

PRIVATE TAKINGS

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ABSTRACT

Eminent domain, or the power to take, is generally analyzed as a quintessential government power. It is unsurprising, therefore, that scholars tend to operate from the basic assumption that eminent domain is solely an incident of the government's domain in the provision of public goods. This assumption has led to widespread criticism of the courts' evisceration of the "public use" requirement, and repetition of the mantra that the government cannot simply take from "A" in order to give to "B."

In this Article, I show that this conception of takings is too narrow. Eminent domain is a property arrangement, and, as such, it is adaptable to private property law even without state action. Indeed, private takings – i.e., takings carried out by non-governmental actors – have a long and distinguished pedigree in our legal system. Additionally, the justifications for government takings lend themselves just as well to private takings. Recognizing the importance and legitimacy of private takings leads to two central claims. First, I argue that private takings should often be a preferred mechanism for achieving goals generally accomplished

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PRIVATE TAKINGS

2

today through public takings. Second, I show that identifying private takings as a vital category helps clarify the proper concerns of takings law—not only to the constitutionally demanded “just compensation” offered for takings and the post-taking “public use,” but also to the pre-taking original use.

Having made these central claims, I posit that a comprehensive law of takings can be developed that encompasses both private and public takings. In the realm of theory, the Article circumscribes the place of takings within the broader theory of entitlements by defining takings within the context of mixed property and liability (“liability”) rules. Normatively, the Article argues for the incorporation of private taking mechanisms into fields generally seen as the domain of classic property law and regulation.

PRIVATE TAKINGS

3

TABLE OF CONTENTS

Abstract	1
Table Of Contents	3
Introduction	4
I. A Theory of Takings, Public and Private	6
A. Origins of Takings	6
B. Modern Justifications for Takings	6
C. Physical Takings, Regulatory Takings and Other Takings	6
D. The Inadequacies of Takings Law	6
1. Government as a Superior Owner	6
2. Takings and Strategic Behavior	6
E. Takings and Pliability	6
F. Public and Private Takings	6
II. Private Takings, Past and Present	6
A. Traditional Private Takings	6
1. Delegated Private Takings	6
2. Private Takings and Necessity	6
B. Government-Mediated Private Takings	6
C. Other Non-consensual Private Acquisitions of Property	6
III. Reviving Private Takings	6
A. When Private Takings	6
B. Models of Private Takings	6
1. Designated Private Takers	6
2. Designated Asset or Relationship Private Takings	6
i. Domain Names	6
ii. Neighbors	6
iii. Partners in Anti-Commons	6
3. Private Takings and Designated Transactions	6
i. Land Assembly	6
ii. Land Use	6
IV. Potential Objections to Private Takings	6
A. Critics of Private Takings	6
B. Constitutional Dimensions	6
1. Private Takings and Public Use	6
2. Private Takings and Just Compensation	6
3. Private Takings and Delegation	6
V. Property and Takings	6
Conclusion	6

PRIVATE TAKINGS

4

INTRODUCTION

The popular firestorm surrounding the Supreme Court's recent ruling in *Kelo v. City of New London*¹ focused on public incomprehension of the idea that government may simply seize property from one private property owner, and transfer it to another private owner.²

In the popular conception, eminent domain—the power to take property without the owner's consent—is the quintessential government power. Generally, only the government has the power to change property rules midstream, and unilaterally alter, abolish or appropriate another's rights over her property. It is unsurprising, therefore, that notwithstanding the fog of uncertainty and dispute that clouds the nature and scope of the takings power, scholars tend to operate from the basic assumption that eminent domain is solely an incident of the government's domain in the provision of public goods.³ Indeed, case reporters abound with judicial pronouncements that the legal system does not tolerate “private eminent domain.”⁴ Even where such takings are mediated by government action, the courts have no hesitation in pronouncing that “it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.”⁵

¹ 125 S.Ct. 2655 (2005).

² See, e.g., Statement of Senator John Cornyn (R-TX) on introduction of The Protection of Homes, Small Businesses, and Private Property Act of 2005 (June 27, 2005), available at http://www.cornyn.senate.gov/doc_archive/jc_other/PHSB%20and%20PPA%202005%20floor%20statement.pdf. See generally, Abraham Bell & Gideon Parchomovsky, The Uselessness of Public Use, 106 COLUM. L. REV. 1412 (2006).

³ See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). For some notable exceptions, see Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986) and Saul Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts*, 68 VA. L. REV. 117, 142-144 (1982) (suggesting that a private eminent domain power may be a worthy alternative to “optimal dishonesty” under certain unspecified circumstances). Cf. Denis J. Brion, *Rhetoric and the Law of Enterprise*, 42 SYRACUSE L. REV. 117 (1991) (ruing occasional judicial and legislative adoption of “private eminent domain” remedies as the result of some clashes in property rights).

⁴ E.g., *Conaway v. Yolo Water & Power Co.*, 266 P. 944 (Cal. 1928); *City of Los Angeles v. Aitken*, 52 P.2d 585 (Cal. App. 1935).

⁵ *Kelo*, 125 S.Ct. at 2661.

PRIVATE TAKINGS

5

Yet, these bold pronouncements are unwarranted. Private takings – i.e., takings carried out by non-governmental actors – have a long and distinguished pedigree in our legal system.⁶ Numerous eighteenth and nineteenth century laws established mechanisms for non-governmental entities such as ordinary corporations to take private property by eminent domain. Railroads, for instance, were often granted the power to take private lands (for compensation) that lay along the route of the intended rail line.⁷ Nineteenth century Mill Acts permitted the erection of mills notwithstanding the consequent flooding of others' riparian properties, so long as the new mill owner paid compensation.⁸ Corporations were delegated powers of eminent domain directly in their corporate charters.⁹ Numerous relics of such delegated private takings powers continue to this day.¹⁰

Additionally, many governmental takings today are functionally private takings. In government-mediated private takings,¹¹ the government is formally responsible for taking property, but in fact, it simply acts as a middleman who transfers the property from one set of private hands to another. More than a half-century ago, in *Berman v. Parker*,¹² the Supreme Court

⁶ Some have used the term “private takings” more narrowly to refer to public takings motivated by a “private purpose.” *See, e.g.*, Robert Ashbrook, *Comment, Land Development, the Graham Doctrine, and the Extinction of Economic Due Process*, 150 U. PA. L. REV. 1255, 1291 n. 185 (2002). I propose a different terminology. As I note later in the Article, public takings for a private purpose may accurately be described as publicly-mediated private takings. *See, infra*, Part III.B. However, there are many other instances of private takings. Private takings has also been used more broadly to refer coercive transfers, including quasi-contract. *See* Boudewijn Bouckaert & Gerrit De Geest, *Private Takings, Private Taxes, Private Compulsory Services: The Economic Doctrine of Quasi-Contracts*, 15 INT'L REV. L. & ECON. 463 (1995). As I discuss later, my definition of private takings includes only cases where the taker is able, of her own volition, to alter property rule protection over another's property into temporary liability rule protection, and is thereafter entitled to property rule protection of her own. *See infra* Part IV.C. Thus, many forms of coercive transfer do not fall under the category of private takings. *See infra* Part III.C.

⁷ *See, e.g.*, *Holbert v. St. L., K. C. & N. R. Co.*, 45 Iowa 23 (1876)

⁸ *See, e.g.*, *Delaware River. Scudder v. Trenton Delaware Falls Co.*, 1 N.J.EQ. 694 (1832) (upholding a New Jersey statute granting a private corporation the right to condemn land for seventy mill sites along a six-mile stretch of the Delaware River). *See generally* THEODORE STEINBERG, (C)NATURE INCORPORATED: INDUSTRIALIZATION AND THE WATERS OF NEW ENGLAND 31-32 (1991)

⁹ *See, e.g.*, *Eppley v. Bryson City*, 157 N.C. 487 (N.C., 1911).

¹⁰ *See, infra* Part III.A.

¹¹ Such takings have also been labeled “public-private takings.” *See, e.g.*, Peter J. Kulick, *Rolling the Dice: Determining Public Use in Order to Effectuate a “Public-Private Taking” – A Proposal to Redefine “Public Use,”* 2000 L. REV. MICH. ST. UNIV. DETROIT COL. L. 639 (2000).

¹² 348 U.S. 26 (1954).

PRIVATE TAKINGS

6

upheld the constitutionality of the an urban development project established by the District of Columbia Redevelopment Act of 1945, under which privately owned land (including residential and commercial properties, of which only some constituted “slum housing”) was seized for subsequent transfer to private developers. Similarly, Hawaii’s Land Reform Act of 1967,¹³ whose constitutionality was upheld in *Hawaii Housing Authority v. Midkiff*¹⁴ involved a land distribution program in which the state of Hawaii confiscated property of large landowners to redistribute it to the erstwhile tenants, in exchange for a negotiated price or a price set by the condemning court.¹⁵ The infamous case of *Poletown Neighborhood Council v. City of Detroit*¹⁶ approved the city of Detroit’s seizure of a number of private lots in order to transfer them to General Motors for building a new factory. In *Kelo v. City of New London*, the Supreme Court upheld New London, Connecticut’s seizure of private residences for a plan that included the transfer of much of the land to private developers for office space.¹⁷

Much criticism has been heaped upon *Kelo* and the effective evisceration of the constitutional requirement that takings be made for a “public use.” Indeed, shortly before *Kelo*, the Michigan Supreme Court itself disavowed *Poletown*’s broad interpretation of public use in *County of Wayne v. Hathcock*.¹⁸ And in the wake of *Kelo*, the Congress and nearly every state legislature has taken up proposals to limit takings lacking sufficient “public use.”¹⁹ Commentators have assailed the *Berman-Midkiff-Kelo* interpretation of public use.²⁰ Nineteenth century legal mechanisms permitting private takings have also come in for their share of criticism,²¹ or have been rationalized as quasi-public takings for the benefit of quasi-public common carriers.²² This would seem to indicate that expanded use of private takings would not readily find support. Yet, I argue otherwise.

This Article makes two central claims. First, I argue, contrary to accepted wisdom, that private takings should not only be

¹³ Haw. Rev. Stat. § 516-33.

¹⁴ 467 U.S. 229 (1984).

¹⁵ *Id.* at 233-34.

¹⁶ 304 N.W.2d 455 (Mich. 1981).

¹⁷ 125 S.Ct. 2655. More precisely, the New London municipality delegated the power of eminent domain to the New London Development Corporation.

¹⁸ 471 Mich. 445 (2004).

¹⁹ See Bell & Parchomovsky, *supra* note 2.

²⁰ See, e.g., EPSTEIN, *supra* note 3, Charles E. Cohen, Eminent Domain After *Kelo v. City of New London*: An Argument for Banning Economic Development Takings, 29 HARV. J. L. & PUB. POL’Y 491 (2006).

²¹ See, *infra*, Part III.C.

²² See, e.g., Richard A. Epstein, Blind Justices: The Scandal of *Kelo v. New London*, WALL ST. J. (July 3, 2005).

PRIVATE TAKINGS

7

permitted, but be preferred as a mechanism for a number of goals. The power to seize ownership of property notwithstanding the owner's objections is as necessary to overcome strategic problems in the private market as it is when the government seeks to obtain property for a public use. And, while there is need to police such seizures to prevent abuse, there are better means of doing so than requiring the government to carry out the seizure. Relative to a mechanism of properly compensated private takings, the government's intermediary role is frequently counterproductive and inefficient. Additionally, due to rent-seeking by government agents or interest groups, there are times when the discipline of markets is more effective than the discipline of politics in curbing undesirable takings. Moreover, the basic policy reasons underlying the governmental power of takings support an expanded use of private takings, even in cases where public takings are not currently employed. Accordingly, the Article develops a comprehensive scheme for determining when private takings should be permitted, and when they should be preferred over public takings. The framework produces several normative insights about how a law of private takings can be created that overcomes some of the shortcomings of the nineteenth century law of private takings, and that fits with modern understandings of the importance of a takings power to overcome strategic problems between potential claimants of a resource. The analysis has broader implications as well, demonstrating some of the factors that must be incorporated into an analysis of when public goods ought to be provided for under private law.

Second, and no less importantly, I create the normative basis for a private takings theory by analyzing takings within the framework of property theory, rather than as a narrow governmental power. Viewing view takings law through a property theory lens permits a clearer identification of the essential pieces of takings law, and a better understanding of many current controversies regarding ordinary public takings and the constitutional duty to compensate. Taking account of private takings as a category of involuntary transfer of property ownership highlights the fact that takings law should undertake to transfer property where two factors are present—where the taker is the superior owner of the property, and where strategic barriers block voluntary transfers to the superior owner. In a comprehensive model of takings that looks at both private and public takings, takings law can move beyond its excessive focus on the nature of the ultimate owner – as exemplified in the debate over public use – and incorporate an examination of the optimality of the original owner, as well as the strategic barriers to voluntary transfer.

Thus, for example, by demonstrating that public ownership of the taken property is not a necessary companion to just and

PRIVATE TAKINGS

8

efficient takings, I show that the “public use” requirement in takings law should not be read to require that takings ultimately leave property in public hands or that they serve a public purpose. Rather, using the work of Thomas Merrill as an important reference point,²³ I argue that the public use requirement should be interpreted to require the efficiency or justice of the taking.

Having made these central claims, the Article sketches out the elements of a comprehensive law of takings that encompasses both private and public takings. This produces both theoretical and normative insights.

Normatively, the Article suggests application of a law of private takings in fields generally seen as the domain of classic property law and regulation, such as zoning. The significance of the private taking analysis extends beyond the realm of eminent domain and property regulation. Private takings are a significant example of an important phenomenon: limited-application private mechanisms that can replace regulatory structures for the provision of public goods and services. The model for comparing the efficacy of public and private takings can thus be used in other areas of law.

In the realm of theory, the Article circumscribes the place of takings within the broader theory of entitlements by defining takings within the context of pliability rules – mixed liability and property rules – and enables a better understanding of the Fifth Amendment’s Takings Clause. By showing that takings are among many acts that a non-owner may undertake that diminish the owner’s enjoyment of property rights, a private takings analysis shows that takings law deserves to be considered alongside other ways in which the law circumscribes the transfer of private entitlements. Here I draw upon terminology Gideon Parchomovsky and I developed elsewhere, as a refinement to the classic typology of legal rules proposed by Guido Calabresi and Douglas Melamed.²⁴ Calabresi and Melamed argued that legal systems typically protect legal entitlements by one of two methods: Property rules allow the entitlement holder to refuse to yield the entitlement until she receives a price to her liking.²⁵ Liability rules force the holder to yield the entitlement at a price specified by a third party, such as a court.²⁶ Parchomovsky and I characterized takings as relying upon a third type of rule – a pliability rule that grants asset holders property rule protection (or

²³ See Merrill, *supra* note 3.

²⁴ Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

²⁵ *Id.* at 1092.

²⁶ *Id.* at 1092. Calabresi and Melamed also mentioned the rarer inalienability rules, which forbid the holder to part with the entitlement altogether. *Id.* at 1092-93.

PRIVATE TAKINGS

9

liability rule protection) until the occurrence of a triggering event, and thereafter offers a different type of protection to the same or a different asset holder.²⁷ A taking, in this context, temporarily relieves an owner of her property rule protection, and permits the taker to condemn the property as if it were only protected by a liability rule. After the taking, property rule protection returns to the asset, now in the hands of the taker.²⁸

Viewing takings as an institutionalized liability rule permits us to see its place in a larger scheme of legal protections that need not be restricted to the government. Temporary transition to liability rule protection serves purposes that are often discussed in the literature of private legal entitlements. It should be seen as merely one of a menu of different kinds of hybrid protections for legal entitlements being proposed by scholars.²⁹ This theoretical insight helps clarify the aims of the “just compensation” requirement and the nature of the constitutional protection against uncompensated takings.³⁰

The Article proceeds as follows. In Part I, I identify the central reasons why a takings power is necessary and show that these reasons apply to private takings as well as public takings. In order to do so, I survey some of the major writings on takings, and sharpen the definition of the difference between takings and other nonconsensual deprivations of property. In Part II, I turn to the history of the law of private takings. In this Part, I show that private takings have been used throughout American legal history and continue to be used to this day. Part III contains normative suggestions for integrating private takings mechanisms into the law. This Part develops a suggestion for comparing public and private takings, and presents several schemes for integrating private takings into the legal system. Part IV examines and rebuts some traditional objections to private takings, and looks at the fit between the proposed law of private takings and constitutional law. Part V looks to the implications of an analysis of private takings on the broader law of takings and theory of entitlements.

²⁷ Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH L. REV. 1, 60 (2002).

²⁸ *Id.* Takings thus constitute an exception to the usual liability rule, which encompasses an articulated expectation from the very outset.

²⁹ See, e.g., Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L. J. 703, 750 (1996); Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399 (2005).

³⁰ See U.S. CONST. AMEND V (“ . . . nor shall private property be taken for public use, without just compensation.”).

PRIVATE TAKINGS

10

I. A THEORY OF TAKINGS, PUBLIC AND PRIVATE

This Part provides an overview of the law of takings, with an eye toward isolating the theoretical justifications for the power of takings. I begin by discussing the origins of the law of takings. After identifying historical justifications for the power to take, I examine modern justifications. Having explicated the theory underlying the takings power, I make three central claims. First, I show that there is an unfortunate disconnect between the reasons underlying the takings power and some of the doctrines that comprise the law of takings today. I then show that a pliability analysis provides a useful prism for understanding the nature of the takings power and circumscribing it. Finally, I show that the justifications giving rise to a takings power, especially as understood in a pliability analysis, warrant a private takings power as well.

A. Origins of Takings

The power of the government to seize property by eminent domain is of ancient pedigree, as are limitations on that power.³¹ For instance, in describing the customs of kings in the Bible, the prophet Samuel informs the people of Israel that the king “will take your fields, and your vineyards, and your oliveyards, even the best of them.”³² However, even in biblical times, this power was apparently limited; for instance, Ahab, the king of Israel, appears to have lacked the power to take the vineyard of Naboth, and had to resort to fabricating charges of blasphemy and sedition in order to confiscate the property.³³ Roman law too appeared to provide for both eminent domain and some limits upon it, though the scope of the power and its limitations remains unclear.³⁴

The Magna Carta provided that “[n]o free man shall be . . . dispossessed . . . except by the legal judg[e]ment of his peers or by

³¹ A remarkable study of the history and theoretical basis of the power of eminent domain may be found in William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972).

³² 1 Samuel 8:14.

³³ 1 Kings 21:1-16. Medieval Jewish scholars interpreted the tension between the two sources to indicate that there was, in fact, no power to take realty. Rather, the power described by Samuel was read as a limited power to use real property temporarily when required by the exigencies of war. *See, e.g.*, Maimonides, *Mishneh Torah* Law of Kings 4:6. Stoebuck was skeptical of the link between Biblical law of eminent domain and modern American law. *See* Stoebuck, *supra* note 31 at 553 (“[T]here is no evidence that th[e] Biblical incident [of King Ahab’s seizure of Naboth’s vineyard] contributed in the slightest to the American law of eminent domain, not even in Massachusetts Bay Colony in its most God fearing days.”).

³⁴ *See* J. Walter Jones, *Expropriation in Roman Law*, 45 L.Q. REV. 512 (1929).

PRIVATE TAKINGS

11

the law of the land” and that when crown officials seized chattels, they could not “take anyone’s grain or other chattels, without immediately paying for them in money.”³⁵

The United States Constitution never explicitly grants the power of eminent domain to the national government.³⁶ However, the Fifth Amendment – which, at the time of its adoption, applied only to the national government – requires that “just compensation” be paid for takings,³⁷ making evident that such a power was assumed to be within the scope of enumerated powers.³⁸ Certainly, the Constitution did not abolish state powers of eminent domain, which appeared in several state constitutions.³⁹

Historically, there were two central justifications for eminent domain.⁴⁰ First, eminent domain was seen as intrinsic to the power of government.⁴¹ Thus, takings could be justified by resort to royal prerogative, or, more generally, to the powers of the central government. Here, eminent domain did not serve any particular purpose. It was simply part of the nature of the Leviathan.⁴² This, for example, appears to be the justification for the takings power cited by the prophet Samuel. A sovereign government, on this view, was created to serve the needs of a society that selected a powerful sovereign in order to avoid the

³⁵ Magna Carta arts. 28 and 39, reprinted in *SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS* 11, 16-17 (Richard L. Perry & John C. Cooper eds. 1952).

³⁶ For a look at the early American history of eminent domain, see William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *YALE L.J.* 694 (1985).

³⁷ See U.S. CONST. AMEND V (“. . . nor shall private property be taken for public use, without just compensation.”).

³⁸ See Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 *CAL. L. REV.* 267 (1988) (discussing hermeneutic implications of Takings Clause’s exclusive application to national government). The Constitutional “just compensation” limitation on the state’s power of eminent domain was eventually applied to the states via the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897). However, even prior to that, state law required both just compensation and a public use, for the exercise of the power of eminent domain. See Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States 1789-1910*, 33 *J. ECON. HIST.* 232, 235 (1973). Interestingly, until 1875, the national government refrained from exercising the power of eminent domain. *Kohl v. United States*, 91 U.S. 367 (1875).

³⁹ See Scheiber, *supra* note 38. See also Stoebuck, *supra* note 31 at 555 (discussing state “just compensation” provisions).

⁴⁰ See Treanor, *supra* note 36 at 695.

⁴¹ Cf. *Kohl v. United States*, 91 U.S. 367 (1875) (describing eminent domain as an inherent attribute of sovereignty).

⁴² HOBBS, THOMAS. *LEVIATHAN*. in 2 *THE ENGLISH WORKS OF THOMAS HOBBS OF MALMESBURY*. (Sir William Molesworth, ed. 1966).

PRIVATE TAKINGS

12

“solitary, nasty, brutish and short” life in the state of nature.⁴³ Sovereignty necessarily entailed certain powers, including the power to take away property.⁴⁴

Second, eminent domain could be seen as incidental to the grant of property rights. Here, the underlying claim was that there were no natural property rights, except at the sufferance of the sovereign. The root of all title was in the sovereign, and the sovereign could “reclaim” its property at any time. Sometimes, this justification would be explicit; land grants might specifically include a clause permitting the government to seize part of the property. For instance, in colonial Pennsylvania, land grants included an “additional” six percent which could be seized by the state in order to build roads.⁴⁵ Indeed, this set-aside in the land grant was later interpreted by the state Supreme Court to permit uncompensated takings, since the “taken” property was implicitly already at the disposal of the state.⁴⁶ But, more broadly, the government’s takings power could be seen as implicit in the grant of legal protection for any property. Even without an explicit clause in the land grant or other legal instrument giving rise to property rights, everyone “knew” that their property was subject to an implicit “take-back” clause.⁴⁷

B. Modern Justifications for Takings

These two traditional explanations of the takings power are, at least today, quite unsatisfying. Pointing to takings as an incident of governmental power is, at best, an allusion to an anachronism, and, at worst, a circular argument.⁴⁸ The fact that takings might be thought to have been an unavoidable part of the package of powers granted to a sovereign power in seventeenth-century political

⁴³ *Id.* (LEVIATHAN 113; XIII, 9, 76).

⁴⁴ *See, e.g.*, Hugo Grotius, *De Jure Belli et Pacis* (1625) (“the property of subjects is under the eminent domain of the state”). This appears to be the explanation for the takings power adopted by Richard Epstein. *See* EPSTEIN, *TAKINGS*, *supra* note 3.

⁴⁵ *See* *M’Clenechan v. Curwen*, 6 Binn. 509, 3 Yeates 362 (1802).

⁴⁶ *Id.*

⁴⁷ *See* Harry N. Scheiber, *The Jurisprudence—and Mythology—of Eminent Domain in American Legal History*, in *LIBERTY, PROPERTY AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL* 217, 222-223 (Paul, Ellen Frankel & Dickman, Howard, eds. 1989).

⁴⁸ “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457, 469 (1897).

PRIVATE TAKINGS

13

theory hardly commends itself as a reason to recognize a power of eminent domain today.⁴⁹

Arguing for a takings power on the grounds of an implicit government power contained within the property is, at least ontologically, more satisfying, in that it appears to advance a reason for the takings power. However, the reason offered by this account disappears upon closer inspection. First, the right to define property does not necessarily imply the right to redefine. Indeed, unlimited powers to redefine property significantly undermine one of the central virtues of defined property rights – their ability to stabilize and protect expectations concerning assets.⁵⁰ Second, even conceding a government power to redefine property or to insert its own right to take within the initial defined right does not offer a reason for that power to be exercised. The “can” does not imply the “ought.” The implicit government power account does not explain why the government ought to exercise any given takings power. Third, viewing property in this way eviscerates the distinction between the concepts of sovereignty and ownership. Since all property is subject to the superior claims of government and may be taken at any time, private property ceases to exist vis-à-vis the government.⁵¹ Forth, and finally, the assumption of absolute government power to define (and redefine) property is belied by both modern economic and psychological accounts. Specifically, economic theory instructs us that even in the absence of government definitions of property rights, *de facto* rights to extract value from assets will emerge from markets where the rights are sufficiently valuable.⁵² Empirical psychological studies have demonstrated that ownership feelings are so basic to human psyches that communities will produce rudimentary property rights even in the absence of legal structures.⁵³

Modern explanations of the takings power thus focus on pragmatic, rather than formalistic reasons for permitting the government to appropriate certain private property for public use.

⁴⁹ Recently, the Supreme Court expressed its disapproval of state attempts to place overly “potent [] Hobbesian stick[s] into the Lockean bundle.” *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

⁵⁰ For a more detailed discussion of the importance of stability value to the law of property, see Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531 (2005).

⁵¹ Indeed, much of the development of Anglo-American property law was aimed at preventing the King from asserting his theoretical rights as owner over all land held by others in mere “tenancies.” See A.W.B. SIMPSON, *A HISTORY OF THE LAND LAW* (2d ed. 1986); RICHARD PIPES, *PROPERTY AND FREEDOM* (1999).

⁵² See generally YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* (2d ed. 1997).

⁵³ See, e.g., ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 18-21, 244-254 (1961).

PRIVATE TAKINGS

14

One set of modern justifications focuses on concerns of distributive justice. The other looks to economic or planning efficiency.

Justifications based in distributive justice see property claims as contingent, and subject to societal claims for redistribution and reallocation of burdens.⁵⁴ This genre of justifications insists upon the reciprocal duties and responsibilities created by the social institution of property. Government, as society's representative, uses the power of takings to assert society's latent claims. Through the takings power, property rights bow to claims of justice asserted by the community of persons for whom property rights are created. In a way, this justification for the power of takings is similar to the formalist explanations for eminent domain. It looks both to the inherent powers of the government (as representative of the interests of society) and to the contingency of property rights (as subject to the prior claims of government). However, in contrast to the formalist accounts of the power of eminent domain, the justice account is not absolute. Property owners must yield to other claimants where justice so demands, rather than as a matter of inferior power. Thus, it cannot be said that all property is ultimately owned by the government. Rather, the government, as a representative of society, takes part in the web of all property relations attached to any given object. This relation may or may not give rise to a just taking, depending on the circumstances of the case.⁵⁵

This justice account of the takings power can be illustrated by the following example. Consider Alice, who owns a large land estate that serves as an important rest stop for several endangered species of migratory birds. Alice's interest in her property should be seen as both a source of claims over other members of society, and implicitly subject to the other societal claimants. The government (through the legal system) prevents trespassers from using Alice's estate, but also demands that Alice bow to other interests of society in preserving endangered species. The land, in other words, is considered Alice's "property" because Alice has entered into the web of relationships vis-à-vis society and the government that allows Alice certain kinds of exclusivity regarding the land, but also demands that Alice provide for certain kinds of public needs in the land. In this case, a government taking of the property to create a wildlife and fowl preserve would be a

⁵⁴ See Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 791-92 (1999).

⁵⁵ This conception should lead "liberal property" conceptualists to favor absolute limitations on the right to take property. Where "fair," the taking should be permitted, even without compensation; where "unfair," the taking should be forbidden, even with compensation. Cf. MARGARET J. RADIN, *REINTERPRETING PROPERTY* 136-37 (1993).

PRIVATE TAKINGS

15

just use of the takings power. A government taking simply in order to enrich Alice's neighbor Barbara, who is similarly situated to Alice, would not justify this justice requirement.

Efficiency claims for the takings power focus on a different set of factors. In the efficiency account, the takings power is necessary to allow government to fulfill its important function of providing public goods,⁵⁶ and, more specifically, warranted by the need to overcome strategic barriers that would block the government's consensual acquisition of such property as would be used in the provision of the public good. The claim rests on the idea that there are times when it is ideal for the government to own property in order, for example, to ensure its preservation, or because the government is the highest-value user. Sometimes, the government will be able to purchase such property on the open market; at other times, however, impediments to bargaining prevent owners from voluntarily reassigning the asset to the government.

Strategic behavior poses the central barriers to successful negotiations overcome by eminent domain. Such behavior includes the closely related problems of holdouts, bilateral monopoly and asymmetric information.⁵⁷

⁵⁶ See EPSTEIN, TAKINGS, *supra* note 3, at 4-5 (arguing that the state can only validly exercise coercive power to prevent private aggression or to provide public goods); see also Thomas W. Merrill, *Rent Seeking and the Compensation Principle* (reviewing Epstein's TAKINGS), 80 NW. U. L. REV. 1561, 1569 (1986) (arguing that "when the power of eminent domain is used to supply public goods, the surplus will tend to be divided, at least approximately, in proportion to preexisting shares of wealth[:] Those with large preexisting shares will obtain large benefits from public goods; those with small preexisting shares will obtain small benefits."); cf. Ugo Mattei, *Efficiency as Equity: Insights from Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3, 7 (1994) ("As far as the public use requirement is concerned, the economic theory of public goods provides both a justification and a limit. The justification is that the government needs to be able to acquire the inputs that are necessary to provide public goods which the market cannot easily provide. The limit is set by the consideration that any private use of the power of eminent domain will be inefficient since it produces a result that private parties would not reach by bargaining.").

⁵⁷ See Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 23 (1982) (reviewing the literature and noting that disagreements as to how to divide the contractual surplus may prevent successful Coasean bargaining); John Kennan & Robert Wilson, *Bargaining with Private Information*, 31 J. ECON. LIT. 45, 46 (1993) (hypothesizing that differences in private information are a primary cause of delays in bargaining); Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2659 (1994) (observing that the valuation problem heightens the possibility of strategic bargaining in the field of intellectual property); Eric L. Talley, *Note, Contract Renegotiation, Mechanism Design, and the Liquidated Damages Rule*, 46 STAN. L. REV. 1195, 1198, 1219 (1994) (discussing the problem of bilateral monopoly in contract renegotiation). On asymmetric information specifically, see Louis Kaplow & Steven Shavell, *Do Liability Rules Facilitate Bargaining? A Reply to Ayres and*

PRIVATE TAKINGS

16

In a situation of bilateral monopoly, the market consists of one buyer and one seller. Each knows that the transaction cannot take place without her cooperation, and each, therefore, attempts to extract all the profit from the transaction. The problem of bilateral monopoly can be illustrated with the example of a government decision to build a reservoir in a valley owned by a single individual. There is only one reservoir, and therefore only one potential buyer of valley land. There is also only one seller. Both the landowner and the government know that the government wishes to purchase the valley for the reservoir, that there are no other locations in which the reservoir may be placed, and that there is no other market for the valley owner. Both buyer and seller need each other, but, ironically, this fact may well foil the sale. Each knows that there is profit to be made in transferring the land to the government, and each side will try to maximize its own share of the profit. In such a situation, the price is unknowable *ex ante*, transaction costs may become prohibitive, and the attempt to out-strategize the opponent may foil the project altogether.

Holdout problems are similar. Imagine that the land in the valley is owned by a number of private individuals. The government must now purchase for the reservoir all the valley parcels in the drainage basin; even one hold-out in the middle of the planned reservoir can ruin the project. Each parcel owner is thus a monopolist, who may attempt to hold out for a higher price that will divert the reservoir profits to her own pockets. Again, strategic considerations may block the transaction.⁵⁸

Eminent domain provides the solution to the strategic difficulties raised by both bilateral monopoly and holdout. The

Talley, 105 YALE L.J. 221, 223 (1995) (“When each party's own valuation is not known by the other, each party will have incentives to misrepresent its valuation in bargaining, hoping to extract more of the bargaining surplus from the other party. Parties may therefore demand too much or offer too little, with the result that efficient bargains may not be reached.”); Karen Eggleston, Eric A. Posner & Richard Zeckhauser, *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 NW. U. L. REV. 91, 109 (2000) (defining “asymmetric information” as a situation in which “one party to a contract . . . has more information about future states of the world than does the other party”); cf. William Samuelson, *A Comment on the Coase Theorem*, in GAME-THEORETIC MODELS OF BARGAINING 321, 331-35 (Alvin E. Roth ed., 1985) (arguing that if an entitlement is auctioned in a particular way between the parties rather than allocated through bargaining, the problems associated with asymmetric information and bargaining can be overcome, but acknowledging that his proposed auctions may be impracticable because they would require the initial entitlement holder to share the proceeds).

See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 56 (4th ed. 1992) (“A good economic argument for eminent domain . . . is that it is necessary to prevent monopoly.”).

⁵⁸ For a discussion of the differences between holdouts and the similar phenomenon of free riding, see Lloyd Cohen, 20 J. LEG. STUD. 351 (1991).

PRIVATE TAKINGS

17

takings power permits the government to take the parcels of land in the valley and then open them for use by the reservoir.

The problem of asymmetric information is particularly important in this regard. Private entities may often overcome the hold-out difficulty by using straw agents or the like to hide their plans. However, in standard accounts, it is far more difficult for the government to hide its plans.⁵⁹ Parcel owners possess knowledge of the government plans, while the government can only guess at the owners' "true" selling price. This leads the parcel owners to engage in strategic behavior and rent-seeking, and burdens the opportunity to successfully negotiate a transaction.⁶⁰

The takings power resolves these dilemmas by eliminating the need for negotiations. Where subject to the just compensation requirement, the government may simply acquire the property for fair market value, notwithstanding the fact that – at least with respect to this buyer and seller – the market for this property is not functioning.⁶¹

C. Physical Takings, Regulatory Takings and Other Takings

The power of eminent domain does not exhaust the powers of government vis-à-vis property. Government may tax, and it may tax property, just as it may tax income or people.⁶² Government may also establish crimes and punishments, and it may confiscate property as a punishment or to prevent it being used as the instrumentality of a crime.⁶³ And, most importantly for our purposes, there are a host of government powers to regulate property in the interests of public health, safety and welfare, generally referred to as "police powers."⁶⁴ Regulatory powers, in particular, have presented a particular dilemma to theorists of takings. Prima facie, seizing property through eminent domain involves the appropriation of all of the sticks in the bundle of

⁵⁹ See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004).

⁶⁰ For discussion of informational justifications for eminent domain, see Levmore, *supra* note 3; Christopher T. Wonnell, The Structure of a General Theory of Nondisclosure, 41 CASE W. RES. L. REV. 329, 360-362 (1991).

⁶¹ Determining market price for taken property is often extraordinarily difficult. See, e.g., Abraham Bell & Gideon Parchomovsky, Taking Compensation Private, 59 STAN. L. REV. 871 (2007). This is hardly surprising, given that market failure is the basis of the decision to take.

⁶² See Eduardo Penalver, Regulatory Taxings, 104 COLUM. L. REV. 2182 (2004) (discussing the fuzzy borderline between taxes and takings).

⁶³ See, e.g., *Bennis v. Michigan*, 516 U.S. 442 (1996) (upholding seizure by state of jointly owned automobile in which husband committed sexual activity with prostitute, and holding that wife not entitled by Takings Clause to "just compensation" for loss of her ownership interest).

⁶⁴ See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 7-3 at 554 (2d ed. 1988).

PRIVATE TAKINGS

18

rights⁶⁵ previously owned by the property holder, while, in regulating, the government may seize only a portion of those sticks. But, in reality, eminent domain may often involve a less-than-complete appropriation, while regulatory powers may accomplish complete appropriation. Consequently, the government may often accomplish the functional equivalent of a taking, without ever claiming to exercise the power of eminent domain. For example, the government may seize all the air rights over a certain parcel of land by eminent domain.⁶⁶ It may also forbid all owner use of such air rights by means of the regulatory power, while retaining overflight rights for itself, functionally accomplishing the same purpose as seizing the air rights, but under a different name.⁶⁷

This dilemma led Justice Holmes, in the landmark 1922 case of *Pennsylvania Coal Co. v. Mahon*,⁶⁸ to establish that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” Determining when precisely a regulation has gone so far as to create a regulatory taking has proved to be one of the more insoluble legal questions of the last half-century. It continues to puzzle scholars, judges and practitioners alike.⁶⁹ The distinctions between takings, taxes and

⁶⁵ For descriptions of property as a “bundle of rights,” see, e.g., GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970* 319-23, 381-82 (1997); JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 86 (3d. ed. 1993); WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 2 (1995); NANCIE G. MARZULLA & ROGER J. MARZULLA, *PROPERTY RIGHTS: UNDERSTANDING GOVERNMENT TAKINGS AND ENVIRONMENTAL REGULATION* 11-12 (1997); EDWARD H. RABIN ET AL., *FUNDAMENTALS OF MODERN PROPERTY LAW* 1, 22 (4th ed. 2000); JOSEPH WILLIAM SINGER, *INTRODUCTION TO PROPERTY* 2 (2000); John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1; J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 U.C.L.A. L. REV. 711 (1996); Jeanne L. Schroeder, *Chix Nix Bundle-o-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994); Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 357-67 (1980).

⁶⁶ *United States v. Causby*, 328 U.S. 256 (1946).

⁶⁷ See *Penn Central v. New York City*, 438 U.S. 104 (1978) (upholding regulation forbidding construction within air rights of lot as not requiring compensation). For a broader discussion of the ability to use non-takings powers to accomplish substantially the same object, see Bell & Parchomovsky, *supra* note 2.

⁶⁸ 260 U.S. 393, 415 (1922).

⁶⁹ See Gideon Kanner, *Hunting the Snark, Not the Quark: Has the Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307, 308 (1998) (“The incoherence of the U.S. Supreme Court’s output in this field has by now been demonstrated time and again by practitioners and academic commentators ad nauseam, and I refuse to add to the ongoing gratuitous slaughter of trees for the paper consumed in this frustrating and increasingly pointless enterprise.”); Daniel Farber, *Public Choice and Just*

PRIVATE TAKINGS

19

punishments have produced a less voluminous scholarly literature; however, the dividing lines are no clearer.⁷⁰

At least formally, the constitutional law of takings and regulatory takings do not serve the same purpose. The central constitutional limitation on the takings power – the just compensation requirement – does not forbid takings; it merely requires a payment to accompany the taking. The law of regulatory takings is slightly different. Based in notions of the contract clause or substantive due process, the regulatory takings limitation forbids altogether certain exercises of the regulatory power.⁷¹ Such regulations as go “too far” are no longer valid regulations, and their aims must be accomplished through a different power: the power of eminent domain.⁷² Functionally, however, this formal difference is meaningless. Whether expressed as an exercise of eminent domain as the result of an unconstitutional regulation, or as a regulation with compensation, ultimately the government act is the same. The government may seize property by explicit use of eminent domain or effectively seize it through eminent domain expressed as a regulation, so long as the seizure is accompanied by just compensation.

D. The Inadequacies of Takings Law

Thus far, I have described the modern accounts for the takings power on the grounds of justice or efficiency. In each case, I showed how the account purported to show that the government should be granted a claim in the property superior to that of the prior owner, either because the government is a more just or because it is a more efficient owner.

To further examine these accounts, it is important to see that the power of takings involves two issues, not one. First, the takings power allows the government to acquire property on the basis of a presumed superior claim in justice or efficiency. Second, the takings power allows that acquisition to be accomplished through the unusual mechanism of seizure with compensation, rather than through a consensual transaction. In other words, the takings power is warranted only where two issues are resolved in favor of the government – i.e., (1) the government

Compensation, 9 CONST. COMMENT. 279 (1992) (“There is no consensus today about takings law—only a general belief that the takings problem is difficult and that takings doctrine is a mess.”).

⁷⁰ See, e.g., Penalver, *supra* note 62.

⁷¹ *Pa Coal v. Mahon*, 260 U.S. at 413.

⁷² Cf. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987) (discussing whether courts have the authority to force government to take property through eminent domain when it has chosen to take through uncompensated regulation).

is the preferred owner for reasons of justice or efficiency, and (2) coercion is the preferred transfer mechanism. By bifurcating the concerns of takings in this way, we can see that contemporary takings law does a poor job with regards to both issues. Specifically, current doctrinal limitations of the takings power fail properly to limit its use to cases where the government is both the superior owner and its ownership should be obtained through coercion.⁷³

1. Government as a Superior Owner

I begin with an examination of the first issue: when the government is the preferred owner. Subject only to the often toothless “public use” requirement and the payment of “just compensation,” the government may take any property it wants. Thus, there is nothing in the law of takings that limits the power to take to those cases where the government is the preferred owner on the grounds of justice or efficiency. Consider the following two cases. In the first case, the government seeks to preserve a unique habitat for an endangered species, and it can accomplish this mission most cost-efficiently by owning the land. In the second case, the government seeks to improve airline safety, which can best be accomplished by leaving having airlines owned privately, subject to public inspections. Nevertheless, in response to a public panic about inadequate air safety, the government seeks a governmental monopoly on the provision of air transportation services, notwithstanding the likelihood that the scheme will cause considerable economic inefficiency and dislocation, without appreciable change in safety, or public confidence.⁷⁴ Ideally, in the first case, the takings power should pave the way to government ownership of the property; in the second case, it should not. Yet, the takings power does not distinguish between the cases.

One might argue that such a distinction can be implied in the constitutional requirement that takings be accompanied by a public use.⁷⁵ On this argument, a proposed taking would lack a

⁷³ Cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 61-63 (5th ed. 1998).

⁷⁴ For the sake of the hypothetical, I am assuming that there is either a disparity between the public’s *ex ante* and *ex post* confidence in government monopolies, or that the government misreads the public desire. These examples are intended to be purely hypothetical. In describing the cases, I am not suggesting either that it is desirable for government to own property for species conservation or that it is undesirable for the government to own air transportation assets. I am also not making any suggestions about whether the government should be restricted, constitutionally or otherwise, from exercising its powers on the basis of popular, if misguided sentiment, or indeed about whether popular sentiment should be subject to questions about its wisdom.

⁷⁵ Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 *HARV. L. REV.* 1165, 1214

PRIVATE TAKINGS

21

public use—and therefore be unconstitutional—where the government were not itself the higher value (or more just) user of the property. In the two hypothetical cases above, the taking for habitat preservation would be justified by a public use and the taking for air transport monopoly would not. Yet, this interpretation of the constitutional public use requirement is clearly not reflected in current law.

The public use limitation on the takings power has long been interpreted extremely narrowly.⁷⁶ Indeed, in recent years, the public use requirement has effectively disappeared from federal law.⁷⁷

Particularly in the wake of the Supreme Court's decision in *Kelo*, affirming the deferential reading of public use,⁷⁸ There have been widespread calls for a revival of some version of the public use limitation, especially where the takings power is used for the benefit of private parties.⁷⁹ And, indeed, the public use limitation has already enjoyed a limited revival at the state level.⁸⁰ However, generally these arguments have not been extended into a claim

(1967). Compare Donald J. Kochan, *Public Use and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. LAW & POL. 49 (1998) (calling for reinterpreting the Takings Clause to reduce private rent-seeking).

⁷⁶ See BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 190 n.5 (1977) (“[T]he modern understanding of ‘public use’ holds that any state purpose otherwise constitutional should qualify as sufficiently ‘public’ to justify a taking.”).

⁷⁷ See, e.g., Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1367 n.29 (1982) (observing that “the public use limitation has little, if any, constitutional bite today, except in cases involving the condemnation of excess land”), prompting protest from some scholars. See, e.g., Epstein, TAKINGS, *supra* note 3 at 161-181 (1989); Merrill, *supra* note 3; Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAWYER 765 (1973). Interestingly, at least as a matter of grammar, the phrasing of the Fifth Amendment's Takings Clause actually suggests that “public use” is a condition precedent of the payment of “just compensation” rather than of the exercise of the taking power. Cf. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 65 (1977) (citing arguments of 19th century lawyers that similar provisions in state constitutions did not limit power to take for private use). That is, the language of the Fifth Amendment suggests that the government may take property even absent a public use, but need pay compensation only when it takes the property for a public use. Traditionally, the Clause has not been so read; instead it has been thought to embody the Anglo-American tradition of limiting the power of eminent domain to cases where the taking is for a public use. See, e.g., *Kelo*, 125 S.Ct. at 2661-63.

⁷⁸ See Bell & Parchomovsky, *supra* note 2.

⁷⁹ See *id.*

⁸⁰ See, e.g., *Bailey v. Myers*, 76 P.3d 898 (Ariz. 2003) (ruling that seizure of property for redevelopment into privately owned retail, office and restaurant facilities lacks “public use”); *Hathcock*, 471 Mich. 445 (purporting to overrule *Poletown*).

PRIVATE TAKINGS

22

that a public use is lacking unless the government is the more efficient or just owner of the property to be taken.⁸¹

The other constitutional limitation on the takings power – the requirement of just compensation – is similarly unlikely to ensure that property will be taken only where the government is the more efficient user. It is true, of course, that the payment of just compensation requires the government to internalize one measure of the cost of its taking. And, if the government were properly viewed as a wealth-maximizing private individual, the compensation requirement might be enough to lead the government to limit its takings to cases where it was the higher-value user of the property. However, in the final analysis, the just compensation requirement cannot be expected – in itself – to properly limit the takings power. First, there is good reason to suspect that the government does not act like a wealth-maximizing individual. Second, even if it did so act, the practical limitations faced by courts in measuring compensation create a situation where the government may often take even though it is not the ideal owner of the property.

Let us examine each of these factors in turn. I turn first to the question of whether the government can be treated as a wealth-maximizing actor. If the government did act like a wealth-maximizing private individual, it would consciously or unconsciously exercise the takings power only after determining that the seizure would produce a net benefit. On the benefit side, the government would place the value of the property to be taken in the hands of the government. On the cost side, the government would place the expected value of the compensation to be paid. If the value of the benefits exceeded the value of the costs, the government would take the property; otherwise, the government would refrain from exercising its power. Given that the compensation is supposed to reflect the value of the property in the hands of the pre-taking owner, the government's calculation as a wealth-maximizer would lead it to precisely the right result: exercising its takings power only where it was the higher-value user.

In practice, however, the government is not a wealth-maximizing individual. Government is not a monolith, and the incentives acting upon governmental decisionmakers almost certainly do not lead to a wealth-maximizing decisionmaking process.⁸² This is not to say, of course, that the financial cost or benefit of any given decision is irrelevant to the government. On the contrary, the government's decisionmaking process is likely influenced by “fiscal illusion,” i.e., by the effect of that decision

⁸¹ Merrill, *supra* note 3, at 71 is a notable exception.

⁸² *See generally*, DENNIS MUELLER, PUBLIC CHOICE III (2003).

on the government's budget, rather than on the public welfare as a whole.⁸³ Nevertheless, the budgetary concern is not the only grounds for decisions. Government decisionmakers are agents with their own agendas and welfare functions. Whether elected officials seeking reelection, or bureaucrats seeking to enhance their likelihood of landing a plum job with the “clients” after retirement from public service, government decisionmakers will pursue their own goals.⁸⁴ Thus, while the compensation requirement will lead government – as an institution – to internalize the costs of its takings, it will not necessarily lead the agents making decisions on behalf of the government to efficient choices.

Moreover, even if we were to assume the government acts like a wealth-maximizing individual, we should not expect the just compensation requirement to provide an adequate guarantee of good decisions in all cases. Compensation in takings law is generally made according to the property’s market value, rather than its value to its current owner. In addition, compensation is not made for various types of damages such as goodwill and consequential damages.⁸⁵ Consequently, even if the government must pay compensation for taken property, it may still take inefficiently, where the government values the property more than the market, but less than the current owner.

In short, the law of takings — at least as currently constituted — fails to ensure that the takings power will be used only when the government is the higher-value or preferred user of the property to be seized.

2. Takings and Strategic Behavior

In addition to the question of the higher value user, takings law involves a second aspect: it allows the government to take the property through coercion, rather than through the usual consensual mechanism. And, again, takings law fails to ensure that this coercive tool is used only when necessary. As I noted earlier, subject to the public use restriction and the payment of “just compensation,” the government may always take, irrespective of the presence of strategic barriers to bargaining. The public use requirement, we have seen, presents no useful guidelines at all, and certainly does not help distinguish between cases where coercion should be preferred to consent.⁸⁶ And, while there will be cases where the just compensation requirement deters the

⁸³ For evidence concerning fiscal illusion’s impact on government decisionmaking *see* William Fischel *** CITES

⁸⁴ *See* Mueller, *supra* note 82.

⁸⁵ *See* Bell & Parchomovsky, *supra* note 61, at 885-90.

⁸⁶ EXCEPTION: prong one of Wayne County ***

PRIVATE TAKINGS

24

government from exercising its power to take, there is little reason to suspect an automatic correlation between those cases and those where the absence of strategic problems should bar government takings.

Consider again the case of the government taking of a habitat for an endangered species. First, let us suppose that the endangered species in question is a sand-dwelling creature that can flourish anywhere on the coast of the eastern seaboard of the United States. There are thousands of private parcels of land that could serve as protected habitat for the creature. In such a circumstance, it is difficult to imagine that there would be serious strategic barriers to negotiating government acquisition of a suitable parcel of conservation property. If one property owner were to attempt to hold out for a share of the expected public “profit” in saving the endangered species, or as a result of a idiosyncratic subjective value she attaches to her land, the government could turn to a large number of other landowners as alternative suppliers of the desired habitat.

Yet, nothing in the law of takings prevents the government from using the coercive mechanism even in such cases where there are no barriers to consensual property transfers. Once again, neither the public use restriction nor the just compensation requirement limits the exercise of the takings power to those cases where it is necessary. Rather, the law of takings leaves the unfettered use of the takings power to the discretion of the government.

The inability of the public use limitation – as currently interpreted – to limit nonconsensual takings should be evident. As noted earlier, in practical terms, the public use restriction is toothless; for purposes of the takings power, everything is a public use.⁸⁷ Even in the more restrictive version of the public use doctrine adopted by several states, and suggested in post-*Kelo* legislative proposals, takings are generally permitted without distinguishing between cases when coercive methods should be used for obtaining property and those in which consensual methods should be preferred. Rather, public use is determined by the eventual purpose to which the taken property will be put.⁸⁸ One might imagine a public use doctrine that restricted exercises of the takings power to situations in which strategic problems or other market failures demand the use of a coercive mechanism for government acquisitions of property. However, that proposed public use doctrine is clearly not the one currently in force. Indeed, it is even further removed from scholarly discussion of the public use requirement than my earlier hypothetical public use

⁸⁷ See note ***, *infra*, and corresponding text.

⁸⁸ See CITES ***

doctrine which required the government to be the highest value or most just user.

The just compensation requirement places a more substantial restriction on the government's use of its coercive powers. Indeed, if one were to assume that it is always substantially more expensive for the acquirer to use the takings power than to engage in market transactions, then the just compensation clause would successfully limit exercises of the takings power to cases where coercion is necessary. If coercion were always more expensive for the government, it would always use the cheaper alternative of voluntary purchase where available.

However, coercion is not infrequently the less expensive option for the government. When the government chooses between purchase and seizure, it also chooses between two types of attendant costs. Purchasing property is attended by contracting costs – the costs of negotiating the deal. Seizure is accompanied by litigation costs. Where litigation costs predominate, consensual transfers will be cheaper; where contracting costs predominate, nonconsensual takings will be more cost-effective. The takings power is insensitive to these concerns, and permits seizure irrespective of attendant costs. And since many of the attendant costs fall on the property owner rather than the government, it is quite conceivable that the government will choose the inefficient means of obtaining property.⁸⁹

Thus, the law of takings fails to ensure that the government's power of eminent domain will be exercised only where coercion is the preferred method of acquiring property.

E. Takings and Pliability

Thus far, I have discussed the takings power in the context of pliability rules in connection with a specific issue: the incompatibility of the justifications for the takings power with the actual law governing it. I now look to the broader implications of situating takings within a broader property analysis and characterizing takings in terms of pliability rules.⁹⁰

A pliability analysis allows the incorporation of an insight made earlier by Louis Kaplow and others: nothing prevents entitlement holders from being aware of the risk of a government

⁸⁹ Cf. Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473 (1976) (demonstrating that different cost structures for government and property owners lead to systematic undercompensation for low value property and overcompensation for high value property).

⁹⁰ See also Merrill, *supra* note 3 (discussing property rule and liability rule analysis of takings law).

PRIVATE TAKINGS

26

taking, or valuing their entitlement accordingly.⁹¹ In a liability analysis, entitlement holders should view their asset as enjoying property rule protection only until the government decides to exercise its right to eminent domain. The decision to exercise the power of eminent domain triggers a change from property rule to liability rule protection. Whereas earlier the government could only acquire the property via consensual transaction, it may now seize it in exchange for the payment of “just compensation.” The uncertainty and flaws in compensation in the event of an involuntary taking will be reflected in the internal owner valuation and the price.

Viewing takings in this way enables us to see that the power of eminent domain is not quite so alien to the private market as we might suspect. Liability rules are hardly unknown to the private sector. Indeed, they are a ubiquitous feature of the legal landscape of private entitlements. Real property is subject to adverse possession and claims by good faith encroachers.⁹² Copyrights expire, and owners cannot block “fair uses” of protected material.⁹³ Businesses can be forced to allow competitors use of “essential facilities” under antitrust law.⁹⁴ More broadly, as Boudewijn Bouckaert and Gerrit De Geest have noted, coercive transfers of entitlements are widely seen in private law, and they share many of the animating principles of takings.⁹⁵

To be sure, there is one feature of the liability rule created by eminent domain that differs from the examples I have just given. Eminent domain permits the taker to trigger the change in the liability rule that alters protection. This is not the case with antitrust law, where the change is triggered by the behavior of the entitlement holder. Arguably, it is not even the case with adverse possession, where an adverse possessor must invest a considerable amount of time to change the entitlement, and in some jurisdictions, must not intend to change the ownership of the property.⁹⁶ In this sense, the liability rule used in takings approaches a standard liability rule, in which anyone may seize the entitlement at any time, in exchange for a price established by an outside actor.⁹⁷ Yet there is no reason to view this one feature as making the effects of eminent domain fundamentally unlike all

⁹¹ *** CITE – transitions article.

⁹² See Bell & Parchomovsky, *supra* note 27, at ***. See also *infra* Part ***.

⁹³ See Bell & Parchomovsky, *supra* note 27, at ***.

⁹⁴ See Bell & Parchomovsky, *supra* note 27, at ***.

⁹⁵ See Bouckaert & de Geest, *supra* note 6.

⁹⁶ ***

⁹⁷ However, the entitlement should not be viewed as being protected only by liability rule protection, as there are contexts in which it enjoys property rule protection against the government actor that holds the power of eminent domain.

other liability rules. Certainly, for the owner of the entitlement, it makes little difference that changed protection is triggered by the taker's choice, rather than some other factor over which the entitlement holder has as just as little direct control. And the government, notwithstanding its power of eminent domain, must nevertheless respect the property rule protection of asset owners under ordinary circumstances. For instance, government agents may not enter upon private property at will, and must instead either obtain the owner's permission or avail themselves of a special privilege such as that granted by a court-issued warrant.⁹⁸

F. Public and Private Takings

We have seen, thus far, what the takings power is meant to accomplish, the difficulty of distinguishing it from other government powers, and the shortcomings of the law of takings in limiting exercises of the takings power to those cases where its use would be just and/or efficient.

To summarize: the takings power renders all private property subject to liability rule protection vis-à-vis the government. The government may take property at any time, subject only to the constitutional requirements that it pay "just compensation" (market value compensation) and that it designate the taken property for "public use" (nearly any use). By contrast, efficiency and justice would require that property be subject to taking by the government only in those circumstances where (a) the government is the superior owner, and (b) high transaction costs or strategic barriers block consensual transfer of ownership to the government.

This brings us to the central question addressed by this Article: why should the takings power be solely limited to the government? As we have seen, a takings power, when combined with a just compensation limitation, essentially makes all entitlements subject to liability rule protection vis-à-vis the government. Under this liability rule, the taker temporarily changes protection of the asset from property rule to liability rule, pays compensation in accordance with the terms of the liability rule, and then keeps the asset under the protection of a new property rule. Yet, the government is not the only actor that can take advantage of a liability rule in order to obtain assets that would ordinarily be under the property rule protection of another. As we saw, liability rules, such as the rules of fair use or essential facilities, may also allow private actors to abridge the property rights of other individuals.⁹⁹

⁹⁸ Cite warrants; state v shack.***

⁹⁹ See *supra* ***

PRIVATE TAKINGS

28

Why then, should this particular form of pliability protection only accrue to the benefit of the government?

The question is particularly pressing in light of the strategic failings presumed to be alleviated by the law of takings. As Richard Posner has noted, the strategic problems addressed by the power of eminent domain – holdouts, asymmetric information and bilateral monopoly – are not unique to the public sector.¹⁰⁰ Desirable private projects, just like public ones, may be held up by holdouts. The typical land assembly project that demands eminent domain for its success¹⁰¹ will often occur in the private sector, rather than the public. Asymmetric information may block welfare-enhancing private projects as well; large corporations involved in gathering assets for a large commercial project may face as much difficulty hiding their plans as the government. Indeed, if the corporation is publicly-held, security laws may require revealing its plans, while the private owner from which the corporation hopes to obtain the property labors under no such constraints.¹⁰² Moreover, large private development projects often require zoning changes or variances, requiring early revelation of plans.¹⁰³ And, of course, bilateral monopoly may occur anywhere in the private markets.

To be sure, there is a price to be paid for reducing the availability of property rule protection to asset owners. Less ability to hold out and to exclude means less stability value for ownership, and a possible reduction of the value of the property relationship.¹⁰⁴ Thus, any increase in the vulnerability of assets to takings imposes a cost on all property ownership. However, this does not seem a very good reason for distinguishing between permissible and impermissible takings on the basis of the identity of the proposed taker. Government takings may be made for trivial purposes that produce net social loss, while potential private takings might lead to large social welfare gains. It would seem better, therefore, to defend property stability not by privileging government takings, but rather, by restricting takings altogether – irrespective of the taker – to those instances in which the harm to property value is justified by the large benefit produced by the taking.

Nor can one justify privileging government takings on the grounds of curbing possible takings abuse. Certainly, an unlimited private taking power might be abused, but so too may a public

¹⁰⁰ *** CITE

¹⁰¹ For discussion of the importance of eminent domain in land assembly, *see* *** CITES.

¹⁰² ***

¹⁰³ ***

¹⁰⁴ *See generally* Bell & Parchomovsky, *supra* note 50.

taking power. Private takings powers can be circumscribed to curb potential abuse. Moreover, the reliance on public decisionmaking by a state apparatus, rather than the discipline of the market, seems unlikely to reach efficient results. I discuss this last issue in greater detail later;¹⁰⁵ for now, it suffices to note that the justifications for a public taking power would seem logically to justify a private taking power as well.

II. PRIVATE TAKINGS, PAST AND PRESENT

In this Part, I move from the theoretical to the empirical and historical. Specifically, I demonstrate the pervasiveness of private takings mechanisms in American law. Although the notion seems somewhat strange today, private takings have long been permitted by American law. In this Part, I present some of the chief mechanisms used by the federal and state governments in the eighteenth and nineteenth centuries to empower private takings. I also discuss modern legal practices that functionally constitute private takings. Finally, I compare these methods to another mechanism that bears great similarity to a private taking: adverse possession. The aim of this Part is to demonstrate the wide range of options available for implementing a regime of private takings. As I will argue in Part IV, the mechanisms of earlier centuries do not exhaust the range of private takings options. However, they present many alternatives that are worth considering today.

A. Traditional Private Takings

1. Delegated Private Takings

In the nineteenth century, every state in the union delegated the power of eminent domain to turnpike, bridge, canal and railroad companies.¹⁰⁶ These delegations essentially put the private actor – the company beneficiary of the delegation – in the place of the government with regard to the law of eminent domain. Additionally, nineteenth century mill acts authorized riparian owners to dam watercourses and flood neighboring land in order to power mills. The mill owners would confiscate the flooded land and pay compensation.¹⁰⁷

Even during their nineteenth century heyday, delegated private takings were not universally popular, and a number of

¹⁰⁵ See *infra* Part V.A.

¹⁰⁶ Scheiber, *supra* note 38, at 237.

¹⁰⁷ See *supra* note 8. See also EPSTEIN, TAKINGS, *supra* note 3, at *** (discussing Mill Acts).

PRIVATE TAKINGS

30

courts and legislatures sought to cut back on such powers.¹⁰⁸ In *Reyerson v. Brown*,¹⁰⁹ for instance, the Michigan Supreme Court restricted the exercise of eminent domain by private corporations to cases of “extreme necessity.” Later, in 1888, the New York Court of Appeals struck down Niagara Falls and Whirlpool Railway Company's taking power because the court considered easing public access to the Niagara Falls an insufficient public purpose.¹¹⁰ By the early twentieth century, state law had cut back significantly on the eminent domain power, limiting various doctrines that reduced compensation for owners deprived of their property.¹¹¹

Yet, many states continue to permit railroads and utilities to undertake more limited private condemnations today. For instance, Alabama permits the exercise of eminent domain by electric companies, operators of water systems and sanitary sewer systems and television satellite systems under the same rules as public takings.¹¹² Among other states recognizing similar private takings powers under similar circumstances are Arkansas,¹¹³ Illinois,¹¹⁴ Indiana,¹¹⁵ Kansas,¹¹⁶ Oklahoma¹¹⁷ and Texas.¹¹⁸ Federal law permits similar private condemnations.¹¹⁹

A handful of states have expanded the power of private takings to other private actors, such as miners and loggers seeking to condemn land for roads and railroads to transport goods,¹²⁰ or individuals seeking to transport water for irrigation or other purposes.¹²¹

¹⁰⁸ See Wendell E. Pritchett, The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 YALE L. & POL'Y REV. 1, 9-11 (2003); Scheiber, *supra* note 38.

¹⁰⁹ 35 Mich. 334, 339 (1877).

¹¹⁰ *In re the Application of the Niagara Falls & Whirlpool Ry. Co.*, 15 N.E. 429, 432 (N.Y. 1888).

¹¹¹ Scheiber, *supra* note 38, at 248-249.

¹¹² Ala.Code 1975 § 37-6-3(15).

¹¹³ See *Arkansas Power & Light Co. v. Harper*, 460 S.W.2d 75 (Ark. 1970) (power transmission line).

¹¹⁴ See *Times Mirror Cable Television of Springfield, Inc. v. First Nat'l Bank of Springfield*, 582 N.E.2d 216 (Ill. App. 1992) (cable television wiring).

¹¹⁵ See *Hagemeier v. Indiana & Mich. Elec. Co.*, 457 N.E.2d 590 (Ind. Ct. App. 1983) (electric right-of-way).

¹¹⁶ See *Williams Telecommunications Co. v. Gragg*, 750 P.2d 398 (Kan. 1969) (fiber optic cable for telecommunications).

¹¹⁷ See *McInturff v. Oklahoma Natural Gas Transmission Co.*, 475 P.2d 160 (Okla. 1970) (gas pipeline).

¹¹⁸ See *Aquila SouthwestPipeline Corp. v. Gupton*, 886 S.W.2d 497 (Tex.Ct.App. 1994) (gas pipeline).

¹¹⁹ See Natural Gas Act, ***CITE.

¹²⁰ See OR. REV. STAT. §§ 772.410 (2003).

¹²¹ See, e.g., COL. REV. STAT. § 37-86-102; IDAHO CODE §§ 42-1102, 42-1106; UTAH CODE ANN. § 73-1-6; See also *Bubb v. Christensen*, 610 P.2d 1343, 1346 (Colo. 1980).

PRIVATE TAKINGS

31

2. Private Takings and Necessity

A different type of private taking that can still be found in state law today is the right to seize easements in neighboring real property by reason of necessity. While only a minority of states allows these private seizures, they remain important and well established means of privately taking property interests. The doctrines permitting such private takings of easements go under a number of names, such as easements by condemnation,¹²² or private ways of necessity.¹²³

To understand the unique nature of such private takings of easements, a brief explanation of ordinary easement law is necessary. Easements are property interests allowing the owner use rights in realty possessed by another. Typically, easements arise by express grant, where the owner of the servient parcel grants an easement – generally, a right of way – for the benefit of the dominant parcel.¹²⁴ Additionally, a number of doctrines allow easements to arise by implication, or by necessity. For example, in most states, easements by strict necessity arise where a parcel is divided into two parcels owned by different parties, and a right of way across one of the parcels (now the servient estate) is necessary for ingress to and egress from the other parcel (now the dominant estate).¹²⁵ For the easement to arise, the necessity must have existed in the whole parcel at the time of separation, such that the easement may be viewed as having been created at separation.¹²⁶ Only the combination of these circumstances automatically gives rise to an easement that lasts so long as the necessity continues.

However, a minority of states allows claimants of an easement by necessity to create a new use right by an act of seizure or condemnation. In Colorado, for example, land owners may create private “ways of necessity” on their neighbors’ real property where the easements are “indispensable to the practical use of the property for which they are claimed.”¹²⁷ Interestingly, owners may invoke the right to create private ways of necessity as an alternative to easements by strict necessity. Thus, the seizing owner need not show a common origin of the two parcels in order to create the private way. Instead, Colorado law requires condemners to show that they have a sufficient interest in the

¹²² *** CITE

¹²³ See, COL. CONST., art II, § 14 (“Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity ...”); COL. REV. STAT. §§ 38-1-102 et seq. (2002).

¹²⁴ An easement appurtenant is for the benefit of a property, while an easement in gross accrues to the benefit of a person. ***CITE

¹²⁵ ***

¹²⁶ See, e.g., *Othen v. Rosier*, 148 Tex. 485, 226 S.W.2d 622 (1950).

¹²⁷ *Crystal Park Co. v. Morton*, 27 Colo.App. 74, 146 P. 566, 569 (1915).

benefited property to entitle them to condemnation and that there is a practical necessity for the private way.¹²⁸ Similar statutes in other states sometimes go under the name of “private road” laws.¹²⁹

Both delegated private takings powers and private ways of necessity have come in for criticism for violating constitutional “public use” clauses. Generally, however, the courts have upheld the constitutionality of private takings, finding that the private benefit to the taker provides sufficient “public” benefit to justify the exercise of eminent domain. The public benefit has been found in greater tax revenues,¹³⁰ more productive use of assets,¹³¹ increased economic activity¹³² and the like.

B. Government-Mediated Private Takings

Alongside the traditional private takings mechanisms identified in the previous Section, there exists a species of public takings that should be seen as effecting private takings. In this Section, I discuss one such type of private takings under the label of government-mediated private takings.

In government-mediated private takings, private actors functionally seize property through eminent domain, but rely upon the government’s formal authority to do so. These types of takings do not involve any delegation of the power of eminent domain. Rather, the government exercises its own taking power to seize property from one private actor, before then granting it to another private actor. Such takings have also been designated “public-private takings.”¹³³

Eminent domain has been used in order to engage in resource allocation among private parties for egalitarian and social engineering purposes. Perhaps the most famous state exercise of this kind was upheld in *Hawaii Housing Authority v. Midkiff*.¹³⁴

¹²⁸ Robyn W. Kube, *Access at Last: The Use of Private Condemnations*, 29-FEB COLO. LAW. 77, 78 (2000). For a list of states recognizing the availability of private ways of necessity, see JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* ¶ 4.02[4] at 4-30 & n. 132 (Rev. Ed. 1995).

¹²⁹ See, e.g., Wyo. Stat. §§ 24-9-101 to -104 (2004).

¹³⁰ See, e.g., *Marinclin v. Urling* 262 F. Supp. 733, 735 (W.D. Pa. 1967), *aff’d* 384 F.2d 872 (3d Cir. 1967).

¹³¹ See, e.g., *Dowling v. Erickson*, 278 Ark. 142, 145-146, 644 S.W.2d 264, 266 (1983).

¹³² See, e.g., *Bieker v. Suttons Bay Township Supervisor*, 197 Mich.App. 628, 632, 496 N.W.2d 398, 400 (1992).

¹³³ Jeffery W. Scott, *Public Use and Private Profit: When Should Heightened Scrutiny Be Applied to “Public-Private” Takings?* 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 466 (Summer 2003); Kulick, *supra* note 11.

¹³⁴ 467 U.S. 229 (1984).

PRIVATE TAKINGS

33

Hawaii had confiscated property of large landowners to redistribute it to the erstwhile tenants. Hawaii only seized property when more than half of the tenants of that property expressed an interest in purchasing it. The purchasing tenants would then pay the former landlords directly for the seized property at a negotiated price or at a price set by the condemning court.¹³⁵ Like the Michigan Supreme Court in *Poletown*, the United States Supreme Court rejected the argument that the taking lacked a public purpose, finding that the act aimed at the public purpose of reducing the perceived social and economic evils of a land oligopoly in which 72 individuals owned more than 90% of the privately owned land.¹³⁶

Government-mediated private taking has proved more contentious where invoked for fungible commercial purposes, as indicated in the controversial case of *Poletown Neighborhood Council v. City of Detroit*.¹³⁷ General Motors had decided to close a money-losing plant in Detroit, and relocate it to a cheaper location. In order to forestall G.M.'s location of the new plant out-of-state, Detroit agreed to furnish, at low cost, a parcel of land for the new facility. The city selected the land on which the Poletown neighborhood was located, and it seized the homes by eminent domain. Poletown residents lost their political and legal battles against the condemnation, and the city eventually obtained all the desired land at a cost of some \$200 million. Detroit then transferred the land to G.M. for \$8 million.¹³⁸ The residents' legal challenge to the city's action focused on the use of the power of eminent domain in order to benefit a private actor. The residents claimed that since G.M. was the intended beneficiary of the condemnation, no public use justified the exercise of the government's eminent domain power.¹³⁹ The Michigan Supreme Court reasoned otherwise, finding a public purpose in "alleviating unemployment and revitalizing the economic base of the community."¹⁴⁰

Poletown, however, is far from the only case in which the government exercised its power of eminent domain in order to transfer property from a private holder to a commercial actor. Eminent domain has played a critical and controversial role in urban renewal schemes involving the condemnation of private property, and its transfer to a private developer.¹⁴¹ In *Berman v.*

¹³⁵ *Id.* at ***.

¹³⁶ *Id.* at 241-242.

¹³⁷ 410 Mich. 616, 304 N.W.2d 455 (Mich. 1981).

¹³⁸ For a review of the facts surrounding the *Poletown* case, see ***CITES. For criticism of the case, see *** CITES.

¹³⁹ *Poletown*, 410 Mich. at 630-632, 304 N.W.2d at 458.

¹⁴⁰ *Id.*, 410 Mich. at 634, 304 N.W.2d at 459.

¹⁴¹ See Pritchett, *supra* note 108; ***.

PRIVATE TAKINGS

34

Parker,¹⁴² the United States Supreme Court upheld the constitutionality of a Washington, D.C. plan to clear “slums” and “blighted areas” by acquiring property, sometimes by eminent domain, and then leasing or selling it to private developers, all in accordance with a “comprehensive plan.” As Wendell Pritchett has noted, *Berman* opened the floodgates to extensive “public-private” development in which the government uses its eminent domain powers to organize parcels of realty for private building plans.¹⁴³

Today, many states employ development corporations or authorities to condemn property for private use in order to “improve the business climate” or engage in “urban renewal.”¹⁴⁴ For instance, the state of New York’s Empire State Development Corp. recently received approval to condemn land in midtown Manhattan (on Sixth Avenue, between 42nd and 43rd Streets) in order to turn it over to a private developer for building a 57-story office tower for Bank of America.¹⁴⁵ Other controversial recent seizures have included the seizure of church property in Cypress, California to make way for a Costco store¹⁴⁶; the taking of used car dealerships in San Leandro, California and Merriam, Kansas in order to replace them with new car dealerships¹⁴⁷; and various condemnations in order to provide parking and tunnels for casinos.¹⁴⁸

This practice is not without its critics. Chastened by public criticism, the Supreme Court of Michigan asserted in *County of Wayne v. Hathcock*¹⁴⁹ that it was overruling the generous interpretation of public use endorsed in *Poletown*, and that it would henceforth only approve government-mediated private takings upon fulfillment of one of three conditions. First, such takings may be justified where necessary for extreme public necessity (such as land assembly).¹⁵⁰ Second, takings for a private owner can be endorsed where the private owner would “remain accountable to the public in its use of that property” such as where it would devote the use of the property to a publicly regulated pipeline.¹⁵¹ Third, where the targeted property is of public concern, such as a slum, property may be seized and turned over

¹⁴² 348 U.S. 26 (1954).

¹⁴³ See Pritchett, *supra* note 108.

¹⁴⁴ Eminent domain is hardly the only governmental power employed in such public-private ventures. Tax and other direct financial incentives are probably the most popular tool. *** CITE something on TIF’s.

¹⁴⁵ Peter Moore, *Durst Buy-Back Plan Sparks Controversy*, 50 ***;

¹⁴⁶ *** CITE

¹⁴⁷ *** CITE

¹⁴⁸ *** CITE

¹⁴⁹ 471 Mich. 445 (2004).

¹⁵⁰ *Id.* at ***

¹⁵¹ *Id.* at *** (citing ***).

PRIVATE TAKINGS

35

to a private owner.¹⁵² Using this test, the court overturned a county decision to seize private property by eminent domain in order to convert it to a privately owned business and technology park. State courts in Arkansas,¹⁵³ Florida,¹⁵⁴ Kentucky,¹⁵⁵ Maine,¹⁵⁶ New Hampshire,¹⁵⁷ South Carolina¹⁵⁸ and Washington¹⁵⁹ have also struck down government-mediated private takings for lack of public use. And while the Supreme Court upheld a Connecticut ruling in favor of such a taking in *Kelo v. City of New London*,¹⁶⁰ permitting the seizure of homes for a major drug corporation's new global research facility and neighboring private residential and commercial uses, the subsequent public outcry is leading to widespread restrictions on some kinds of "economic development" takings.¹⁶¹

Yet, these exceptions do not disprove the rule. Many states have allowed and continue to allow government-mediated private takings.

States may mediate private takings to solve narrower problems of excessive transactions costs in the use of resources. Consider first the issue of compulsory pooling. Traditionally, subsurface oil and gas has been governed by the property rule of capture,¹⁶² most familiar from the context of wild animals.¹⁶³ Under that rule, oil and gas are owned by no one so long as they remain in the "state of nature." They become subject to an owner's property rights only when she takes possession of them. As might be expected, the rule of capture induces races to drill. Where a single pool of oil lies under the land of multiple owners, each will attempt to drill and withdraw as much of the oil as quickly as possible. So long as the oil remains in the ground, it belongs to no one. Pooling laws aim at averting this race to the bottom by aggregating the surface owners above a pool of oil or gas into a joint venture for purposes of drilling.¹⁶⁴ Voluntary pooling

¹⁵² *Id.* at ***

¹⁵³ *E.g.*, *Little Rock v. Raines*, 241 Ark. 1071, 1083-84, 411 S.W.2d 486 (1967).

¹⁵⁴ *E.g.*, *Baycol, Inc. v. Downtown Development Authority*, 315 So.2d 451, 456-58 (Fla.1975).

¹⁵⁵ *E.g.*, *Owensboro v. McCormick*, 581 S.W.2d 3, 5-8 (Ky.1979).

¹⁵⁶ *E.g.*, *Opinion of the Justices*, 152 Me. 440, 447, 131 A.2d 904 (1957).

¹⁵⁷ *E.g.*, *Merrill v. Manchester*, 127 N.H. 234, 237-39, 499 A.2d 216 (1985).

¹⁵⁸ *E.g.*, *Karesh v. City Council*, 271 S.C. 339, 342-45, 247 S.E.2d 342 (1978).

¹⁵⁹ *E.g.*, *In re Seattle*, 96 Wash.2d 616, 627- 29, 638 P.2d 549 (1981).

¹⁶⁰ ***

¹⁶¹ *See Bell & Parchomovsky, supra* note 2.

¹⁶² *** CITE

¹⁶³ *See Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805) (seminal case awarding property rights in a fox to the first possessor despite the practice that the pursuer should be entitled to catch the fox).

¹⁶⁴ 38 AM. JUR. 2D GAS AND OIL § 186 (2003).

PRIVATE TAKINGS

36

agreements require the consent of each surface owner.¹⁶⁵ However, a number of states force property owners into pooling arrangements, generally by order of an administrative body.¹⁶⁶ Under such arrangements, the administrative agency essentially orders land owners to consent to pooling, or sell the land to neighbors. Thus, for instance Oklahoma Supreme Court held that the administrative agency empowered to act under the state's compulsory pooling statute could order a non-consenting landowner to participate or involuntarily sell his working interests to the operator for a "fair price."¹⁶⁷

C. Other Non-consensual Private Acquisitions of Property

Private takings are not the only means of effectuating nonconsensual transfers of property between private individuals.¹⁶⁸ The doctrine of adverse possession permits trespassers to gain title to another's land by wrongfully occupying it for an extended period of time.¹⁶⁹ The doctrine of prescription permits a similar seizure of use rights after lengthy wrongful use.¹⁷⁰ To succeed on an adverse possession (or prescription) claim, the occupier must show that her occupation is hostile to the owner's interest, actual, open and notorious, exclusive, and continuous for the statutorily mandated period of time.¹⁷¹ The

¹⁶⁵ *Id.* at § 187.

¹⁶⁶ *See, e.g.*, *Atlantic Richfield Co. v. Tomlinson*, 859 P.2d 1088 (Okla. 1993); *V-F Petroleum, Inc. v. A.K. Guthrie Operating Co.*, 792 S.W.2d 508 (Tex. App. Austin 1990). *See also* 37 A.L.R.2d 434 § 1 (2004) ("A statute under which owners of small or irregularly shaped tracts can be required to develop their lands as a single drilling unit for conservation purposes is usually defined as 'a compulsory pooling' statute. It is contrasted with a compulsory unitization statute, which applies ordinarily to joint operations on a large scale, such as those covering an entire oil or gas field. However, sometimes the terms are used interchangeably.").

¹⁶⁷ *Anderson v. Corporation Commission*, 327 P.2d 699, 702-03 (1957).

¹⁶⁸ My definition of private takings therefore differs from that employed by Boudewijn Bouckaert and Gerrit de Geest. *See* Bouckaert & de Geest, *supra* note 6.

¹⁶⁹ WILLIAM B. STOEBAK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 583 (3rd ed. 2000); Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135 (1918) ("[T]he doctrine [of adverse possession] apparently affords an anomalous instance of maturing a wrong into a right contrary to one of the most fundamental axioms of the law. 'For true it is, that neither fraud nor right/Can make a title where there wanteth right.'" (quoting *Altham's case*, 8 Coke Rep. 153, 77 Engl. reprint, 707)).

¹⁷⁰ *** CITE

¹⁷¹ *See e.g.*, John P. Dwyer & Peter S. Menell, *PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE* 77-82 (1998). *See, e.g.*, *Van Valkenburgh v. Lutz*, 304 N.Y. 95, 98 (1952) (noting that "[t]o acquire title to real property by adverse possession not founded upon a written instrument, it must be shown by clear and convincing proof that for at least fifteen years (formerly twenty years) there was an 'actual' occupation under a claim of title .

PRIVATE TAKINGS

37

successful adverse possessor obtains the full set of rights associated with property ownership.¹⁷² Adverse possession, then, effectively permits private actors to take others' property.

Before seeking to understand adverse possession, it is important to bear in mind that adverse possession does not fall precisely into the framework of private takings as discussed earlier. Private takings carried out by eminent domain – whether by delegation, government mediation, or other legal doctrine – permit the taker to convert the property owner's legal protection from property rule to liability rule by the voluntary act of invoking the power of eminent domain. Under most versions of adverse possession, by contrast, the adverse possessor must believe that she is not taking possession of another's property in order to be eligible for taking title.¹⁷³ The doctrine of adverse possession, therefore, is generally a means of dealing after the fact with a mistake.

Various explanations have been proffered for the doctrine of adverse possession.¹⁷⁴ First, evidence of ownership decays over time, creating the need, some say, for limiting the time period in which an ejectment suit may be brought.¹⁷⁵ Adverse possession rules, accordingly, clarify the provenance of titles and facilitate transactions.¹⁷⁶ Second, adverse possession is thought to

. . ."); *Howard v. Kunto*, 3 Wash. App. 393, 397 (1970) (restating “the oft-quoted rule that: ‘[T]o constitute adverse possession, there must be actual possession which is uninterrupted, open and notorious, hostile and exclusive, and under a claim of right made in good faith for the statutory period’”); *but see Chaplin v. Sanders*, 100 Wash. 2d 853, 861 (1984) (overruling *Howard v. Kunto* to the extent that the case suggested a good-faith requirement for adverse possession, and specifically noting that an adverse possessor’s “subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant”); *O’Keefe v. Snyder*, 83 N.J. 478, 491, 494, 497 (1980) (noting that “[t]o establish title by adverse possession to chattels, the rule of law has been that the possession must be hostile, actual, visible, exclusive, and continuous,” but also noting that in the case of works of art, the “introduction of equitable considerations through the discovery rule [providing that a cause of action will not accrue until the injured party discovered or should have discovered facts supporting a cause of action] provides more satisfactory response than doctrine of adverse possession”). *** PRESCRIPTION CITES.

¹⁷² See e.g., *Stoebach & Whitman*, *supra* note 169 at 853 (“Title gained [through adverse possession] is usually in fee simple absolute.”).

¹⁷³ *** Cite *helmholz* etc.

¹⁷⁴ See *Thomas J. Miceli & C.F. Sirmans, An Economic Theory of Adverse Possession*, 15 INT’L REV L. & ECON. 161 (1995); *Thomas W. Merrill, Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122 (1984).

¹⁷⁵ Some claim that the role of adverse possession in eliminating unenforced property claims and quieting title should be viewed as separate and unique reason for the doctrine. See, e.g., *Merrill*, *supra* note 174 at 1129; *Miceli & Sirmans*, *supra* note 174 at 161.

¹⁷⁶ *Bell & Parchomovsky*, *supra* note 27 at ***.

PRIVATE TAKINGS

38

incentivize owners to utilize their property efficiently.¹⁷⁷ Third and finally, adverse possession protects investments made by squatters made in reliance upon the strength of their possessory claim.¹⁷⁸

None of these explanations, however, fits within the framework of reasons to provide for a private takings power described earlier. Traditional explanations for eminent domain have focused either on the nature of sovereign powers or on expected strategic bargaining failures that lead to the need for a coercive transfer mechanism to be initiated by the purchaser. Evidentiary problems certainly do not fit within either explanation, and, indeed, are easily resolved by improved recording systems.¹⁷⁹ Adverse possession as a mechanism for improving property utilization has also been widely criticized. Opponents have noted that the ideal use of property at any given time may be to leave it idle,¹⁸⁰ due to environmental or other conservation purposes, or simply because the time for more intensive use has not yet arrived.

As Thomas Miceli and C.F. Sirmans have argued, the protection of squatters' reliance interests appears to provide a stronger rationale for the doctrine of adverse possession, but only as a way of dealing with mistaken squatting on another's land. In such cases, say Miceli and Sirmans, adverse possession rules prevent the title owner from extorting quasi-rents from the possessor's expenditures in reliance upon an initial error,¹⁸¹ while the lengthy time period before possession ripens into title retains an incentive for squatters to investigate title before building.¹⁸² By contrast, where the squatting is intentional, or where the title owner has taken no steps to encourage the squatter's improvements, there seems no reason to provide legal doctrines to protect the squatter. Indeed, in such cases, ordinary property rules would seem to properly align the incentives of all parties, while liability rules would be both unfair and inefficient.¹⁸³

While Miceli and Sirmans' theory does not match the traditional description of the doctrine, it does accord with the way the doctrine is practiced in the United States, as demonstrated by

¹⁷⁷ See Richard A. Posner, *Savigny, Holmes, and the Law and Economics of Possession*, 86 VA. L. REV. 535, 559 (2000) ("The economic rationale of adverse possession, conceived as a method of shifting ownership without benefit of negotiation or a paper transfer, can be made perspicuous by asking when property should be deemed abandoned, that is, returned to the common pool of unowned resources and so made available for appropriation through seizure by someone else. The economist's answer is that this should happen when it's likely to promote the efficient use of valuable resources.").

¹⁷⁸ CITE ***

¹⁷⁹ *** CITE

¹⁸⁰ *** CITES

¹⁸¹ Miceli & Sirmans, *supra* note 174 at 161.

¹⁸² *Id.* at 161.

¹⁸³ *Id.* at 165.

PRIVATE TAKINGS

39

Richard Helmholtz' study showing that courts typically refuse to credit claims of adverse possession of possessors shown to have acted in bad faith.¹⁸⁴ This view of adverse possession connects the rule with other doctrines designed to protect good faith improvers of another's land. Generally, where courts are convinced of the good faith of encroachers, they will refuse automatic application of the common law rule of ejecting trespassers. Instead, courts will "balance the hardships" of the parties, and craft a remedy that works the least loss on the title owner and the trespassing improver.¹⁸⁵ Such remedies may include the payment of damages, or even a forced sale.¹⁸⁶ According to Miceli and Sirmans, the doctrine of adverse possession should be understood as a way of dealing with the central shortcoming of doctrines of mistaken improvers: it is extraordinarily difficult to determine *ex post* whether an encroachment resulted from an honest mistake, or from a deliberate trespass.¹⁸⁷

So understood, adverse possession is not quite a private takings power. It is, rather, a doctrine designed to deal *ex post* with problems of sequential wrongs. Thus it falls into a category of coerced transactions attempting to deal with problems of time constraints, incapacity or error.¹⁸⁸

However, this does not mean that adverse possession could not be refashioned into a private takings doctrine. Recently, Lee Anne Fennell proposed reinterpreting the requirements of adverse possession in order to make it function like a private takings power.¹⁸⁹ Fennell rejects the view that adverse possessors should be viewed as an *ex post* remedy for mistaken improvers of another's land, and instead she argues that the doctrine of adverse possession provides a way for claimants to take possession deliberately of another's property.¹⁹⁰ Specifically, she claims that adverse possession should aim at "moving land into the hands of a (much) higher-valuing user, where ordinary markets cannot accomplish that task" — i.e., that it should strive to be a private taking mechanism.¹⁹¹ Indeed, to ensure that adverse possession be used consciously, and with *ex ante* planning, as a private takings mechanism, Fennell urges that adverse possession claimants be required to prove *bad faith*, i.e., knowledge of wrongful entry

¹⁸⁴ *Id.* at 162; Helmholtz ***

¹⁸⁵ *** CITES

¹⁸⁶ *** CITES

¹⁸⁷ *** CITE

¹⁸⁸ Bouckaert and de Geest see all these phenomena, as well as bilateral monopolies, as falling in the same category. *See* Bouckaert & de Geest, *supra* note 6 at 467-468.

¹⁸⁹ Lee Anne Fennell, Efficient Trespass: The Case for "Bad Faith" Adverse Possession, 100 NW. U. L. REV. 1037 (2006).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

PRIVATE TAKINGS

40

contemporaneous with the entry.¹⁹² Fennell argues that this would ensure that the rule of adverse possession protects only efficient trespassers.¹⁹³

Fennell's suggested version of adverse possession does not track current law in most jurisdictions, and it is therefore difficult to suggest that adverse possession is currently a private takings rule outside the handful of states requiring a showing of bad faith.¹⁹⁴ However, Fennell's proposal reveals continuing recognition in some quarters of the need for a private takings doctrine that would permit transfer of title in the absence of a genuine ability to engage in market transfers.

Interestingly, adverse possession requires an unusual payment structure for the private taking. The original owner receives no compensation for her property at all, while the possessor need pay only by investing time. A would-be acquirer of property under eminent domain must stake a possessory claim, and then wait for the many years of the statutory period until the possessory claim ripens into title to the property. In the meantime, the possessor has no property rights, and may be ejected at the owner's will. At the end of the period, the possessor's title relates back to the beginning, and the owner loses all rights, including compensatory rights. Thus, even if interpreted as a private takings doctrine, adverse possession diverges from the normal course of takings: the acquirer must wait an extended period before being awarded title, and the owner of the taken property enjoys no compensation. This makes adverse possession an awkward mechanism for non-market transfers of property to higher-value users.

III. REVIVING PRIVATE TAKINGS

In previous Parts, I demonstrated the theoretical basis for private takings and the existence of private takings doctrines throughout the law. In this Part, I build on the descriptions of the theory of public takings and the current practice of private takings to normative analysis of private takings. Specifically, I develop a comprehensive approach to private takings that integrates current theoretical and legal approaches to eminent domain with the needs of private transfers of property through takings. Based on existing models of public takings, I sketch out the ideal domain of private takings. I then suggest methods for comparing private and public takings, and examine a number of possible mechanisms for implementing private takings in the law. The central theme of this

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *See* ***

PRIVATE TAKINGS

41

Part is that private takings may prove an appropriate means for transferring property entitlements in a variety of circumstances without significantly altering the overall scope or purpose of eminent domain.

A. When Private Takings

As seen in the previous Part, private takings are permitted – directly or indirectly – in a number of areas of current law. Presumably, the law provides for such takings on the basis of a dual belief that societal goals are more efficiently served by transferring the property from one owner to another, and that such transfer will not be effected by ordinary market transfer mechanisms. Yet, the various cases in which the law provides for a direct private takings mechanism lack any unifying theme, and seem, more than anything else, to reflect historical accident. Government-mediated private takings are explicitly *ad hoc*.

Notwithstanding this record, it is not difficult to state the circumstances in which a private takings power ought to be recognized. A private taking power should be granted in those cases in the private market parallel to those where the exercise of a governmental taking power is warranted. Specifically, a private taking power should be granted where the dual conditions of an appropriate taking are met: first, the taker is the preferred owner of the property right (for reasons of justice or efficiency), and second, strategic difficulties block the efficient or just transfer of property rights in the market place. Grants of private taking power may be localized (to one or several grantees) or generalized (to a large class of grantees). Whatever the number of grantees, the power may be granted in advance to a class of transactions, or it may be granted on a case-by-case basis with respect to specific transactions.¹⁹⁵

There are three keys to determining when and to whom to grant the private taking power. The first is the likelihood of strategic barriers blocking efficient transfers. Only when such barriers are substantial and highly likely to occur should the law permit undermining the certainty of property rights and transition from the ordinary property system to the pliability system created by the private taking power. This reflects the general preference for clearly defined property rights in order to increase certainty and alienability and reduce transaction costs.¹⁹⁶ Relatedly, the law must clearly define the circumstances in which such takings will

¹⁹⁵ For a more limited suggestion of recognizing private eminent domain as an alternative to dishonesty where nondisclosure is optimal, *see* Levmore, *supra* note 3 at 142-144.

¹⁹⁶ On the importance of stability in property rights and their protection through property rules, *see* Bell & Parchomovsky, *supra* note 50.

PRIVATE TAKINGS

42

be permitted. Without such clarity, private takings may fall prey to the hazards of undue undermining of property and abuse of the takings power in place of market transfer mechanisms. Alternatively, the private takings power may be so restrictive as to continue to prevent the transactions it seeks to promote.

Second, there must be some reliable mechanism for determining that the taking effectuates a transfer to a desirable owner. There are several important elements to ensuring that only such transfers take place. Private takings must be restricted to cases where circumstances provide a reasonable means for adjudicating property values. Where such values cannot be cost-effectively determined, the takings power can no longer provide a solution for strategic bargaining problems. Moreover, without any guidance about such value, it is impossible to ascertain whether property is in fact being steered to the right owner. Additionally, payment for the taking must be made by the actual private taker, rather than an intermediary such as the government.¹⁹⁷ This ensures that the taker indeed values the property right more highly than the previous owner.

Third, the pliability rule created by the private taking power should be superior to alternative pliability rules, or government mediation, under the circumstances. Consider, for instance, the essential facilities doctrine in the law of antitrust. Essential facilities are facilities that cannot practically be duplicated and are necessary for competitors' survival, such as a municipal sports stadium.¹⁹⁸ Because access to the facility is considered essential, but the market for use of the facility is likely to develop the inefficient dynamics of a monopoly, the essential facilities doctrine dictates a transition to a liability rule: competitors may make use of the facility without the owner's consent, in exchange for a fair price, as set by the court or an administrator.¹⁹⁹ This pliability rule is superior to a private takings regime because continuing property rule protection would leave the inefficiency in place irrespective of the owner. In the hands of a new post-taking owner, the facility would still be essential, engendering the same monopoly inefficiencies. By contrast, when a railroad seeks a pliability rule solution for the holdout problems it encounters in trying to purchase land along the lay of the track, a private taking power is the more appropriate solution. The private taking allows a one-time transfer to the desired owner, but returns to an ordinary property regime thereafter.

¹⁹⁷ See Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L. J. 547 (2001).

¹⁹⁸ See, e.g., *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977).

¹⁹⁹ ***

In particular, it is worth remembering that a private taking is worthwhile only when the desired endpoint remains private property ownership in different hands.

By the same token, implementation of the private takings rule must not be so costly as to exceed the savings produced by overcoming strategic barriers to the transaction. Here, it is important to recall the traditional discussion of the relative costs and benefits of property and liability rule protection for entitlements. As noted earlier, the takings power essentially reduces an owner's legal rights over an entitlement to liability rule protection, comprised of three stages. In the first stage, the owner enjoys property rule protection over her asset, and may accept or reject any offers to transact. In the second stage, the taker may initiate a temporary change from property rule to liability rule, allowing him to seize the object in exchange for "just compensation." In the third and final stage, the taker holds the entitlement, and is himself entitled to property rule protection. The temporary shift to liability rule protection allows a transfer with a minimum of contracting costs, but potentially weighty litigation costs. For a private takings power to be worthwhile, the litigation costs produced by authorizing the taking and determining compensation must not exceed the savings in contracting costs.

B. Models of Private Takings

In this Section, I propose for adoption a number of different private takings mechanisms that meet the general outline presented in the previous Section. The list draws heavily upon mechanisms already in use, as described in the previous Part, and it makes no claim at being exhaustive. The purpose is solely illustrative—to demonstrate how private takings rules may serve as a superior means of transferring property rights between private actors under certain circumstances. I examine three different categories of private takings schemes. In the first, certain private actors are granted the ability to exercise a power of eminent domain similar to that of the government. Here, actors enjoy generalized powers to take. The second category involves private takings powers that are recognized among parties that find themselves in certain designated relationships with one another, such as neighbors. The focus here moves from the taker to the original owner. The third and final group concerns private takings powers granted in relation to certain classes of transactions, without reference to the particular parties involved.

1. Designated Private Takers

Delegated private takings, as noted above, involve the direct empowering of private actors to invoke a traditional power of

PRIVATE TAKINGS

44

eminent domain. Generally, utility companies are the beneficiaries of such delegations today; in previous eras, public carriers such as railroads also generally received such powers.²⁰⁰

It is not difficult to understand the rationale behind such broad delegation of eminent domain powers. The empowered private takers are viewed as sharing the characteristics of the government in ordinary public takings—like the government, the private actors serve a “public function” will likely be unable to control information about their property acquisitions, and will probably have difficulty with holdout problems. However, such generous empowerments of private actors possess considerable potential for overbreadth. Not every acquisition of property by a utility involves strategic barriers that bar voluntary transactions, and not every acquisition of property by a utility or public carrier moves such property to its most efficacious owner. The result is that private takings may be authorized even where voluntary transactions would suffice.

One may summarize as follows the advantages and disadvantages of designating certain private actors as always being able to engage in private takings. On the one hand, such designations significantly reduce the costs of litigation and investigation into the question of whether a given private actor should be authorized to use a private takings power. On the other hand, such designations may allow inefficient private takings, thereby leading to two kinds of social loss—unduly weakened property stability, and undercompensation due to transactions at market price rather than the original owner’s true reserve price. Thus, the question of whether to issue a generalized power to carry out private takings to a private actor boils down to a comparison of two types of costs: the errors and transactional costs produced by a case-by-case analysis of the efficacy of a private taking versus the costs in property value and development induced by greater availability of a private takings power.

Given this tradeoff, it makes sense to issue a broad designation to an actor to engage in private takings only where there is likely a real need for private takings (on the grounds of strategic barriers to anticipated efficient transactions) and it would be unnecessarily burdensome to require external ratification of each exercise of the takings power. Utility companies will generally be good candidates for general designation as private takers. As regulated monopolies, they often lack the ability to maintain privacy of information regarding intended property transactions. As a consequence of their inability to disguise their intentions, they may be subject to holdouts and other strategic difficulties in property acquisition. Naturally, this argument only

²⁰⁰ See *supra* ***.

PRIVATE TAKINGS

45

obtains for that class of assets whose acquisition would be subject to such strategic problems. This means that designated private takers should be able to exercise their private takings power only for acquisition of land, in order to facilitate the assembly of large parcels.

Additionally, in order to calibrate a policy of designated private takers to meet the central needs of a takings rule, close attention must be paid to the issue of compensation. As noted previously, takings rules should assure both that the taker is a higher-value user and that the taking is the more efficient means of carrying out the property transfer.²⁰¹ If compensation is paid at a level that reflects the true reserve price of the original property owner, and must be paid by the private taker, the taker will refrain from seizing property unless her own valuation of the property exceeds the current owner's reserve price. Consequently, by definition, the taker will seize property only when she is a higher value owner.

Unfortunately, the current owner's reserve price is not easily discovered. The fact that the owner turns down market offers of a certain price does not necessarily mean that the offer is lower than the reserve price. The owner may simply be strategically rejecting an offer she feels is less than the ultimate price she may receive. Declarations of the reserve price in a compensation hearing, however, are likely to be exaggerated. In such a hearing, there is no reason for the owner to refrain from over-reporting the value, so long as the overstatement is within the bounds of credibility.²⁰² The difficulty in ascertaining the correct reserve price undermines the desirability of private takings on two grounds. First, as required compensation diverges from the owner's reserve price, the likelihood of the property finding its highest value owner diminishes. Excessive compensation deters too many takings by high-value owners; insufficient compensation permits too many takings by low-value owners. Second, would-be acquirers of property may overuse the private takings power since the costs of proving the reserve value will fall primarily on the original owner. Thus, there may be cases where takings are used to acquire property even though takings litigation costs exceed voluntary transactional costs for the simple reason that the taker will bear much less of the former than the latter.²⁰³

One traditional way to deal with this problem is to require that takers pay a fixed percentage in excess of fair market value.

²⁰¹ See *supra* Part II.A.1.

²⁰² See Jack L. Knetsch & Thomas E. Borcharding, *Expropriation of Private Property and the Basis for Compensation*, 29 U. TOR. L. J. 237 (1979).

²⁰³ Cf. Munch, *supra* note 89. See generally, Bell & Parchomovsky, *supra* note 61.

PRIVATE TAKINGS

46

Nineteenth century Mill Acts, for example, required the payment of a substantial bounty on market price in order to deter overuse; a New Hampshire act²⁰⁴ considered by the Supreme Court in *Head v. Amoskeag Mfg. Co.*²⁰⁵ set compensation for private takings of riparian land at 150% of market value. While the amount of such bounties is necessarily arbitrary and an imprecise measure of aggregate undercompensation, the bounties may serve to deter excessive use of private takings. Importantly, there is no reason to suspect that the problem of excessive takings in this regard differs in any way from that associated with ordinary public takings.

An alternative possibility might be through self-assessment mechanisms.²⁰⁶

2. Designated Asset or Relationship Private Takings

The power to undertake private takings may also be recognized for a designated asset, or set of relationships concerning an asset. For example, private takings powers may be recognized in the hands of parties seeking exclusive use of a domain name or other trademark. Similarly, such powers may be granted to neighbors regarding realty. Here, the focus is on the characteristic strategic problems accompanying transactions regarding certain assets or within certain relationships, rather than those typically faced by given types of private actors.

i. Domain Names

I consider first the special relationships created with respect to unique World Wide Web domain names. Cybersquatting refers to the phenomenon of preemptive registration of popular internet domain names – often of trademarked names – with the purpose of transferring the name at a profit to a third party (the owner of the trademark, or of the business associated with the name to be registered).²⁰⁷ The first mover profits by virtue of her arbitrage, or, as courts might put it, “ransom”,²⁰⁸ or “blackmail”.²⁰⁹ The domain name, even where not a recognized trademark, is valuable because it is associated with a particular product or potential owner (consider, for example, www.vw.net, most valuable to Volkswagen²¹⁰). The first mover, taking advantage of the small

²⁰⁴ New Hampshire Mill Act, 1868 N.H. LAWS ch. 20 § 3.

²⁰⁵ 113 U.S. 9, 10-11 (1885).

²⁰⁶ See Bell & Parchomovsky, *supra* note 61. Self-assessment mechanisms require a penalty mechanism to ensure accurate reporting; the mechanisms we suggested for public takings would certainly need adjustment for private takings.

²⁰⁷ *** CITE

²⁰⁸ *** CITE

²⁰⁹ *** CITE

²¹⁰ *** CITE

PRIVATE TAKINGS

47

filing fee, profits by extracting value from the ideal owner. As with other cases of “diluting” trademarks, the arbitrage is unnecessary, and results in inefficiency by raising transaction costs.²¹¹ Moreover, since the sole purpose of the first move is to extract the more efficient owner’s gains, strategic difficulties are sure to plague the negotiations. Congress has responded by permitting suit, compensation and punishment for inappropriate registrations in bad faith.

States of mind like bad intent, unfortunately, are notoriously difficult to determine. The Anticybersquatting Consumer Protection Act²¹² seeks to ease the evidentiary burden by listing nine factors to be considered by the court in determining intent, including some relatively easy items such as the personal and legal affiliation of the registrant to the name,²¹³ and such vague ones as the registrant’s intent to subvert the business of the trademark owner.²¹⁴

As Gideon Parchomovsky noted, albeit under different terminology,²¹⁵ private takings provide a far more promising and comprehensive solution to allocating the resource of domain names. Where domain name contestants can take desired names from other owners for fair compensation, the domain names will arrive in the hands of the owner who most highly values them, without the strategic pitfalls incurred by protecting the rights of registrants with property rule protection. Obviously, for this mechanism to work, compensation would have to be set at the subjective value of the name owner. Otherwise, the domain names would be subject to endless takings and retakings.²¹⁶ Parchomovsky thus urged that contestants for a domain name be permitted to initiate an auction for ownership of the name. In his analysis, the auction would assure the name’s allocation to the contestant who values it most highly, without the high transaction costs associated with the statutory procedure.²¹⁷ Importantly, the auction mechanism would provide a means of revealing subjective valuation in order to anchor appropriate payment.

²¹¹ *** CITES

²¹² *** CITE

²¹³ *** CITE

²¹⁴ *** CITE

²¹⁵ Gideon Parchomovsky, *On Trademarks, Domain Names, and Internal Auctions*, 2001 U. ILL. L. REV. 211 (2001).

²¹⁶ *See* *** CITE (noting the importance of property rules for possessory objects, since they would otherwise be subject to endless takings and retakings).

²¹⁷ Cybersquatting may also be addressed through the rules of ICANN (International Corporation for Assigned Names and Numbers), the international organization responsible for allocating domain names. *** CITE.

PRIVATE TAKINGS

48

The case for special relationship private takings may be stated more broadly, and applied in other cases besides that of domain names. Where there is a high likelihood of a certain party enjoying unusually high benefits from an asset – i.e., where there is an obvious “ideal owner” – a private takings mechanism can potentially provide a lower transaction cost means of transferring the object to that ideal owner.

ii. Neighbors

Neighbors in land provide another good example. Consider, for instance, Jack and Jill, who own neighboring lots in a residential neighborhood. Jack wishes to move and sell his house and lot. Jill, whose family is growing, will derive unusually high benefit from Jack’s lot, since she will be able to attach it to her own. However, since Jack knows this, strategic difficulties may block the transfer, and Jack may end up selling the property to another bidder on the open market. The problem can be resolved with a private taking right for neighbors when neighboring properties are offered for sale on the general market.

As Stewart Sterk has noted, neighbors in realty will have a particularly difficult bargaining to solutions given the likelihood of strategic failure stemming from bilateral monopoly.²¹⁸ Thus, neighbor relations provide particularly fertile ground for private takings and other pliability rules. Private takings – in the form of preemptive purchase rights, or such existing doctrines as private takings of easements (or private ways of necessity) – can thereby be added to the menu of departures from classic property rule protection (such as adverse possession²¹⁹ and good faith improver doctrines²²⁰) that can be used to overcome the strategic bargaining difficulties between neighbors.

iii. Partners in Anti-Commons

Anti-commons present another case in which private takings are warranted. Anti-commons exist where property rights are overly fragmented – either because an asset has been subdivided into too many pieces, or because ownership of a single asset has been divided among too many owners.²²¹ This may happen, for example, where ownership in a single piece of land is passed by

²¹⁸ Stewart Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55 (1987).

²¹⁹ *** CITE Pliability Rules + refer back to earlier AP discussion.

²²⁰ *** CITES

²²¹ See Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); Frank I. Michelman, *Ethics, Economics and the Law of Property*, in NOMOS XXIV: ETHICS, ECONOMICS AND THE LAW 3, 6, 9 (1982). See also Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907 (2004).

inheritance for several generations, to the point where owners own such small shares that it no longer is cost-effective for any given owner to participate in making decisions about the asset. Consider, for example, the Indian Land Consolidation Act of 1983, struck down in *Hodel v. Irving* by the Supreme Court as an uncompensated taking.²²² The Act escheated to the state extremely small fractional interests—defined as interests of 2% or less of the acreage of the whole, and worth less than \$100 per year in rental value—in Native American reservation lands in order to prevent them from remaining in disuse.²²³ One extremely fractionated 40-acre tract covered by the law, worth \$8,000, was owned by 439 owners, some with shares worth as little as \$.000418.²²⁴

Allowing owners of such fractionated interests to seize one another's claims in exchange for just compensation provides a cleaner way of reducing transaction costs and reaggregating ownership.

3. Private Takings and Designated Transactions

Finally, the power to engage in private takings may be granted by class of transaction. This offers perhaps the greatest possibility for proper limitation of the power to those cases where strategic bargaining difficulties prevent welfare enhancing transactions. However, if these transactions are not to be identified on a case-by-case basis, the law will have to tolerate some estimation regarding the types of transactions that are likely to be afflicted by such problems. Here, the two best examples are provided by land assembly and land use controls.

i. Land Assembly

Land assembly is traditionally seen as the prototypical case where takings are necessary to overcome strategic barriers to voluntary transactions or other transaction costs. Bargaining with each potential landowner seller entails costs even in ordinary circumstances. In the case of land assembly, the costs are exacerbated by holdouts and other strategic bargaining practices.²²⁵ A takings rule, rather than permanent transition to a liability rule, is the proper response because ultimately the land assembly aims at a durable rather than temporary use, and therefore is best hosted by a new owner of the assembled land with traditional property rule protection. However, in the transition between owners, a liability rule is necessary to

²²² *Hodel v. Irving*, 481 U.S. 704, 717 (1987).

²²³ *Id.* at 709.

²²⁴ *Id.* at 713.

²²⁵ See *supra* notes 58–60 and 101–103, and corresponding text.

PRIVATE TAKINGS

50

overcome the high transaction costs engendered by strategic bargaining practices.

Land assembly is often closely related to zoning changes. Building projects involving multiple lots often involve transforming the uses of those lots (for example, from single-family residential to multi-family residential), requiring developers to institute formal proceedings with zoning authorities for variances, special exceptions, or zoning amendments.²²⁶ One important consequence of this is that developers frequently lose the ability to block holdouts and other strategic problems by hiding their plans. Zoning changes are public, and once the information about the planned land assembly makes it into the public domain, private developers find themselves in the same disadvantaged position as public authorities. Developers can avoid this conundrum only by assuming a very large risk: they can complete land assembly first, and only then formally explore the possibility of receiving legal permission from zoning authorities. If such permission fails to materialize, the developers will likely incur a great loss, due to both the costs of assembling and disassembling the land as well as possible payment of “control premiums” to some sellers.²²⁷

It is little wonder, then, that many land assembly projects have required public assistance. Opponents of government-mediated private takings delight in listing the many instances in which government actors have exercised the power of eminent domain in order to benefit affluent private purchasers²²⁸ such as the New York Times,²²⁹ Costco,²³⁰ Pfizer,²³¹ Sears,²³² General Motors.²³³ Yet, it is far from clear that all such government-mediated takings are, in fact, demonstrations of inefficient or unjust uses of the takings power. While the popular imagination may view such takings as taking place for the private benefit of politicians and their benefactors and at the expense of social welfare, in some cases, at least, such government-mediated takings simply reflect the high costs of and strategic barriers to land assembly.

Unfortunately, once private takings for land assembly are mediated by the government, the chances of inefficient takings greatly increase. Government actors will approve private takings on the basis of their private political calculus, which has no

²²⁶ ***

²²⁷ *Cf.* *** m&a

²²⁸ ***

²²⁹ ***

²³⁰ ***

²³¹ ***

²³² ***

²³³ ***

PRIVATE TAKINGS

51

necessary connection with social welfare.²³⁴ Moreover, government mediators of private takings rarely pass along the full takings cost to the private purchaser. Rather, irrespective of the cost of taking property, the government mediators generally sell the taken property to the private purchaser at a “fair” price that may turn out be far lower than the cost of acquisition.²³⁵ For example, in the Poletown case, acquisition costs exceeded \$200 million, but General Motors, the purchaser, ultimately paid only a “small fraction.”²³⁶ Finally, even where the government sells the property for a more reasonable price, the very mediation of the government in the transaction may increase costs.

Private takings without government mediation can avoid the inefficiencies created by the government middleman. Private takers pay acquisition costs out of pocket – the full compensation paid to the landowner, as well as attendant transaction costs – and will therefore avoid inefficient takings, so long as they are made to pay full compensation. When such full compensation is paid, it will only be worthwhile for private takers to seize the property if it is, in fact, worth more in the taker’s hands than in the current owners. In addition, because the taker is not an agent of the public (or anyone else), there is no possibility of other agency problems such as bribery to a corrupt official to overpay homeowners.

Rules for private takings in land assembly projects can be easily fixed in advance, and keyed to the size of the project, the number of landowners and similar factors. I offer here one proposed way of structuring private takings for land assembly, but there are many other plausible alternatives.

Under this suggestion, would-be private takers would be required to file a public notice with zoning authorities 180 days before any proposed land assembly project, specifying the proposed area to be taken and the proposed compensation scale to be paid to landowners. The compensation scale would provide for uniform compensation for land, fixtures, uses and the like, both in order to assure that landowners could easily evaluate the nature of the offer, and in order to provide the basis for subsequent review in the case of later litigation. In order to be eligible to file the notice, the private taker would need to specify a project that includes at least a minimum number of different owners — say, 20 — and, perhaps, a minimum spread of value — for example, with no individual owner possessing more than 15% of the total value. The filing would initiate a period in which competing bidders could offer to acquire the same collection of properties; a competing takings bid at a higher price would supplant the

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²³⁶ William A. Fischel, Before Kelo, 28 REGULATION 32 (Winter, 2005).

original bid and restart the clock. If the later bid did not ultimately result in a taking, the supplanted bidder would retain a right to sue the later for damages. The ultimate taker would be required to acquire more than a minimum share of the land (perhaps 51% of both the built-up area and the land mass) in voluntary transactions before any land could be taken involuntarily. Finally, those owners whose land was taken in involuntary transactions would have a right of appraisal.

It should be clear that this proposal is highly influenced by the rules governing corporate acquisitions.²³⁷ This should not be surprising as there is a commonality between land assembly and corporate acquisitions: in each case the purchaser seeks to aggregate smaller pieces of property in order to realize a control premium (the additional value accrued to controlling the larger entity), while seeking to overcome the strategic problems that result when so many owners attempt to make collective control decisions. Corporate acquisitions take place against a background rule of overcoming collective action problems through delegated powers to management and majority rule for many corporate decisions;²³⁸ thus, much of the corporate acquisition literature focuses on the strategic difficulties created by majority or acquirer manipulations.²³⁹ Land assembly, by contrast, takes place against the usual background of property law and owner autonomy and veto rights. As a consequence, the focus must be on relieving the strategic problem of holdouts.

ii. Land Use

Land use controls provide another fertile area for designating transactions for private takings.

Land use controls are often provided for by private agreements (such as covenants) or by default common law rules of reasonableness (such as provided for in the law of nuisance).²⁴⁰ For the last century, many kinds of land use controls have been viewed as engendering too many transaction and litigation costs to be capable of resolution through these traditional mechanisms; consequently, administrative controls through zoning have become ubiquitous.²⁴¹ Zoning rules limit height, bulk, density and uses of real property by creating different zones with different permitted building and use rights.²⁴² Zoning rules are constantly in flux as land use patterns change, leading to an endless parade of rezoning

²³⁷ See generally ***

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²³⁹ ***

²⁴⁰ *** CITE

²⁴¹ *** CITE on reasons for zoning and spread.

²⁴² *** CITE

PRIVATE TAKINGS

53

in the form of amendments to zoning ordinances and plans or entirely new ordinances and plans, as well as special use and variance applications.²⁴³

Zoning law is based upon the idea that incompatibility in uses and building styles, as well as unaccounted for negative externalities caused by development, can be addressed “scientifically” and “comprehensively” by regulatory experts.²⁴⁴ The traditional constitutional justification for zoning thus relies heavily on a comparison with nuisance law, which similarly seeks to end conflicts among property owners by limiting unreasonable incompatible uses.²⁴⁵ Naturally, some quarters of academia – notably, Robert Ellickson – suggest that nuisance control can be accomplished through traditional nuisance law, without the additional tool of zoning law.²⁴⁶ However, this position has achieved general acceptance.

William Fischel has suggested viewing zoning rights as collective property rights taken by the zoning municipality;²⁴⁷ whether these rights are more efficient than scattered private rights is very much a function of transaction costs. In areas without zoning controls, private rights are not unlimited, but incompatible uses of land may be blocked only by successful bargaining or litigation. Thus, where the inefficiency created by the incompatible use is sufficiently low value relative to transaction costs of bargaining or litigating, non-zoning systems will permit inefficient land uses. However, in areas with zoning controls, private rights are limited by a collective decisionmaking process that almost certainly fails to arrive at optimal land use decisions. This is because the collective mechanism is itself subject to various transaction costs, and prone to rent-seeking by decisionmakers. To put it bluntly, the zoning process can, and likely will be corrupted, by politicians auctioning off collective rights at less than their public value for private gain.

As with land assembly, then, land use controls are an instance of trading off the strategic inefficiencies of individualized property controls against the inefficient strategic and agency manipulations of majority control. Interestingly, by contrast with land assembly, states and municipalities have almost universally chosen majority control for land use and private property controls for land assembly. But, in both cases, a private takings mechanism may

²⁴³ *** CITE

²⁴⁴ *** CITE

²⁴⁵ *** CITE Euclid.

²⁴⁶ Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

²⁴⁷ *** Fischel

PRIVATE TAKINGS

54

offer a better means of compromising among the strategic problems.

Again, as with land assembly, a number of private takings mechanisms may be imagined, but I consider one modeled on corporate acquisitions. The animating principle is reformulating zoning rights as transferable veto property rights rather than as regulatory rights, while simultaneously providing limited private takings rights to overcome the vetoes. Nuisance law's endorsement of "illogical doctrines"²⁴⁸ and its development into a "legal garbage can"²⁴⁹ have greatly diminished its ability to help in land use controls.²⁵⁰ Rather than re-rationalize nuisance law to serve land use purposes as suggested by Ellickson,²⁵¹ one could simply interpret existing zoning law as a definitive statement of parties' legal property rights, permitting any party within a specified zone (e.g., x distance for every y height) to assert a veto over a proposed construction or use. However, upon acquisition of a sufficient number of vetoes through voluntary transactions (e.g., 51%), the non-conforming landowner would be permitted to take the remaining veto property rights by means of a private taking. Would-be private takers would have to file a public notice with zoning authorities 180 days before any proposed zoning change, specifying the proposed zoning change as well as the price to be paid for acquiring zoning rights according to a scale of distance and use.²⁵²

IV. POTENTIAL OBJECTIONS TO PRIVATE TAKINGS

In this Part, I examine several possible criticisms to expanded use of private takings, as well the constitutionality of an expansion of private takings.

A. Critics of Private Takings

Past criticism of private takings in the past has been found mainly in two different forms. There have been a handful of studies of the broad nineteenth century delegations of eminent domain powers to private actors. A number of these studies were undertaken by scholars of a Marxist orientation, and their criticisms have predictably focused on exploitation of property rules to benefit rich capitalists and been accompanied by a critique

²⁴⁸ Ellickson, *supra* note 246 at 721.

²⁴⁹ William Prosser, Nuisance Without Fault, 20 TEX. L. REV. 399, 410 (1942).

²⁵⁰ Ellickson, *supra* note 246 at 721.

²⁵¹ *Id.*

²⁵² Once again, this will also prove of assistance in the event of litigation concerning the adequacy of compensation.

PRIVATE TAKINGS

55

of the rhetoric of the sanctity of property.²⁵³ More popular today are criticisms of government-mediated private takings. On this score, scholars have decried the erosion of the public use requirement for public exercises of eminent domain, and deplored the use of state powers for private gain.²⁵⁴

Both heads of criticism are concerned with the claim that eminent domain is a power that should not be in the hands of affluent private takers, albeit for different reasons. Critics in the first group tend to support a broad takings power, and have little concern for private property rights. Thus, the critics are not terribly concerned about the fact that property is taken, *per se*. Rather, they decry the use of government power to transfer resources back into unworthy private hands.²⁵⁵ By contrast, critics in the second group are primarily interested in the private property rights of those whose assets are taken. Eminent domain is seen as an extraordinary power that must be reserved only for cases of extreme societal distress. As a result, these critics too oppose takings that are intended to steer property back into unworthy private hands.

In evaluating opposition to private takings, I examine two separate aspects to the criticism – the fear of allowing actors other than the government to initiate a taking, and the objection to takings that ultimately leave the taken property in private hands.²⁵⁶

Critics of private takings may be viewed as making two separate assumptions: both that the government is more likely than private actors to make decisions for the benefit of the public,²⁵⁷

²⁵³ See, e.g., Scheiber *supra* note 38; *** Morton Horwitz.

²⁵⁴ See, e.g., critiques cited in Bell & Parchomovsky, *supra* note 2.

²⁵⁵ Scheiber *supra* note 38 at ***.

²⁵⁶ These aspects correspond to the two central questions in privatization of government services. See JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 7 (1989) ("The choice between public and private has two basic dimensions. The first dimension concerns financing: Should we pay for some good or service individually, out of our own resources, or should we pay for it collectively with funds raised through one for or another of taxation? The second dimension concerns performance: Should the good be produced or the service delivered by a governmental organization or by a nongovernmental organization?") (italics omitted).

²⁵⁷ An interesting modern version of the critique can be found in Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 *IND. L. J.* 1125 (1999). Radin builds on themes first expressed in Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982), where she argued that the personhood theory of property – positing that some control over resources in a person's external environment is necessary to proper self-development – is often implicit in court opinions and commentaries, yet ignored in legal thought, and warrants distinguishing between "personal property" deserving special property protection, and "fungible property" warranting no such special protection. Radin criticizes what she labels "private eminent domain" on the grounds of its presumed encroachment upon personal values sought to be

PRIVATE TAKINGS

56

and that the public benefit is more likely to be served when taken property is held by the government than when held by private actors. Both assumptions rest on dubious grounds.

It is certainly not news that the government is capable of poor decisionmaking. There is no shortage of studies demonstrating both the practice and theory of rent-seeking by government decisionmakers, corruption of politics, distortions of the political process and lack of accountability to the interests of the wider public.²⁵⁸ Even where well-intended, government action may often be cumbersome and bureaucracy-laden, and the source of extraordinarily costly and slow approaches to public problems.²⁵⁹ Of course, the state is capable of good decisions as well: corruption may be curbed; incentives may be aligned to limit rent-seeking; accountability and efficiency may be encouraged. Even if well-motivated, however, studies such as Patricia Munch Danzon's examination of eminent domain show that government action demonstrate that, in exercising its eminent domain power, the government is more likely to disadvantage the less-well off.²⁶⁰

Mismanagement of public resources is also legion. While many studies focus on mismanagement of government finances²⁶¹ and the government regulatory power,²⁶² there is every reason to suspect similar disfunction in caring for non-cash government assets. Consider, for example, criticisms of the role of the state in handling resources like timber or oil found on public lands.²⁶³ Indeed, it is ironic that the arguments in favor of narrower interpretation of public use rely upon a perception of government corruption and excessive solicitousness to corporate desires that undermine the idea that publicly-held resources will be well-managed.

Thus, it seems odd to suggest that government decisions to carry out takings by eminent domain will intrinsically be sounder and more public-minded than private decisions. On the other side of the equation, there is no doubt that an improperly disciplined takings power can lead to inefficient takings and too little security in private property. Yet, whether carried out by public or private

protected by the absolute right of exclusion entailed in property rule protection. However, Radin expresses greater comfort with private eminent domain that victimizes "businesses firms," so long as the firms enjoy reciprocal powers. Radin, 75 *IND. L. J.* at 1155. Radin fails to identify reasons for believing that such personal property will be better defended if eminent domain decisions are made solely by public actors.

²⁵⁸ *** CITES

²⁵⁹ *** CITES

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PRIVATE TAKINGS

57

actors, the takings power is one that may be abused. Whether the taking is public or private, the law must carefully circumscribe the power — primarily through the payment of full compensation²⁶⁴ — to ensure that the power of eminent domain is used wisely and efficiently.

Even where government decisionmaking is presumed superior, it is not clear that resources for public use need necessarily be held by the public. The much-noted current trend in public administration is toward privatization of public functions.²⁶⁵ Public services and facilities now handled by private entities at the behest of government include hospitals, landfills, nursing homes, public transport, sewerage, stadiums, fire protection, airports, water supply, and electric and gas utilities.²⁶⁶ As with any other organization, the government may find “outsourcing” activity to be more cost-effective.²⁶⁷ The decision of whether to privatize involves the standard variables that governs outsourcing decisions: cost of monitoring outside versus inside activity, differences in abilities and special skills, contracting costs, etc.²⁶⁸ Empirical studies have shown that, at least in some cases, such out-sourcing to private providers has proved a more efficient means of providing public services.²⁶⁹

More significantly, the flaws in the ordinary market for property suggest that a takings power is necessary outside of the context of property dedicated to “public use.” As noted earlier, asymmetric information, holdout problems and bilateral monopolies may characterize private transactions as well as public ones.²⁷⁰ These phenomena may block socially desirable transactions, whether the property is ultimately to be devoted to public or private use. Consider, for example, the case of a farmer who discovers that her land covers a previously unknown mineral located nowhere else in the world. The mineral is worthless in most contexts, but if used in the production of widgets, it can reduce manufacturing costs by 90%. Big Corporation, a widget manufacturing company, proposes to purchase mining rights from the farmer in order to extract the mineral. This is a classic case of bilateral monopoly. While there are positive sums to be divided between the farmer and widget manufacturer, there is a wide range of purchase prices in which the transaction will be valuable to both

²⁶⁴ See Bell & Parchomovsky, *supra* note 2 and Bell & Parchomovsky, *supra* note 61.

²⁶⁵ *** CITES

²⁶⁶ Florencio Lopez-de-Silanes, Andre Shleifer & Robert W. Vishny, *Privatization in the United States*, 28 RAND J. ECON. 447, 448 (1997)

²⁶⁷ *** CITE

²⁶⁸ *** CITE

²⁶⁹ CITES ***

²⁷⁰ See *supra* Part ***.

PRIVATE TAKINGS

58

the manufacturer and farmer. Negotiating difficulties may therefore undermine the entire deal, leading to a net loss for society. A takings rule, by contrast, would be easy to implement, as the mineral is readily valuated, and litigation costs should be low. It is not easy to see why a takings rule should be avoided simply because the mineral will be used for the production of widgets for Big Corporation rather than cannons for the army.

Often, criticism of private takings seems motivated not by any particular feature of private takings. Instead, the animus is a sense that too much property is taken altogether, whether by private or public taking. Such criticism is sounded in numerous quarters, and by critics of various political stripes; defense of a broad takings power is similarly widespread.²⁷¹ However, both the criticism and defense are irrelevant to the issue of private takings. The question of who should exercise the power to take property is not identical to the question of how and when that power should be exercised.

B. Constitutional Dimensions

Constitutional law places two central limitations on the use of the takings power.²⁷² First, by convention, if not necessarily the strict language of the Fifth Amendment, the takings power must be exercised for a “public use.” Second, “just compensation” must be paid for taken property. Additionally, one might argue that empowering private actors to engage in takings constitutes an unconstitutional delegation of government authority. I examine, in turn the implications of each of these constitutional restrictions on the law of private takings. I reconsider these arguments again in Part V, *infra*, where I argue that private takings might properly be considered outside the scope of the Fifth Amendment altogether.

1. Private Takings and Public Use

Formally, current federal constitutional takings law requires a public use before property may be taken from private owners under the eminent domain power. Thus, for example, several courts have opined that as a result of the Public Use Clause, “a ‘private taking’ cannot be constitutional even if compensated.”²⁷³

Yet, even 150 years ago, when federal courts looked more negatively upon exercises of state power for the direct benefit of private actors, federal courts would not use the Public Use Clause to place any real limits on state exercises of the power of eminent domain.²⁷⁴ Today, federal courts liberally find public use. As the

²⁷¹ CITES ***

²⁷² *** CITE

²⁷³ *Armendariz v. Penman*, 75 F.3d 1311, 1321 n.5 (9th Cir. 1996) (*en banc*).

²⁷⁴ CITE ***

PRIVATE TAKINGS

59

Supreme Court's rulings *Berman*,²⁷⁵ *Midkiff*²⁷⁶ and *Kelo*²⁷⁷ made clear, the mere fact that the government intends to transfer taken property to private ownership does not nullify a finding of public use. Modern jurisprudence of the Public Use Clause of the Fifth Amendment has left little doubt that, at least in federal law, the clause should be considered "toothless."²⁷⁸ So long as "the exercise of the eminent domain power is rationally related to a conceivable public purpose," the courts will uphold the taking, even for a private beneficiary.²⁷⁹

To show that a taking has a public use, the government need show only that there the taking serves a purpose that would be constitutional under the Due Process Clause.²⁸⁰ This means both that the benefit to public welfare may be miniscule, and that courts will not readily question legislative judgments about how the public welfare is best served.²⁸¹ Since there are few constitutional limitations on the giving of property to private actors,²⁸² the Public Use Clause places correspondingly few limitations on the exercise of eminent domain aimed at accomplishing such givings.

Past suggestions at reviving the public use limitation have explicitly or implicitly aimed at curbing a perceived excessive use of the power of eminent domain, or at resolving the perennial puzzle of what regulations should be considered compensable takings. In the first category, Richard Epstein, for example, argued for limiting the definition of public use to the acquisitions of property for the provision of public goods.²⁸³ Epstein was quite explicit in complaining that the central fault of a broad definition of public use to cover private takings is that it would permit promiscuous use of the takings power.²⁸⁴ In the second category fall suggestions of a more robust examination of public use as a way to distinguish compensable takings from non-compensable regulations such as those made by Joseph Sax²⁸⁵ and Jed Rubenfeld.²⁸⁶ These approaches find limited support in the case

²⁷⁵ CITE ***

²⁷⁶ CITE ***

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²⁷⁸ DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 191 (2002)

²⁷⁹ *Midkiff*, 467 U.S. at 241.

²⁸⁰ *Id.* at 240-243.

²⁸¹ *** CITE

²⁸² See Bell & Parchomovsky, *supra* note 197 at ***.

²⁸³ See Epstein, *supra* note 3 at 161-181.

²⁸⁴ *Id.* at 170.

²⁸⁵ Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62-63 (1964). *But see* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

²⁸⁶ Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993).

PRIVATE TAKINGS

60

law.²⁸⁷ However, they do not in any way affect the power to take property; they affect only the requirement to pay compensation.²⁸⁸

To be sure, some courts have surreptitiously challenged the broad reading of public use and questioned the goals served by some exercises of eminent domain.²⁸⁹ Additionally, some state courts have undertaken more probing examinations of public use,²⁹⁰ and they may yet be followed more state courts and legislatures.²⁹¹ Even today, formally, a private taking unjustified by a public purpose remains unconstitutional.²⁹² However, the reign of the broad interpretation of the Public Use Clause has not yet ended. Consequently, it is difficult to conceive of any substantial difficulty for private takings posed by the Public Use Clause.

2. Private Takings and Just Compensation

The central limitation imposed upon takings by the federal constitution is the requirement that owners receive “just compensation” for the taking of their private property. The result has been a vast and varied jurisprudence of takings compensation,²⁹³ as well as a rich normative literature on what compensation ought to be paid in order to properly align incentives of takers and property owners.²⁹⁴ The law has even pushed forward into the difficult valuation problems arising from partial takings, temporary takings and other oddities in the condemnation or its timing.²⁹⁵ For purposes of this analysis, the most important element of existing law is its use of a fair market value standard for determining how much compensation must be paid.²⁹⁶ As has been noted extensively elsewhere, one may presume that a substantial number of property owners are inframarginal, and attach a greater value to their property than it

²⁸⁷ See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978) (“a use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose”).

²⁸⁸ Cf. Bell & Parchomovsky, *supra* note 2.

²⁸⁹ See Nicole Stelle Garnett, *The Public Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 (2003).

²⁹⁰ See *supra* ***.

²⁹¹ See *supra* note ***.

²⁹² *Midkiff*, 467 U.S. at ***.

²⁹³ *** CITE

²⁹⁴ See, e.g., Lawrence Blume, Daniel L. Rubinfeld & Perry Shapiro, *The Taking of Land: When Should Compensation Be Paid?*, 99 Q. J. ECON. 71 (1984); Thomas J. Miceli & Kathleen Segerson, *Regulatory Takings: When Should Compensation Be Paid?*, 23 J. LEGAL STUD. 749 (1994); Thomas J. Miceli, *Compensation for the Taking of Land Under Eminent Domain*, 147 J. INST. & THEOR. ECON. 354 (1991); Abraham Bell, *Not Just Compensation*, 13 J. CONTEMP. LEGAL ISSUES 29 (2003).

²⁹⁵ *** CITES

²⁹⁶ *** CITE

PRIVATE TAKINGS

61

could fetch in the market.²⁹⁷ The result is that takings compensation systematically undercompensates property owners.²⁹⁸

There is little reason to suspect that current compensation law poses any barrier to wider use of private takings. So long as the property owner receives just compensation, the constitutional compensation requirement should pose no independent barrier to private takings, and, indeed, no suggestion to the contrary has appeared in any of cases endorsing government-mediated or delegated private takings. Given that market-based compensation undercompensates, decisionmakers may want to increase compensation to reflect owners' true reserve price, and thereby to prevent excessive takings. As noted above, nineteenth century Mills Acts set compensation at above free market value.²⁹⁹ However, there is no reason to suspect that payment of such bounties is uniquely required by law in the case of private takings.³⁰⁰

3. Private Takings and Delegation

While nothing in the Constitution explicitly bars the delegation of sovereign powers such as eminent domain, the Supreme Court has ruled that excessive delegations of government authority, both within government and to non-governmental actors, violate the Constitution.³⁰¹ While recent years have not seen the Court striking down legislation for violating the nondelegation doctrine, the doctrine remains the subject of considerable scholarly interest, and a debate rages over the doctrine should still be considered a vital part of constitutional law.³⁰² A dearth of recent cases has similarly failed to deter discussions of the limits of private delegations.³⁰³

Traditionally, the nondelegation doctrine does little more than require that Congress supply an "intelligible principle" in statutory delegations.³⁰⁴ Importantly, in its barest form, the doctrine limits

²⁹⁷ See Bell & Parchomovsky, *supra* note 61.

²⁹⁸ Arguments can be made that such undercompensation is desirable, as it deters property owners from overdevelopment in anticipation of a taking. See Lawrence Blume, Daniel L. Rubinfeld & Perry Shapiro, *The Taking of Land: When Should Compensation Be Paid?*, 99 Q. J. ECON. 71 (1984); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986). But see Thomas J. Miceli, *Compensation for the Taking of Land Under Eminent Domain*, 147 J. INST. & THEOR. ECON. 354 (1991); Abraham Bell, *Not Just Compensation*, 13 J. CONTEMP. LEGAL ISSUES 29 (2003).

²⁹⁹ See *supra* ***.

³⁰⁰ But see Epstein, *supra* note 3 at 170-175.

³⁰¹ *** CITES.

³⁰² CITES ***

³⁰³ See, e.g., *** CITES

³⁰⁴ *** CITE

PRIVATE TAKINGS

62

only the power of Congress; the federal Constitution places no bars upon states' internal allocations of power. However, the broader principle of nondelegation extends to all delegations of government authority to private actors. In this form, the private delegation doctrine, as an expression of due process, forbids the delegation, even by the states, to private actors of powers "traditionally exclusively reserved to the State."³⁰⁵ However, the list of such exclusive state functions is short—conducting elections, exercising a monopoly on municipal functions, and perhaps tax collection and fire and police protection.³⁰⁶ Given the long history of private exercises of eminent domain in the United States, it seems difficult to argue that eminent domain is traditionally within the exclusive domain of the state.

The increasing popularity of privatizing government functions has led to calls for broader application of the private delegation doctrine to such public functions as imprisonment and welfare provision.³⁰⁷ At the other end of the political divide, voices have been raised in favor of viewing all private actions in defense of property rights as "state action" and all definitions of property rights as definitively part of state powers.³⁰⁸ Neither approach, however, reflects current law. As currently constituted, the constitutional law of delegation presents no bar to expanded use of private takings.

V. PROPERTY AND TAKINGS

In this Part, I extend the analysis of private takings into a broader analysis of the law. This Part makes two central claims. First, I show that a private takings analysis has important implications for the theory of legal entitlements, and that a compensated takings rule must be understood within the classic framework of property and liability rules as an important category for organizing private property relations. Second, I show that identifying private takings helps clarify the aims of takings law, and the nature of the constitutional demands of "just compensation" and a "public use." I begin by looking at the traditional analysis of legal entitlements.

The analysis of legal entitlements has long and justly been dominated by Guido Calabresi's and Douglas Melamed's classic analysis in *Property Rules, Liability Rules, and Inalienability: One*

³⁰⁵ *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 157 (1978) (citing *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 352 (1974)).

³⁰⁶ *Flagg Brothers*, 436 U.S. at 157.

³⁰⁷ *** CITES

³⁰⁸ *** CITES

PRIVATE TAKINGS

63

View of the Cathedral.³⁰⁹ Briefly stated, the article suggested categorizing legal entitlements according to the rules governing their transfer. Legal entitlements protected by inalienability rules may never be transferred; i.e., the entitlement holder may never yield the protection offered by the rule.³¹⁰ Under property rule protection, by contrast, the entitlement holder may voluntarily transfer the entitlement to another. However, all transfers must be voluntary, and this means that potential takers must agree on a price with the transferring entitlement owner.³¹¹ Finally liability rule protection permits even involuntary transfers, allowing potential takers to seize others' entitlements, so as they pay a price determined by a third party such as a court.³¹² The law need not consistently defend entitlements by the same rule over time: it may employ pliability rules that shift from property to liability or liability to property rules as circumstances dictate.³¹³

As I noted earlier, takings powers create a peculiar kind of pliability rule in which the taker initiates a temporary transition from property rule protection to liability rule protection during the taking, but enjoys property rule protection for the entitlement after the taking.³¹⁴ Viewed this way, when the state creates a takings power, it simply adds to the existing rules by which legal entitlements are protected. A takings power, then, may be viewed not as an act which wrenches away property rights and places an asset outside the world of property protection. Rather, it may be seen as an act within the larger super-structure of property.

If we accept this view of takings, we can see that traditional conceptions of the relationship between regulation and takings may be reversed. Regulatory takings doctrine is often seen as extending the protection of the Takings Clause to incomplete seizures because so many rights have been taken that a regulation is the functional equivalent of a seizure.³¹⁵ In this conception, regulations of property are acknowledged to be a function of government that need not generally be accompanied by compensation. However, because regulations have gone “too far” in destroying value or essential property rights, they must be viewed as the equal of a formal seizure through eminent domain.

Yet, we might just as well reverse this picture and view seizures as simply extended regulations. In this conception, when the government permits the reassignment of property through eminent domain, it has merely redefined the nature of legal

³⁰⁹ 85 Harv. L. Rev. 1089 (1972).

³¹⁰ *Id.* at ***.

³¹¹ *Id.* at ***.

³¹² *Id.* at ***.

³¹³ Bell & Parchomovsky, *supra* note 27.

³¹⁴ See Part I.E, *infra*.

³¹⁵ ***

PRIVATE TAKINGS

64

protection attaching to property, just as it might redefine the elements and compensation for a tort.

This reversal of the traditional conception has two important consequences.

First, one might defend private takings from constitutional scrutiny under the Fifth Amendment by denying that private takings are the kinds of takings contemplated by the Amendment altogether. Permitting private takings could be seen as the kinds of entitlement regulations that constitute the usual business of state regulation. Asking whether a private taking serves a public use would be no more apt than asking whether refusing an injunction for repeated trespass serves a public use.

Second, it permits us to recognize just how much flexibility the law has in defining legal entitlements. If one of the major functions of defining legal entitlements is specifying their protective schemes, the state's definitions always entail an aspect of controlling the destinations of transferring those entitlements. Reconsidering the interests protected by nuisance law may be viewed as a question of entitlement and protection; alternatively, it may be considered a government transfer program from nuisance to nuisance. In considering how to structure property, then, the state always has the ability to build in transfer rules that promote social welfare.

This last observation leads to an important caution in considering private takings. Private takings — even if viewed as a property regulation rather than an extension of the regulatory power to seize through eminent domain — are no more intrinsically efficient than any other property regulation. An improperly structured liability rule or a misplaced liability rule or any other poor protection scheme may block inefficient transfers of entitlements or encourage inefficient ones. Determining when and how to extend rights of private takings must therefore be analyzed with reference to the many factors — especially transaction costs — that have driven entitlement protection analysis over the years.

CONCLUSION

This Article has presented the private takings as a vibrant and useful power in property law, contrary to common wisdom. Notwithstanding courts' repeated pronouncements that the law cannot allow private takings, such have a long and distinguished pedigree in our legal system, and can be seen in such diverse areas as the law of easements and utilities.

PRIVATE TAKINGS

65

In this Article, I have argued that private takings should often be a preferred mechanism for achieving goals generally accomplished through public takings. Private takings may transfer property to a preferred private owner in cases where strategic barriers prevent the transfer, in precise analog to takings for transfer to a preferred public owner. This has important implications for the theory of legal entitlements as well as for public concerning public use and takings more generally. Indeed, a compensated private takings rule must be placed alongside the classic property and liability rules as an important category for organizing private property relations.