252, 254 (N.Y. App. Div. 1970) (citing *Mahon v. Bd. of Educ. of N.Y.*, 63 N.E. 1107 (N.Y. 1902)).

99. *See* Bell & Parchomovsky, *supra* note 40, at 580.

100. *Id.*

101. *Id.* at 584.

102. *Id.*

103. *Id.* at 581.

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as not every taking by the government requires just compensation, it follows that not every giving is chargeable.<sup>104</sup> Therefore, the givings model seeks to identify givings that are chargeable and those that are not. “[I]n other words, [the purpose of the givings doctrine is] to distinguish ‘between intentional redistribution [on the one hand] and the imposition of gains and losses as an incidental, and sometimes unavoidable, side-effect of government [on the other].’”<sup>105</sup> To make this determination, two inquiries must be made. First, when is a giving perfected?<sup>106</sup> And second, once a giving is perfected and identified, at what point does the giving become compensable?<sup>107</sup> With respect to the first inquiry, the “reversibility of the act” and the “identifiability of the recipient” must be considered.<sup>108</sup> With respect to the second inquiry, “the proximity of the act to a taking[] and . . . the refusability of the benefit . . . are relevant in determining the means of imposing the charges.”<sup>109</sup>

*1. Reversibility of the Act*

Relying on the principle that givings are the conceptual inverse of takings, it is axiomatic that the distinction between a chargeable and non-chargeable giving occurs when, if the government act were flipped, it would amount to a compensable taking.<sup>110</sup> Thus, the first step towards determining whether a cognizable giving has occurred is to determine whether “its inverse would constitute a compensable taking.”<sup>111</sup> To illustrate, it is helpful to think of different types of property grants or deprivations that would not trigger a compensable taking.<sup>112</sup> For example, if a government distribution of property is viewed as a prize for a “response to socially beneficial activity[,]” then it should not be viewed as a chargeable giving because its inverse, a penalty, “is not considered a compensable taking[.]”<sup>113</sup>

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104. See Bell & Parchomovsky, *supra* note 40, at 590; Wang & Chen, *supra* note 44, at 331.

105. Bell & Parchomovsky, *supra* note 40, at 591.

106. *Id.* at 554.

107. *Id.*; see also Wang & Chen, *supra* note 44, at 327 (noting that “givings doctrine seeks to determine under what circumstances beneficiaries of government actions must be charged for received benefits.”).

108. Wang & Chen, *supra* note 44, at 331; see also Bell & Parchomovsky, *supra* note 40, at 591-96.

109. Wang & Chen, *supra* note 44, at 331; Bell & Parchomovsky, *supra* note 40, at 596-604.

110. Bell & Parchomovsky, *supra* note 40, at 591.

111. *Id.*

112. *Id.*

113. *Id.* at 591-92.

This inquiry is not limited to government bestowals of grants or deprivations of property through a penalty. Some commentators, for example, have applied this inquiry to situations where a government might need “to compensate shareholders if it removes the trading right of their shares.”<sup>114</sup>

### 2. *Identifiability of the Recipient*

The next step in determining whether a giving is realized concerns the underlying fairness and equity principles that underpin givings jurisprudence.<sup>115</sup> In this step, if a single recipient enjoys the benefits of a government distribution, then a presumption of a charge arises.<sup>116</sup> It follows then that “when the government action benefits the public at large, the need for assessing a charge is presumptively weaker.”<sup>117</sup> To this end, if the benefit seems to be uniformly distributed over a number of beneficiaries, the chargeability of the benefit is greatly reduced.<sup>118</sup> Moreover, “[j]ust as a taking from a large demographic does not typically require recompense, a giving to a large segment of society need not be charged to the members of that segment.”<sup>119</sup>

### 3. *Proximity of the Act to a Taking*

The third step of the framework concerns less with whether a giving has occurred and more with when and how to levy charges for givings.<sup>120</sup> This stage involves the somewhat modified principles set forth in *Jackman v. Rosenbaum Co.*<sup>121</sup> and *Pennsylvania Coal Co. v. Mahon*,<sup>122</sup> where the Supreme Court established that no compensation would be awarded “where the government action [figured] an average reciprocity of advantage . . . .”<sup>123</sup> As applied to givings jurisprudence, “in determining the amount of compensation to be paid or charge to be assessed, the total value of givings and takings must be taken into account.”<sup>124</sup> In other words “an assessment would necessarily take into account any takings simultaneously incurred by the benefit recipients,

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114. Wang & Chen, *supra* note 44, at 331.

115. See Bell & Parchomovsky, *supra* note 40, at 593.

116. *Id.*

117. *Id.*

118. *Id.*

119. Lindsay Warren Bowen, Jr., Note, *Givings and the Next Copyright Deferment*, 77 *FORDHAM L. REV.* 809, 837 (2008).

120. Bell & Parchomovsky, *supra* note 40, at 596.

121. 260 U.S. 22, 30 (1922).

122. 260 U.S. 393, 415 (1922).

123. Bell & Parchomovsky, *supra* note 40, at 597.

124. *Id.* at 597.



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that is, the charge imposed for the benefit must be appropriately reduced by the loss arising out of the simultaneous takings.”<sup>125</sup>

Importantly, the modern day average reciprocity of advantage principle works differently than the nineteenth century’s benefit-offset principle, and the latter ultimately carries the day in givings doctrine.<sup>126</sup> For example, average reciprocity of advantage is binary, where the benefit-offset principle incorporates more elements.<sup>127</sup> “[T]he benefit-offset principle aggregated the total value of the derivative giving and physical taking in order to determine the amount of compensation.”<sup>128</sup> On the other hand, the average reciprocity of advantage militates against compensation because it determines that the gain of increased property value roughly cancels out the concomitant taking of property.<sup>129</sup> In the end, the benefit-offset principle prevails and therefore “[a] complementary detriment-offset principle must be used in the law of givings. Any charge for a giving must be reduced by the absolute value of the taking to the property owner.”<sup>130</sup>

Regarding the totality of the taking and the giving, two clear principles emerge. First, if and when a charge for a giving is identified, it should incorporate the total of the givings and the takings.<sup>131</sup> Second, if the link between the giving and taking is clear, and the number of beneficiaries and those whose “property” has been taken is obvious, then “compensation and charge should be made directly between the parties to the extent feasible.”<sup>132</sup>

#### 4. Refusability of the Benefit

The final inquiry in determining when and how to charge for a

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125. Wang & Chen, *supra* note 44, at 334.

126. Bell & Parchomovsky, *supra* note 40, at 597-99.

127. *Id.* at 597-98.

128. *Id.* at 598.

129. *Id.*

130. *Id.* at 599. *But see* Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 HARV. ENVTL. L. REV. 295, 359-60 (2003) (recognizes the importance of average reciprocity of advantage in limiting givings but makes no mention of the benefit-offset principle).

At the most general level, courts have recognized the role of government givings in calculating diminutions in property values caused by government regulations. . . . [The] average reciprocity of advantage [doctrine] posits that government givings benefit landowners in roughly the same proportion that landowners suffer diminutions in property values caused by regulation.

*Id.* at 359-60.

131. Bell & Parchomovsky, *supra* note 40, at 601.

132. *Id.*

giving relies on the principles of gifts and unjust enrichment.<sup>133</sup> Based on established law requiring voluntary acceptance of gifts, it logically follows that:

[i]f a giving is refusible and the beneficiary accepts it, she should pay the charge upon receipt. If . . . the giving is not refusible, payment of the charge should be deferred until a future realization event transpires. If the benefit is permanently refused and realization never occurs, no charge should be assessed.<sup>134</sup>

In short, “the recipients of givings have to accept the benefits voluntarily to be charged for them . . . .”<sup>135</sup>

### C. Putting it All Together

In sum, to determine whether a compensable giving has transpired two questions must be answered. First, if the act were reversed, would it amount to a compensable taking? Second, are the identities of the recipients readily identifiable such that the bestowal of government property falls on a relatively few number of people? If answered in the affirmative, a cognizable giving has taken place. The next step is to determine when and how a charge should be laid by considering the interplay between the taking and the giving in conjunction with the ability of the recipient to refuse the benefit. “Once the government determines that the conferment of a benefit is a chargeable giving, it should give notice to all beneficiaries that they have received a giving and that it is chargeable.”<sup>136</sup> After notice, the burden of assessing a giving could be placed on the government, or alternatively, upon the recipient of the giving.<sup>137</sup>

## III. A GIVINGS ANALYSIS

This Note applies the givings framework sketched out above to the scenarios of the DSR and Harmel’s to show that, in certain situations, a landowner who charges an access fee on a state stocked river reaps a pecuniary gain from the exploitation of a public resource. Further, such situations are archetypal examples of chargeable givings (both physical and regulatory) and therefore the recipient should compensate the state.

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133. *Id.*

134. *Id.* at 603.

135. Wang & Chen, *supra* note 44, at 336.

136. Bell & Parchomovsky, *supra* note 40, at 605.

137. *Id.*

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*A. The Government Giveth: The Act is Sufficiently Reversible*

The first step in determining whether “[a] giving is chargeable [is whether] its inverse would [amount to] a compensable taking.”<sup>138</sup> As a threshold matter then, the alleged benefit bequeathed to the DSR and Harmel’s must be identified. If the alleged giving was reversed, would it calculate to a compensable taking? Because the answer is yes, as explained below, both the DSR and Harmel’s have enjoyed cognizable givings and must compensate the state.

The DSR receives both regulatory and physical givings. Recall two important facts about the DSR’s operation. First, in 1997, New York’s highest court determined that the DSR could assert an exclusive right of fishery.<sup>139</sup> For the purposes of a givings analysis, this decision constituted a cognizable regulatory giving. Second, New York facilitates an extensive fish stocking program in the Salmon River.<sup>140</sup> Absent the state’s stocking efforts, high populations of fish would not be present. Therefore, the state’s stocking program amounts to a cognizable physical giving.

With respect to the *Douglaston* decision, the question before the court was “whether [DSR’s] ownership entitles it to exclude the public from fishing in, though not from navigating through, its portion of the [Salmon] [R]iver.”<sup>141</sup> The court answered in the affirmative: the DSR “enjoys a duly conveyed exclusive right of fishery.”<sup>142</sup> For the purposes of a givings analysis then, the dispositive question becomes: hypothetically, if the court had refused to recognize the DSR’s exclusive right of fishery, would the decision have worked a compensable taking? Simply, the answer is yes.

This analysis relies on the settled property law principle of the right of exclusion and equates the DSR’s exclusive right of fishery with the general right to exclude.<sup>143</sup> Abrogating an exclusive right of fishery is akin to removing the property owner’s right to exclude, and thus the

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138. *Id.* at 591.

139. *Douglaston*, 678 N.E.2d at 205.

140. *See Salmon River*, *supra* note 1.

141. *Douglaston*, 678 N.E.2d at 202.

142. *Id.* at 205.

143. *See* Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 285 (2002) (“The rights most commonly identified with the property bundle include the right to exclude others, the right to possess, the right to use, and the right to alienate (or transfer or dispose of).”). *See also* *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (“[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property [is] the right to exclude others.”).

government must pay just compensation.<sup>144</sup>

In the DSR hypothetical (failure to recognize a right of exclusive fishery), a compensable taking would not be found by application of any of the four categorical rules. The *Loretto* standard does not apply because there is no permanent physical occupation of property.<sup>145</sup> The *Lucas* rule is not triggered because the converse of the *Douglaston* decision would probably not erase “all . . . beneficial or productive use of land.”<sup>146</sup> The nuisance and noxious use exceptions do not apply. And since there is no issue about an exaction, the rules of the *Nollan* and *Dolan* duality are inoperable. The hypothetical then must be analyzed using the three-part standard of *Penn Central*.

### 1. Applying *Penn Central* to the *Douglaston* Decision

If the court in *Douglaston* failed to recognize the DSR’s exclusive right of fishery, the decision would likely result in a compensable taking under *Penn Central*. The first step in the *Penn Central* analysis considers the economic impact of the regulation. In applying this factor, one commentator has concluded that “[g]enerally speaking, the greater the economic impact of a government action the greater the likelihood of a taking.”<sup>147</sup> Further, to determine the economic impact, “estimate the difference, as of the date of the alleged taking, between the ‘fair market value’ of the property (1) subject to the regulatory constraint being challenged, and (2) assuming the regulation being challenged did not apply.”<sup>148</sup> Application of this factor to the DSR hypothetical is problematic because it is just that, a hypothetical. The fair market value of the DSR property before and after regulation is unknown. Allowing for some assumptions, however, makes the analysis tenable. Indeed, the federal court tasked with hearing most takings claims “has summarized its case law by stating that the court generally has ‘relied on diminutions well in excess of [eighty-five] percent before finding a regulatory taking.’”<sup>149</sup> Using that eighty-five percent diminution in value as a baseline, it is not hard to imagine that a court would find a compensable taking if the court in *Douglaston* failed

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144. See *Kaiser Aetna*, 444 U.S. at 179-80 (holding “that the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation”).

145. See *supra* Part II.A.1.

146. *Lucas*, 505 U.S. at 1015.

147. John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL’Y 171, 178 (2005).

148. *Id.* at 180.

149. *Id.* at 180 (quoting *Walcek v. United States*, 49 Fed. Cl. 248, 271 (Fed. Cl. 2001)).

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to recognize the DSR's exclusive right of fishery. The very reason the DSR exists in the first place is because the law recognized an absolute right to exclude. If that right had not extended to an exclusive right of fishery there would be no logical basis for the DSR to continue to charge.

The second factor to be considered in a *Penn Central* analysis concerns the property owner's "distinct investment-backed expectations" and the way the regulation interferes with those expectations.<sup>150</sup> Applying this factor to the DSR hypothetical further illustrates why a removal of their exclusivity of fishing would constitute a taking. The Federal Circuit uses a formula to correctly identify and weigh three factors when considering the investment-backed expectations of the property owner:

- (1) whether the plaintiff operated in a "highly regulated industry;"
- (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the property; and
- (3) whether the plaintiff could have "reasonably anticipated" the possibility of such regulation in light of the "regulatory environment" at the time of purchase.<sup>151</sup>

Using this method "provides a measure of protection against regulatory conflicts that cannot reasonably be anticipated and are therefore likely to unfairly affect property owners."<sup>152</sup>

Application of these three components to the DSR hypothetical is straightforward. With respect to the first component, the DSR does not appear to operate in a significantly regulated industry.<sup>153</sup> An affirmative answer to the second and third components is likely impossible, as the current owners of the DSR property could not have known of the problem (the battle for exclusivity of fishing) nor reasonably anticipated it because the purchase of the property relates back to a conveyance

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150. *Penn Central*, 438 U.S. at 124; *see also* Echeverria, *supra* note 146, at 183 ("The second *Penn Central* factor is the extent to which a regulatory restriction interferes with 'investment-backed expectations.'").

151. Echeverria, *supra* note 146, at 184 (quoting *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004)).

152. *Id.* at 185.

153. The DSR operates a guide service on its property. *See Current Conditions, DOUGLASTON SALMON RUN*, <http://www.douglastonsalmonrun.com/default.aspx?PageID=16> (last visited Sept. 13, 2011). The extent of the regulatory environment extends only so far as New York law requires professional guides to be licensed. *See, e.g.*, N.Y. ENVTL. CONSERV. LAW § 11-0533(2) (McKinney 2011) ("All guides engaging in the business of guiding on all lands and waters of the state shall possess a license issued by the department . . .").

from 1792.<sup>154</sup> For these reasons, a reasonable conclusion could be drawn that a hypothetical nullification of the DSR's exclusive fishing rights would interfere with the property owner's investment-backed expectations, thus rendering a compensable taking.

The final factor of the *Penn Central* test considers "the character of the governmental action."<sup>155</sup> Application of this factor to takings claims has been notoriously difficult, though in *Lingle v. Chevron U.S.A. Inc.*, the Court seemingly lifted the fog.<sup>156</sup> Under *Lingle*, the character factor of the *Penn Central* test has four definitions.<sup>157</sup> The first definition involves any "government action [that] involves a physical occupation of private property."<sup>158</sup> The second definition of "the character factor must include consideration of whether a regulation impairs the right to devise private property to one's heirs."<sup>159</sup> The third definition "focuses on whether the regulation targets one or a few owners or is more general in application."<sup>160</sup> The fourth and "final definition of the character factor focuses on whether a regulation is benefit-conferring or harm-preventing."<sup>161</sup>

A quick application of these definitions to the DSR hypothetical reveals that "the character of the governmental action" is sufficient to weigh in favor of the property owner, thus supporting a compensable taking.<sup>162</sup> The first definition (temporary physical occupation) is obviously not triggered. A hypothetical failure of the court to recognize an exclusivity of fishing bears no relevance to any physical occupation. The second definition (whether the regulation allows the property to be devised) should not factor because exclusivity of fishing rights do not account for whether or not a property could be transferred to progeny. The third and fourth definitions (the generality of the regulation and whether it confers a benefit or prevents a harm, respectively) however are applicable. If a regulation that burdens is offset by a corresponding

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154. *Douglaston*, 678 N.E.2d at 202.

155. *Penn Central*, 438 U.S. at 124.

156. *See generally* 544 U.S. 528 (2005); *see also* Echeverria, *supra* note 146, at 186 ("Compared with the economic impact and expectations factors [of the *Penn Central* test], which present problems and uncertainties of their own, the definition of the term 'character' is a veritable mess.").

157. *See* Echeverria, *supra* note 146, at 203 ("*Lingle's* thorough pruning of regulatory takings doctrine leaves two discrete, narrow definitions of character, and two more general definitions.").

158. *Id.*

159. *Id.*

160. *Id.* at 204.

161. *Id.* at 207.

162. *Penn Central*, 438 U.S. at 124.

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benefit because others are similarly restricted, the regulation looks less like a taking.<sup>163</sup> But in the case of the DSR hypothetical, the exact opposite is manifest. Here, failure to recognize an exclusive right of fishery unduly burdens one party and benefits none.<sup>164</sup> Relevance of the fourth definition is difficult but no less sound. For example, “a regulation that is designed to protect neighboring owners and the community as a whole from serious harms should be less likely to generate a finding of a taking than a benefit-conferring regulation.”<sup>165</sup> The problem with the DSR hypothetical is that the regulation is not intended to prevent any harm or confer any benefit. If a line must be drawn however, it makes more sense to put the hypothetical decision into the “benefit-conferring” compartment because, after all, the recognition of exclusivity of fishing allows the DSR to realize a benefit.

*2. Physical Givings and Conceptual Capture*

The foregoing discussion satisfies the first inquiry necessary to identify a chargeable giving. Because the inverse of the *Douglaston* decision would constitute a compensable taking, the DSR has enjoyed a chargeable regulatory giving for which they should compensate the state. But the inquiry need not end there. Indeed, because both the DSR and Harmel’s derive a private gain from a public resource (fish) they have also enjoyed a chargeable physical giving.

Under the “reversibility of the act” component, when the state stocks fish in the Salmon and Taylor Rivers it exacts a physical giving the moment the private fishing preserve exerts constructive control over the fish.<sup>166</sup> To come to this conclusion, it is necessary to conceptually reverse the physical giving. That is to say, if the state were at once to remove the fish and stop stocking the rivers, would the government action amount to a compensable taking? Because the answer is yes, as explained below, it follows that the DSR and Harmel’s enjoy a chargeable physical giving.

To understand why removing fish from the DSR’s or Harmel’s

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163. See Echeverria, *supra* note 147, at 204.

164. See *id.* (“[E]xamining the generality versus particularity of a regulation provides useful insight into whether a regulation imposes an unfairly onerous burden.”).

165. *Id.* at 207.

166. See, e.g., Bell & Parchomovsky, *supra* note 40, at 563 (“In a physical giving, the government bestows a property interest upon a private actor.”). To this end, “[e]xamples of physical givings include the granting of cattle grazing rights, mineral rights, and logging rights on public land to private interests . . . .” *Id.* With respect to the DSR and Harmel’s, the physical giving is the granting of fishing rights. By placing the fish in the river, the state effectively allows the landowner to exert exclusive control over the fish in their zone of property.

zone of private property would amount to a compensable taking (and therefore a chargeable giving) it must be shown that fish have become property of the landowner. In New York, fish are considered a public resource. For example, “New York owns all fish . . . except those legally acquired and held in private ownership. Any person who kills, takes or possesses such fish . . . consents that title thereto shall remain in the state for the purpose of regulating and controlling their use and disposition.”<sup>167</sup> A similar principle also exists in Colorado. For example, “[a]ll wildlife within [Colorado] not lawfully acquired and held by private ownership is declared to be the property of this state.”<sup>168</sup>

Under the authority of the above definitions, both the DSR and Harmel’s appear to facially violate the New York and Colorado state constitutions because, by charging anglers to fish for a state owned resource, they derive a private gain from a public resource. But this problem is both explained and solved by applying the law of givings. Once the fish enter the zone of property owned by the DSR and Harmel’s, the fish come under the de facto legal control of the locus owner because no one other than a fee-paying angler can harvest a fish from one of these preserves. The property owner, in other words, holds constructive control or capture over the fish.<sup>169</sup> If the state were to remove the fish from the possession of the DSR or Harmel’s, the government action would be characterized as an impermissible appropriation of private property necessitating just compensation. If this holds true, the physical giving has been realized because the reversibility of the giving constitutes a compensable taking.

This tedious and lengthy subsection shows that the factual

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167. N.Y. ENVTL. CONSERV. LAW § 11-0105 (McKinney’s 2011); *see also* Barrett v. State, 116 N.E. 99, 100 (N.Y. 1917) (In New York, state ownership of wildlife is a matter of public interest because “[t]hey are a species of natural wealth which without special protection would be destroyed.”).

168. COLO. REV. STAT. ANN. § 33-1-101(2) (West 2010); *see also* Farmers Irrigation Co. v. Game & Fish Comm’n, 369 P.2d 557, 560 (Colo. 1962) (“In this state all game and fish, not held under legally acquired private ownership, is the property of the state of Colorado.”).

169. Well-established precedent supports this assertion. *See, e.g.*, Pierson v. Post, 3 Cai. R. 175, 175 (N.Y. 1805) (establishing the rule of capture, “[i]f the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation”); *see also* Douglas v. Seacoast Prods., Inc. 431 U.S. 265, 284 (1977) (“A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of ‘owning’ wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture.”).



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scenarios of the DSR and Harmel's are sufficient to satisfy the first prong of a givings analysis. In either situation, a reversal of the alleged giving would constitute a taking requiring just compensation. Because the conceptual inverse of the giving would qualify as a taking, the giving is realized and is chargeable.<sup>170</sup>

*B. Who Benefits? The Recipients are Identifiable*

The second and last inquiry to be made in identifying a chargeable giving has to do with whether the recipients of the giving are easily identifiable.<sup>171</sup> Generally, "giving to a single beneficiary should presumptively give rise to a charge. When, by contrast, the government action affects the broader public, there is more reason to view it as a tax or a noncompensable regulation."<sup>172</sup> This prong is easily satisfied in the case of the DSR and Harmel's and thus the presumption of a chargeable giving should be found.

With respect to the DSR, there is only one identifiable recipient of the giving: the DSR itself.<sup>173</sup> In this case, the government benefit falls unfairly on one party thus perfecting the giving.<sup>174</sup> A wrinkle or two is added in the case of Harmel's, though nonetheless the recipients of the government benefit are identifiable. Harmel's is not the only private fishing ranch on the Taylor River. Wilder on the Taylor, for example, is a private ranch on the river that presumably seeks to enforce its property right of exclusion.<sup>175</sup> The mere presence of one other private fishing preserve however should not weigh against the finding of a giving in the case of Harmel's because the government action does not positively affect the broader public.

Of course the anglers who pay to fish at either the DSR or Harmel's are not the only people fishing the river. Thus, an argument can be made that the public stocking of rivers is intended to benefit the broader public. This Note accepts that argument as true and valid, though it should not affect the outcome of this analysis. For example, "it is . . . necessary to examine how the benefits of a giving are

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170. See Bell & Parchomovsky, *supra* note 40, at 591-592.

171. *Id.* at 593.

172. See *id.*

173. The Salmon River is seventeen miles long and the DSR is the property owner that charges an access fee. See *Salmon River*, *supra* note 1; *Pick Up a Pass*, *supra* note 8.

174. See Bell & Parchomovsky, *supra* note 40, at 594 ("It would be unfair for an individual to enjoy a benefit at society's expense, when the benefit should, in all fairness and justice, be enjoyed by society as a whole.").

175. *Wilder*, WILDER ON THE TAYLOR, <http://www.wildercolorado.com/history/> (last visited Sept. 13, 2011); Fender, *supra* note 38.

distributed over the group of beneficiaries. If the distribution is uniform, no charge should be assessed.”<sup>176</sup> In the case of both DSR and Harmel’s, however, the benefit of a fish stocking program and the recognition of an exclusive right of fishery disproportionately falls on a relatively few number of property owners. In sum, because the recipients of a giving are easily identified, the second prong of the givings analysis is satisfied.

*C. Give and Take: Measuring the Giving Against the Taking*

The third installment in a givings analysis concerns “whether and how to assess charges for givings.”<sup>177</sup> At this point in a givings inquiry, a compensable giving has already been identified and, as previously stated, the goal now becomes determining the monetary value ascribable to the giving. The scenarios of the DSR and Harmel’s have already presented themselves as receiving chargeable givings and therefore the next step in the inquiry is to calculate the value of the giving.

A straightforward analysis however proves to be difficult because the recipient of the giving (the DSR or Harmel’s) is not the same as the taking victim, who arguably can be anyone from the public at large, down to individual guides and fishermen.<sup>178</sup> But all is not lost, as “[u]nified treatment of givings and takings need not be restricted to cases where the giving beneficiary and taking victim are the same person.”<sup>179</sup> Precise calculation at this point however still evades analysis because the concomitant takings and their values are beyond the scope of this Note. Suffice it to say that when considering what charge to lay on a landowner in a factual situation similar to the DSR or Harmel’s, the total value of the giving and taking must be considered in conjunction.<sup>180</sup>

*D. The Benefits Are Refusable*

The fourth and final installment of a givings analysis concerns the

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176. Bell & Parchomovsky, *supra* note 40, at 593.

177. *Id.* at 596.

178. A more direct link is explored in relation to stock trading rights in China. For example, “the Chinese split share structure scenario underscores the fact that the benefits of a regulatory giving are often built on a previous uncompensated taking. The trading restrictions imposed on the non-tradable shares in the early nineties can be construed as a regulatory taking of the non-tradable shares’ trading rights.” Wang & Chen, *supra* note 44, at 335.

179. Bell & Parchomovsky, *supra* note 40, at 599.

180. For a short discussion on how givings could be applied to copyright deferments and the realization of their charge, see Bowen, *supra* note 119, at 847.

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temporal relationship between the giving and the realization of its charge. A giving becomes chargeable when the recipient can refuse the benefit but accepts regardless.<sup>181</sup> Application of this rule indicates that the giving at both DSR and Harmel's are realized and therefore ripe for a charge.

At first blush, it seems that neither the DSR nor Harmel's could refuse their benefit. After all, it is unlikely that either property owner could, or even would, request the state to stop stocking certain portions of the river. Moreover, fish are wild animals and will swim wherever they like. The DSR and Harmel's could claim an inability to refuse the benefit because they lack control over it in the first place. But this argument does not hold water. To refuse the benefit, the DSR or Harmel's could simply decide not to charge. If that were the case, the giving is not perfected because the property owner doesn't realize any pecuniary gain. To summarize, the final piece of a givings analysis is positively identified because the property owners of the DSR and Harmel's could indefinitely refuse the benefit by ceasing to charge anglers for exclusive access.

**CONCLUSION**

This Note argues that there are certain situations where fee-charging landowners who operate private fishing preserves should compensate the state for the distribution of the government's largesse. Applying the law of givings, the rise to such charges manifest themselves in at least two situations relevant to such fishing preserves. First, when a regulation or court decision has recognized a property owner's exclusive right of fishery, the presumption of a chargeable giving is apparent. Second, when a private fishing operation relies heavily on the stocking efforts of a state, the existence of a cognizable giving should be found.

Additionally, this Note recognizes several shortcomings in the application of its giving analysis. Were this framework to be applied in actual practice, several assumptions would need to be filled-in using actual mathematical figures, for example, to accurately account for the total cost of the giving weighed against the cost of the taking.

Finally, although the scope of this Note may be narrow, its implications and relevance are not. Indeed, if a cognizable giving is found in the case of private fishing preserves, the question is begged: what are the outer limits of givings jurisprudence?<sup>182</sup> The existing body

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181. Bell & Parchomovsky, *supra* note 40, at 603.

182. *See id.* at 563.

of takings law is a thicket of snarls, and, as this Note has shown, givings law may prove to be equally obtuse.