ADVERSE POSSESSION AND TAKINGS SELDOM COMPENSATION FOR CHANCE HAPPENINGS

Martin J. Foncello[*]

INTRODUCTION

The law of adverse possession is relatively settled.[1] Generally, a trespasser's possession of another's property will result in a transfer of title if the possession was adverse, exclusive, open and notorious, and uninterrupted for the statutory period.[2] By failing to assert the right to exclude within the statutory period, the true owner loses title to the property[3] and is without claim for compensation or damages.[4]

Federal takings law, on the other hand, is relatively unsettled.[5] While the Fifth Amendment's requirement that the government must pay just compensation for any land taken for public purpose is straightforward, it has proven difficult in application.[6] The Takings

[*] J.D. Candidate, 2005, Seton Hall University School of Law; B.A., 2000, Boston College. The author would like to thank Professors Marc Poirier and Jeremy Blumenthal for their criticism, encouragement, and friendship.

[1] Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1122 (1984) ("The law of adverse possession tends to be regarded as a quiet backwater.").

[2] Classic legal scholarship on adverse possession is in agreement on the elements necessary to make out a claim. *See* Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135 (1918); Henry W. Ballantine, *Claim of Title in Adverse Possession*, 28 YALE L.J. 219 (1918); Percy Bordwell, *Mistake and Adverse Possession*, 7 IOWA L. BULL. 129 (1922); William Edwin Taylor, *Actual Possession in Adverse Possession of Land*, 25 IOWA L. REV. 78 (1939); William F. Walsh, *Title by Adverse Possession*, 16 N.Y.U. L.Q. REV. 539 (1939) (part 1); William F. Walsh, *Title by Adverse Possession*, 17 N.Y.U. L.Q. REV. 44 (1939) (part 2).

[3] Ballantine, *Title by Adverse Possession*, *supra* note 2, at 139.

[4] *See, e.g.*, Rogers v. Marlin, 754 So. 2d 1267, 1273 (Miss. Ct. App. 1999) (stating that "damages are never a part of adverse possession").

[5] William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 887 (1995) (stating that "takings law today is incoherent").

[6] The terms of the Fifth Amendment are some of the "most common and difficult terms in our legal lexicon, linked together in sentences of great power but of equally great abstraction." RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 20 (1985). Courts have had difficulty applying these terms to the many complex, and even bizarre, situations possible in the modern

Clause has become a hotbed of the Constitution, with its panoply of precedent stretching and twisting to fit into the year's new litigation, potentially as numerous as the regulations that invade every aspect of our modern life.[7]

But at the point where these two legal doctrines cross, there is a no man's land, void of analysis by a federal court until *Pascoag Reservoir & Dam, LLC v. Rhode Island*.[8] In *Pascoag Reservoir*, the District Court of Rhode Island was presented with an issue that had not previously surfaced in federal jurisprudence.[9] Pascoag Reservoir, also know as Echo Lake, is an artificial body of water located in the towns of Burrillville and Glocester, Rhode Island.[10] Pascoag Reservoir & Dam, LLC's predecessor in title created the lake in 1860.[11] In 1964,

---

state. *See generally* Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (military battery overlooking beach resort); Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926) (zoning regulations reduced value of property by seventy-five percent); United States v. Causby, 328 U.S. 256 (1946) (military flights over chicken farm); United States v. Dickinson, 331 U.S. 745 (1947) (flooding of land); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (federal law requires disclosure of trade secret); Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988) (sheep killed by protected grizzly bears); Moerman v. California, 21 Cal. Rptr. 2d 329 (Cal. Ct. App. 1993) (endangered elk destroyed fences and ate forage); Am. Heart Ass'n v. County of Greenville, 489 S.E.2d 921 (S.C. 1997) (retention by Probate Court of original will and signature of famous baseball player).

[7] The most recent cases to set practitioners and the academy abuzz include: Brown v. Legal Found. of Washington, 538 U.S. 216 (2003) (5-4 decision) (state directs interest earned on funds in IOLTA accounts to legal services); Tahoe-Sierra Pres. Council v. Tahoe Reg. Planning Agency, 535 U.S. 302 (2002) (moratorium on development while environmental agency could determine impact of development on lake); Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (state regulation preventing owner from developing coastal wetlands).

[8] 337 F.3d 87 (1st Cir. 2003), *cert. denied*, 124 S. Ct. 962 (2003).

[9] Pascoag Reservoir & Dam, LLC v. Rhode Island, 217 F. Supp. 2d 206, 217 (D.R.I. 2002). One student commentator has already discussed this case. *See* Kimberly A. Selemba, Comment, *The Interplay Between Property Law and Constitutional Law: How the Government (Un)Constitutionally "Takes" Land Dirt Cheap*, 108 PENN ST. L. REV. 657 (2003). Selemba's Comment directly follows the reasoning of the district court. *See id.* at 664-75. Selemba describes the issues, but does not bring theory to bear. This Comment, on the other hand, explores the theoretical underpinnings of the requirement of just compensation and analyzes other issues not thoroughly explored by the district court. Such issues include: whether the takings claim accrues from the moment of actual entry or when title is vested in the adverse possessor, whether requiring compensation by the government would undermine the justifications for adverse possession, and whether adverse possession is a background principle of state property law.

[10] *Pascoag Reservoir & Dam,* 337 F.3d at 90.

[11] *Id.*

the State of Rhode Island purchased a lot abutting the reservoir.[12] One year later, the state constructed a boat ramp, whose supports extended into the company's property.[13] Community members used the boat ramp to access the lake.[14] This use went uninterrupted until 1997, when after several years of failed negotiations between the parties for the sale of the lake, Pascoag Reservoir & Dam, LLC erected a "No Trespassing" sign at the water's edge, trying to limit the public's use of the water.[15] The State then brought suit in state court seeking to quiet title to the land via a theory of uninterrupted adverse possession.[16] In 2001, the Supreme Court of Rhode Island held that the state had acquired the part of the lake bottom under the boat ramp by adverse possession and had acquired a prescriptive easement for the public to use the boat ramp to access the lake.[17]

In 2002, Pascoag Reservoir & Dam, LLC brought suit in federal court seeking just compensation.[18] The district court held that, although the state's acquisition of a fee simple in land through adverse possession is a taking,[19] the federal takings claim must be dismissed because the company failed to pursue the available state remedy in a timely fashion.[20] Alternatively, the court held that the company's twenty-six year delay in bringing suit was unreasonable and that the claim was barred by the doctrine of laches.[21]

In 2003, the First Circuit Court of Appeals affirmed the district court's dismissal of the claim[22] without passing upon the constitutional question of whether adverse possession by the government is a compensable taking.[23] The First Circuit concluded

---

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Pascoag Reservoir & Dam,* 337 F.3d at 90.

[17] Reitsma v. Pascoag Reservoir & Dam, LLC, 774 A.2d 826, 838 (R.I. 2001) (3-2 decision).

[18] *Pascoag Reservoir & Dam,* 217 F. Supp. 2d at 209.

[19] *Id.* at 222.

[20] *Id.* at 228.

[21] *Id.*

[22] *Pascoag Reservoir & Dam,* 337 F.3d at 90.

[23] *Id.* The First Circuit followed the fundamental notion of judicial restraint where constitutional questions are not answered in absence of their exigency. For support of this principle of judicial restraint, see Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 446 (1988); Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138, 157-58 (1984); Leroy v. Great W. United Corp., 443 U.S. 173, 181 (1979); Massachusetts v. Westcott, 431 U.S. 322, 323

that even if such a claim were viable, the company failed to bring the state claim for compensation in a timely fashion and its federal takings claim was therefore forfeited.[24]

This Comment will attempt to steer a path through this "curious juncture between property law and constitutional law"[25] and answer the question unresolved by the First Circuit in *Pascoag Reservoir*: Does a governmental actor's acquisition of land by adverse possession give rise to a compensable taking under the Fifth Amendment?[26] This Comment will assert that the government must pay just compensation for land acquired through adverse possession. The underlying rationales for both adverse possession and the constitutional prohibition on takings without just compensation compel such a result.

In Part I, this Comment will examine the different methods through which a governmental actor can acquire land, such as condemnation and prescription, and the constitutional limits on each method. Part II will employ the district court's opinion in *Pascoag Reservoir* as a portal through which to explore the constitutional argument that the government's physical invasion of private property for the statutory period is a taking. The Comment will contrast the decisions of the district court in *Pascoag Reservoir* with the few state courts that have addressed whether adverse possession by the government is a compensable taking. In addition, the Comment will demonstrate the merits of the district court's position by providing a detailed analysis of the statutes of limitation on the remedies available to the true owner for the government's physical invasion. In Part III, it will then allay the potential concerns of some commentators by illustrating that requiring the government to compensate for land taken by adverse possession would not undermine the rationales underlying the doctrine. Recalling the four justifications of adverse possession that were put forth by Professor Thomas Merrill in his classic article, *Property Rules, Liability Rules, and Adverse Possession*,[27] the Comment will argue that both the eminent domain power and the statute of limitation for the takings claim will minimize the impact that the compensation requirement

(1977); Alexander v. Louisiana, 405 U.S. 625, 633 (1972); Burton v. United States, 196 U.S. 283, 295 (1905).

[24] *Pascoag Reservoir & Dam*, 337 F.3d at 96.

[25] *Pascoag Reservoir & Dam*, 217 F. Supp. 2d at 209.

[26] *Pascoag Reservoir & Dam*, 337 F.3d at 90.

[27] Merrill, *supra* note 1, at 1128-32.

has on these rationales. Finally, in Part IV it will argue that the Takings Clause is a fundamental limitation on government overreaching and that the government cannot evade this obligation by virtue of adverse possession.[28] The government is not exempt from paying compensation in this context because adverse possession does not fall within the narrow reach of the "background principles of state property law" exception announced by the Supreme Court in *Lucas v. South Carolina Coastal Council*.[29]

I. METHODS THROUGH WHICH THE GOVERNMENT MAY ACQUIRE PRIVATE LAND AND ITS CONSTITUTIONAL LIMITS

There are multiple methods through which the government can acquire property from a private landowner. The first of these methods, condemnation, deals with: (1) the express taking of land through exercise of the power of eminent domain; and (2) inverse condemnation, where in absence of the exercise of the power of eminent domain, the state takes land through physical appropriation or excessive regulation.[30] The second method by which the government can acquire land is through the doctrine of adverse uses. Under this doctrine, the government may acquire land by adverse possession and prescriptive easement—property rights that, in many respects, are equivalent in form and substance.[31]

I-A. Eminent Domain

Eminent domain is the right of the sovereign, as the ultimate owner of all real property, to recall private land for public purposes.[32] The origin of the sovereign's right to acquire title to private property by condemnation antedates constitutions and legislative enactments.[33] This right is "an incident to sovereignty, inherent in and belonging to every sovereign state."[34] The power of eminent domain is said to be

---

[28] *Pascoag Reservoir & Dam*, 217 F. Supp. 2d at 226 (noting that "[t]he government cannot escape the Takings Clause by opting to sit by until title is transferred to it").

[29] 505 U.S. 1003 (1992).

[30] *See Tahoe-Sierra Pres. Council*, 535 U.S. at 322 n.17.

[31] Merrill, *supra* note 1, at 1124 (characterizing prescription as "a first cousin of adverse possession").

[32] Haig v. Wateree Power Co., 112 S.E. 55, 57 (S.C. 1922).

[33] *Id.*

[34] Johnston v. Alabama Public Serv. Comm'n, 252 So. 2d 75, 76 (Ala. 1971) (per curiam).

"one of the unwritten laws of all civilized nations."[35]

The power of eminent domain is a product of political necessity.[36] The sovereign would find it difficult, if not impossible, to construct highways, bridges, sewers, waterlines, or any other public necessities that may arise, without the power of eminent domain.[37] It would be difficult for the government to piece together enough voluntary transactions to complete one of these projects.[38] The high transaction costs associated with trying to find the landowners and then to successfully negotiate a fair price may deter progress and frustrate public goals.[39] The government can bypass these difficulties by exercising the right of eminent domain.[40]

Although the power of eminent domain is a basic element of sovereignty,[41] it is not without limitation. The Takings Clause of the Fifth Amendment limits the federal government's ability to divest a landowner of property. The Fifth Amendment states, "nor shall private property be taken for public use, without just compensation."[42] The Takings Clause is incorporated into the Due Process Clause of the Fourteenth Amendment and therefore applies to the states.[43]

The "public use" limitation prescribes that the government may not take land for whatever purpose it pleases, but may only take for a public purpose.[44] While sound in theory, this limitation is rather porous due to the Supreme Court's formulation of a loose standard to determine which acts purportedly take land for a public purpose.[45] For the taking to be considered for a public use, there must be a "rational relationship to some conceivable public purpose."[46] One

---

[35] *Haig*, 112 S.E. at 57.

[36] United States v. 4,450.72 Acres of Land, 27 F. Supp. 167, 172 (D. Minn. 1939) (quoting Kohl v. United States, 91 U.S. 367 (1875)).

[37] *See* EPSTEIN, *supra* note 6, at 3-6.

[38] *Id.*

[39] It is the potential for "hold outs" that drives up the transaction costs. *Id.* Eminent domain eliminates the problem of the one uncooperative landowner who seeks to improve his bargaining position. *Id.*

[40] *Id.*

[41] 9 THOMPSON ON REAL PROPERTY § 80.01(b)(1) (David A. Thomas ed., 1999).

[42] U.S. CONST. amend. V.

[43] Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 (1897).

[44] U.S. CONST. amend. V.

[45] *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 243-45 (1984) ("The Court long ago rejected any literal requirement that condemned property be put into use for the general public.").

[46] Montgomery v. Carter County, 226 F.3d 758, 765 (6th Cir. 2000) (internal

court astutely pointed out that few takings would fail to meet this standard.[47] Furthermore, the reviewing court will show deference to the legislative decision as to what constitutes a public use unless the use is without reasonable foundation.[48]

The second limitation, the payment of "just compensation," is a fundamental limitation on the actions of the state.[49] It is well established that, "[t]he power to take and the obligation to indemnify for the taking are inseparable."[50] The owner should be fully indemnified for the loss sustained when his property is taken for public use.[51] The private landowner is compensated for the loss suffered to him, not the benefit gained by the government.[52]

I-B. Inverse Condemnation

Inverse condemnation is defined as "a cause of action against a

---

quotation marks omitted) (discussing Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984)).

[47] *Id.* at 765-66.

[48] *Midkiff*, 467 U.S. at 241. Some commentators have questioned whether courts have given municipalities too much deference allowing condemnations for purposes seemingly tangential to a public use and whether a "more rigorous standard" is required. *See* DAVID L. CALLIES ET AL., LAND USE 294 (4th ed. 2004). The Supreme Court recently granted certiorari in Kelo v. City of New London, 73 U.S.L.W. 3178 (Sept. 28, 2004) (No. 04-108), raising speculation that the deferential public use standard expressed in *Midkiff* will be reevaluated. In *Kelo*, the Connecticut Supreme Court upheld the city's condemnation of private residences where the land was to be developed pursuant to an economic development plan that aimed to compliment the expansion of a local pharmaceutical company's facilities. Kelo v. City of New Haven, 843 A.2d 500, 507-08 (Conn. 2004). The Connecticut court held that the exercise of eminent domain power to "promote municipal economic development by creating new jobs, increasing tax and other revenues, otherwise revitalizing distressed urban areas, constituted a valid public use." *Id.* at 531.

[49] As Justice Holmes cautioned, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Penn. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

[50] Drury v. Midland R. Co., 127 Mass. 571, 576 (1879).

[51] It can be difficult to determine the value of what is taken. As Justice Brandeis stated, "[v]alue is a word of many meanings." Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n of Missouri, 262 U.S. 276, 310 (1923) (Brandeis, J., concurring in the judgment). In Kimball Laundry Co. v. United States, the Court examined a claim for compensation to a laundry service company for the government's temporary use and occupancy of the laundry service for servicemen. 338 U.S. 1 (1949). Justice Frankfurter noted that to fix the amount of compensation requires a well informed "guess" as to what the property owner would have received in a voluntary exchange. *Id.* at 5-6.

[52] Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910) (Holmes, J.) ("[T]he question is, What has the Owner lost? not, What has the taker gained?").

governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency."[53] The two situations where the government may take property include: (1) the physical appropriations of property for public use; and (2) restrictions on uses of property which are so severe that they are tantamount to a condemnation.[54]

To determine the type of taking that is implicated, one must focus on the character of the government invasion.[55] When the government physically appropriates land, the finding of a taking is fairly obvious.[56] Indeed, the Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corporation*[57] announced a categorical rule to determine when a taking has occurred. The Court held that governmental action that can be fairly characterized as a permanent physical occupation of property is a taking.[58]

A taking is not self-evident, however, when the owner contends that a law or regulation so severely restricts the use of the land as to amount to a taking.[59] The analysis is much more complex.[60] The logical starting point of regulatory taking analysis is Justice Holmes' oft-quoted statement that, "if regulation goes too far it will be recognized as a taking."[61] For more than eighty years, the Court has been trying to come up with a formulation to identify those regulations that go "too far."[62]

---

[53] United States v. Clarke, 445 U.S. 253, 257 (1980) (quoting D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971)) (internal quotations omitted) (Court's emphasis omitted).

[54] *Tahoe-Sierra Pres. Council*, 535 U.S. at 322 n.17.

[55] *See generally id.* at 324-25.

[56] *Palazzolo*, 533 U.S. at 617 ("The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use.").

[57] 458 U.S. 419 (1982).

[58] *Id.* at 434-35. The rule announced by the Court in *Loretto* was not surprising. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). Michelman noted that, "[t]he one incontestable case for compensation" is where the government "regularly" uses or "permanently" occupies land under private ownership. *Id.* at 1184. Further he noted that, "courts never deny compensation for a physical takeover." *Id.*

[59] *Tahoe-Sierra Pres. Council*, 535 U.S. at 322 n.17.

[60] *Id.*

[61] *Penn. Coal Co.*, 260 U.S. at 415.

[62] *Id.*

In *Lucas v. South Carolina Coastal Council*,[63] the Court announced a second categorical rule defining one instance where a regulation has gone "too far." The Court held that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, . . . he has suffered a taking."[64] The *Lucas* rule only applies to regulations that deprive the landowner of all economically beneficial uses of the land. Regulations whose impact comes short of a "complete elimination in value," or a "total loss," require analysis under the *Penn Central Transportation Co. v. City of New York* balancing test.[65]

Under the *Penn Central* balancing test, the court will engage in "ad hoc, factual inquiries" to determine if there has been a regulatory taking.[66] Factors the court will consider include "the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action."[67]

---

[63] 505 U.S. 1003 (1992).

[64] *Id.* at 1019.

[65] *Tahoe-Sierra Pres. Council*, 535 U.S. at 330 (referring to the balancing test announced in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978)).

[66] *Penn. Cent. Transp. Co.*, 438 U.S. at 124.

[67] *Id.* The reader should note that this Comment does not provide an in-depth look at federal takings jurisprudence. This is a pragmatic decision reflecting the desire not to wade into murky water unnecessarily. While this Comment will briefly look at regulatory takings, the focus of the discussion will be on physical takings, which are implicated when the state acquires land by prescription. A snapshot of academic critiques of Supreme Court takings jurisprudence should support this Comment's limited endeavor. *See, e.g.*, BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 8 (1977) (existing case-law is "but a chaos of confused argument"); Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in* Lucas v. South Carolina Coastal Council, 26 LOY. L.A. L. REV. 955, 966 (1993) (takings test is "so amorphous as to defy description"); Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147, 147 (1995) (many view takings cases as "incoherent, piecemeal, or categorical"); James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143, 1143 (1997) ("law in this area is a bewildering mess"); Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1432 (1993) (the Court has failed "to develop a coherent, consistent framework for takings analysis"); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I – A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1304 (1989) ("[I]t is difficult to imagine a body of case law in greater doctrinal and conceptual disarray."); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964) (this area of law is best characterized as "a welter of confusing and apparently incompatible results"); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 887 (1995) ("takings law is plagued by fundamental disagreements"). *Cf.* Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 93 (2002) (embracing the vagueness in takings doctrine as both "quite functional and entirely appropriate").

I-C. Adverse Possession and Prescriptive Easement

Adverse possession is a possession of land that is inconsistent with the right of the true owner.[68] When the possession is accompanied by specific acts, the title will vest in the adverse possessor.[69] To establish title by adverse possession, the trespasser's possession must be actual, open and notorious, adverse, exclusive, under a claim of right, and continuous for the statutory period.[70]

An easement is an interest in land granting to one individual the right to use and enjoy another's land.[71] Unlike an express easement, where the owner of the dominant estate has been granted the right to use the servient estate,[72] a prescriptive easement is implied from an individual's open, adverse, and continuous use of the land for the statutory period.[73]

Although a prescriptive easement bears many similarities to adverse possession,[74] there are two significant differences. First, the elements necessary to create a prescriptive easement mirror those of an adverse possession claim[75] except for the exclusivity requirement.[76]

---

[68] Ballantine, *Title by Adverse Possession*, *supra* note 2, at 219.

[69] *Id.*

[70] Caselaw from different jurisdictions shows the general uniformity of the elements of adverse possession. *See* Bonds v. Carter, 75 S.W.3d 192, 198 (Ark. 2002); Hennessy v. Fairley, 796 A.2d 41, 49 (Me. 2002); Totman v. Malloy, 725 N.E.2d 1045, 1047 (Mass. 2000); Habel v. James, 68 P.3d 743, 746 (Mont. 2003); Nye v. Fire Group P'ship, 657 N.W.2d 220, 224 (Neb. 2003); Greubele v. Geringer, 640 N.W.2d 454, 457 (N.D. 2002); Francis v. Rogers, 40 P.3d 481, 485 (Okla. 2001); Lewis v. Aslesen, 635 N.W.2d 744, 746 (S.D. 2001); MacDonough-Webster Lodge No. 26 v. Wells, 834 A.2d 25, 35 (Vt. 2003); Hovendick v. Ruby, 10 P.3d 1119, 1122 (Wyo. 2000).

[71] Commercial Wharf East Condominium Ass'n v. Waterfront Parking Corp., 552 N.E.2d 66, 73 (Mass. 1990). *See* Morrill v. Mackman, 24 Mich. 279 (1872); Alban v. R. K. Co., 239 N.E.2d 22 (Ohio 1968); Brown v. Haley, 355 S.E.2d 563 (Va. 1987).

[72] *See* Yeager v. Tuning, 86 N.E. 657, 658 (Ohio 1908).

[73] BLACK'S LAW DICTIONARY 528 (7th ed. 1999).

[74] William G. Ackerman & Shane T. Johnson, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 LAND & WATER L. REV. 79, 88 (1996).

[75] Beach v. City of Fairbury, 301 N.W.2d 584, 586 (Neb. 1981).

[76] Jurisdictions differ to the extent they require exclusiveness as an element of prescription. Some states do not require it at all. *See* Neyland v. Hunter, 668 S.W.2d 530, 531 (Ark. 1984); Shellow v. Hagen, 101 N.W.2d 694, 697 (Wis. 1960). Those states that do retain the requirement of exclusiveness employ it in a less meaningful fashion than in the adverse possession context. They define exclusivity in this context, not as a showing that only the claimant made use of the land, but that the claimant's use "does not depend on a like right in others." Schmidt v. Brown, 80 N.E. 1071, 1074 (Ill. 1907). *See also* Dena Cohen, Note, *Exclusiveness in the Law of Prescription*, 8 CARDOZO L. REV. 611 (1987) (discussing the different approaches to the

Exclusivity is not possible in a claim for a prescriptive easement because the owners of the dominant and servient estate may both use the land simultaneously.[77] A second difference between adverse possession and a prescriptive easement is the property right that results from each claim.[78] Adverse possession converts the trespasser's uninterrupted possession into actual title to the property.[79] Prescription, on the other hand, only gives rise to a limited right to use property in a way as defined by the adverse use.[80]

While the doctrines of adverse possession and prescriptive easement are commonly thought of in the context of private actors, the state, and its political subdivisions, can acquire land through such means.[81] The elements required to acquire land by adverse possession are the same for a governmental entity as for a private individual.[82] Generally, for private ouster, the adverse possessor is not required to compensate the former owner for acquiring her property.[83] Therefore, any requirement for the state actor to compensate for land acquired by adverse possession must come from a source other than the common law. This Comment argues that the

---

exclusive requirement courts have adopted and advocating that this requirement be dropped from the elements necessary to establish a prescriptive easement).

[77] Cohen, *supra* note 76, at 627-28; *see also* Phillips v. Bonadies, 136 A. 684, 686 (Conn. 1927) ("[U]ser may be exclusive, though it was participated in by owner of servient tenement."); Cramer v. Jenkins, 399 S.W.2d 15, 18 (Mo. 1966) (stating there is no requirement that "the user must prevent the owner of the land from using it").

[78] Ackerman & Johnson, *supra* note 74, at 88.

[79] *Id.*

[80] *Id.*

[81] A. M. Vann, Annotation, *Acquisition of Title to Land by Adverse Possession by State or Other Governmental Unit or Agency*, 18 A.L.R.3d 678 (1968). Representative decisions agreeing with the principle that the state may take land by adverse possession include: Roche v. Town of Fairfield, 442 A.2d 911 (Conn. 1982); State v. Hays, 785 P.2d 1356 (Kan. 1990); Daley v. Town of Swampscott, 421 N.E.2d 78 (Mass. App. Ct. 1981); Granite County v. Komberec, 800 P.2d 166 (Mont. 1990); Reitsma v. Pascoag Reservoir & Dam, LLC, 774 A.2d 826 (R.I. 2001); Koontz v. Town of Superior, 746 P.2d 1264 (Wyo. 1987). *But see* Regard v. Escude, 69 So. 2d 627, 629 (La. Ct. App. 1953) (holding that a "municipality cannot acquire property by prescription"). Subsequent history of this decision raises the question of whether this is still a valid statement of law after substantial amendments were made to the Louisiana state constitution. Parish of Jefferson v. Bonnabel Prop., Inc., 620 So. 2d 1168 (La. 1993).

[82] A. M. Vann, *supra* note 81, at 678; *see* Williams v. North Carolina State Bd. of Educ., 147 S.E.2d 381 (N.C. 1966); State v. Vanderkoppel, 19 P.2d 955 (Wyo. 1933).

[83] *But see* Warsaw v. Chicago Metallic Ceilings, Inc., 676 P.2d 584, 591-94 (Cal. 1984) (Reynoso, J., dissenting) (asserting he would affirm the court of appeals decision requiring the bad faith possessor of a prescriptive easement to compensate for the fair market value of the easement).

Fifth Amendment mandates that the government compensate for any land it acquires through adverse possession.

II. ADVERSE POSSESSION BY THE GOVERNMENT IS A COMPENSABLE TAKING

In *Pascoag Reservoir*, the District Court of Rhode Island became the first federal court to address whether adverse possession by the government gives rise to a compensable taking.[84] It correctly ruled in the affirmative. The district court surveyed the few state court decisions that had addressed this issue.[85] These state courts have held the contrary, finding that: (1) no taking has occurred, therefore no compensation is warranted;[86] (2) a taking has occurred but the claim for just compensation is time-barred due to the passing of the statute of limitations for the prescriptive period;[87] or (3) that compensation is never a part of adverse possession cases.[88] As the district court pointed out, these decisions are fundamentally flawed for two reasons.[89]

First, many of these courts erroneously rely on *Texaco, Inc. v. Short*[90] for the proposition that land acquired by a governmental entity through adverse possession is not subject to a takings claim.[91] As the district court astutely observed, the *Texaco* decision does not stand for this proposition.[92] In fact, the case is not even about adverse

[84] *Pascoag Reservoir & Dam*, 217 F. Supp. 2d at 217.

[85] *Id.* at 223-24.

[86] The Ohio Supreme Court held that after the statutory period for adverse possession is completed the true owner no longer has title. State *ex rel.* A.A.A. Inv. v. City of Columbus, 478 N.E.2d 773, 775 (Ohio 1985) (per curiam). Thereafter, the state is simply maintaining its possession and can no longer be said to be taking property. *Id.* *See* Bd. of County of Comm'rs v. Flickinger, 687 P.2d 975 (Colo. 1984); Commonwealth v. Stephens, 407 S.W.2d 711 (Ky. 1966); Dunnick v. Stockgrowers Bank of Marmouth, 215 N.W.2d 93 (Neb. 1974).

[87] *See* Weidner v. State, 860 P.2d 1205 (Alaska 1993); Stickney v. City of Saco, 770 A.2d 592 (Me. 2001).

[88] *See* Rogers v. Marlin, 754 So. 2d 1267 (Miss. Ct. App. 1999); Krambeck v. City of Gretna, 254 N.W.2d 691 (Neb. 1977); Algermissen v. Sutin, 61 P.3d 176 (N.M. 2002); City of Ashland v. Hardesty, 543 P.2d 41 (Or. 1975); Peterson v. Port of Seattle, 618 P.2d 67 (Wash. 1980); Ackerman v. Port of Seattle, 348 P.2d 664 (Wash. 1960).

[89] *Pascoag Reservoir & Dam*, 217 F. Supp. 2d at 224-25.

[90] 454 U.S. 516 (1982).

[91] One state court even went so far as to characterize the case before it as "not analytically distinguishable from *Texaco*." *Flickinger*, 687 P.2d at 984. *See also State ex rel. A.A.A. Inv.*, 478 N.E.2d at 775 (listing other authorities, which predate the *Texaco* decision, but are consistent with the reasoning in that case).

[92] *Pascoag Reservoir & Dam*, 217 F. Supp. 2d at 224. The district court made this

possession.[93]

In *Texaco*, a landowner challenged the Indiana Dormant Mineral Interests Act (or "Mineral Lapse Act") as a taking.[94] The act provided that, unless the owner filed a claim in the county recorder's office, severed mineral interests that had been unused for more than 20 years would be deemed to have been abandoned and would revert to the surface owner.[95] The United States Supreme Court found that this was not an impermissible taking.[96] In oft-quoted language, the Court stated that, "[i]t is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right."[97] After abandoning the property, "the former owner retains no interest for which he may claim compensation."[98]

Relying upon the broad language in *Texaco*, some courts have held that the state is not taking property in an adverse possession case, but it is actually the failure of the true owner to make use of the property that has caused the property right to lapse.[99] These courts have apparently seized upon some of the Supreme Court's words, while ignoring others. The focus is on the "owner's failure to make any use of the property."[100] In the instance of adverse possession, it is accurate to say that the true owner's failure to inspect the property and to exercise the right to exclude has contributed to the loss of the property right. But the true owner's inaction alone is not sufficient for the transfer of the property right. The adverse possessor's affirmative acts must factor into this equation.[101]

The circumstances in *Texaco* and *Pascoag Reservoir* are similar in that there is extended inaction by the true owner, but are different in an important sense. In *Texaco*, the state is not a trespasser.[102] The often-neglected language in *Texaco* is that the transfer of the property

---

astute observation.

93 *Id.*

94 *Texaco, Inc.*, 454 U.S. at 522.

95 *Id.* at 521.

96 *Id.* at 530.

97 *Id.*

98 *Id.*

99 *See, e.g.*, *Flickinger*, 687 P.2d at 984; *State ex rel. A.A.A. Inv.*, 478 N.E.2d at 775.

100 *Texaco*, 454 U.S. at 530.

101 To make out a claim for adverse possession, the trespasser's possession must be actual, open and notorious, exclusive, adverse, under a claim of right, and continuous for the statutory period. Taylor, *supra* note 2, at 78.

102 *Texaco* is not about adverse possession, but an alleged regulatory taking. *See Texaco*, 454 U.S. at 530.

right under the Mineral Lapse Act is not due to an "action of the State."[103] On the other hand, in *Pascoag Reservoir*, the State of Rhode Island is the adverse possessor.[104] The state has actually acquired title by claiming ownership to the reservoir and using it in a way that is inconsistent with that of the true owner, continuously for the statutory period.[105] This is a clear situation of the government's actual ouster of a private landowner.

Critique of the state court decisions does not end with highlighting their erroneous reliance on *Texaco*. The district court in *Pascoag Reservoir* observed that, to hold—as a number of state courts had[106]—that the true owner's takings claim is time-barred after the statutory period for adverse possession is completed, misstates what is transpiring in adverse possession cases.[107] The state courts have mechanically applied the adverse possession doctrine without regard to the constitutional implications of the government's physical invasion of private property for the statutory period—an invasion which falls within the confines of a *per se* takings rule.[108] An examination of the statutes of limitation for the various remedies available to the true owner for a physical invasion by the government (i.e., trespass, ejection, and takings) illustrates that the district court's holding is analytically sound.

Generally, the statute of limitations for a takings claim against the federal government is six years.[109] Seeing as there is no federal statute of limitations for a takings claim against a state government, a federal district court faced with such a situation will "adopt the analogous state statute of limitations."[110] A takings claim is said to "sound[] in tort" and, therefore, the particular jurisdiction's statute of limitations for trespass or personal injury is usually applied.[111]

For purposes of illustration, assume—as the state courts

---

[103] *Id.*

[104] *Reitsma*, 774 A.2d at 829.

[105] *Id.*

[106] *Weidner*, 860 P.2d at 1212; *Flickinger*, 687 P.2d at 984; *Stephens*, 407 S.W.2d at 712; *Stickney*, 770 A.2d at 603; *Dunnick*, 215 N.W.2d at 96; *State ex rel. A.A.A. Inv.*, 478 N.E.2d at 775.

[107] *Pascoag Reservoir & Dam*, 217 F. Supp. 2d at 224.

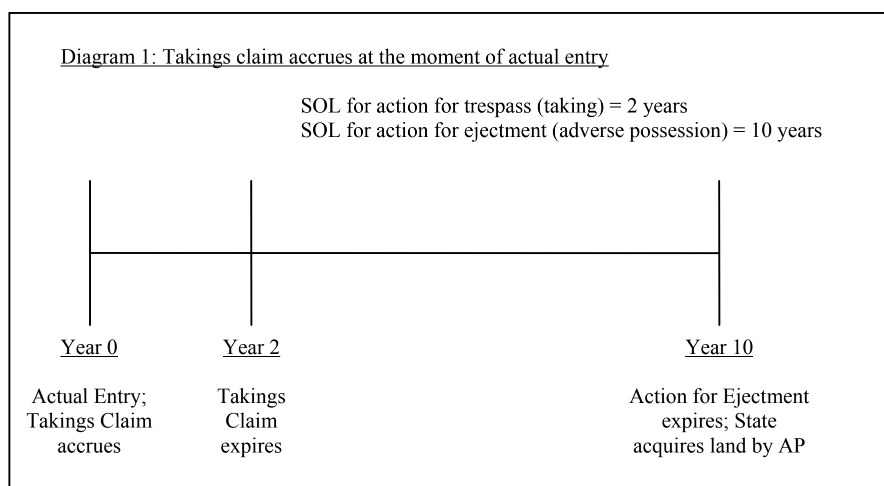
[108] *Loretto*, 458 U.S. at 441 (holding that "a permanent physical occupation of property is a taking.").

[109] Tucker Act, 28 U.S.C. § 1346(a)(2) (West 2004).

[110] Azul Pacifico, Inc. v. City of Los Angeles, 948 F.2d 575, 587 (9th Cir. 1991).

[111] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 711 (1999).

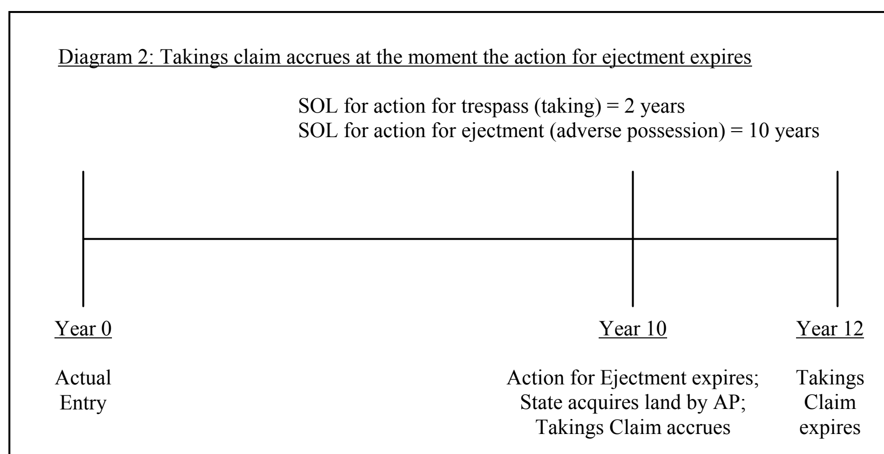
apparently did—that the takings claim begins to accrue at the moment that the government first comes into physical occupation of the land, the moment of actual entry. Imagine the Catch 22 situation faced by a true owner in a jurisdiction with a two-year statute of limitations for an action for trespass—and therefore a two-year statute of limitations for a takings claim against the government—but a ten-year statute of limitations for an action for ejectment. The true owner's takings claim would effectively expire on year two, eight years prior to the property right having actually been taken by the adverse possessor. This result can hardly be considered a logical reconciliation of the adverse possession and takings doctrines.



Instead, the true owner's takings claim should not begin to accrue until the title vests in the adverse possessor, the moment the true owner's action for ejectment has expired.[112] Using this moment as the accrual point would accommodate both the adverse possession and takings doctrines and afford the true owner all remedies available at law. For example, if the true owner were to file suit before year ten, he would eject the government intruder and recover

[112] In the *Pascoag Reservoir* opinion, District Court Judge Lagueux astutely pointed out that the original owner cannot bring a takings suit until the prescriptive period has expired, because it is not until the period expires that the adverse possessor can show a right in the property. *Pascoag Reservoir & Dam*, 217 F. Supp. 2d at 224. Prior to that point, the landowner's remedies included an action for ejectment and damages for trespass. *Id.*

some measure of damages for the temporary invasion.[113] On year ten, the true owner's action for ejectment would expire and the government would take title to the land by adverse possession. The true owner would then have until year twelve to seek compensation for the permanent taking. Any claim brought after year twelve would be time-barred.



A brief survey of the elements of a federal cause of action for a taking will prove the accuracy of this analysis. The Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank*[114] stated two prerequisites that must be met before the takings claim is ripe for federal review. First, the governmental entity charged with implementing the regulations must have reached a final decision regarding the application of the regulations to the property in question.[115] This is the "final decision requirement."[116] Also, the landowner must have sought, and been denied, just compensation by means of an adequate state procedure.[117] This is the "state action requirement."[118] Decisions by lower courts have indicated that the

[113] If the adverse possession claim is terminated prematurely, regardless of whether the government chose to abandon its adverse possession claim or the true owner brought suit to eject, the government must compensate for the temporary invasion. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987).

[114] 473 U.S. 172 (1985).

[115] *Id.* at 193.

[116] *Id.*

[117] *Id.*

[118] Inadequacy, unavailability, and the futility of seeking the state remedy have

"final decision" requirement is relaxed in physical occupation cases.[119]

Even with the relaxed "final decision" requirement, a landowner who is subjected to a physical invasion cannot bring a federal takings claim if the landowner does not pursue the available state remedy for compensation in a timely fashion.[120] The timeliness of a state claim for compensation depends on when the taking actually occurs. For physical takings, the inquiry is this: at what point does the government's physical invasion change in character and nature from a trespass to a permanent physical occupation? Central to this inquiry is identifying the point where the invasion shifts from a temporary limitation on the owner's right to exclude to a permanent extinguishment of that owner's right.

The Supreme Court in *Loretto* laid down the categorical rule that permanent physical occupations are a compensable taking.[121] Writing for the Court, Justice Marshall attempted to make the distinction between temporary and permanent takings. The Justice noted that, while every physical invasion is not a taking, it is the "permanence and absolute exclusivity of a physical occupation" that distinguishes it from a temporary limitation.[122] An owner's property rights in a physical thing include the right to possess, use, and dispose of the

---

been recognized as exceptions to this *Williamson* "state action requirement." *Pascoag Reservoir & Dam*, 337 F.3d at 92.

[119] *See id.* at 91; Hall v. City of Santa Barbara, 833 F.2d 1270, 1282 n.28 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988). The *Williamson* court only provided a framework for regulatory taking cases. *Williamson County*, 473 U.S. at 185.

[120] *See* Deniz v. Municipality of Guaynabo, 285 F.3d 142, 150 (1st Cir. 2002) (finding the landowner's "failure to seek recompense through Puerto Rico's inverse condemnation remedy renders both his takings and substantive due process claims unripe for federal adjudication"); Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 380 (2d Cir. 1995) (finding federal takings "claim is not yet ripe for review" because of developer's failure to seek state remedy); Stern v. Halligan, 158 F.3d 729, 734 (3d Cir. 1998) (stating that the landowners have not "sought compensation through state proceedings . . . [and their] takings claim must be rejected"); Gamble v. Eau Claire County, 5 F.3d 285, 286 (7th Cir. 1993) (noting that "[b]y booting her state compensation remedies [the landowner] forfeited any claim based on the takings clause to just compensation"); Austin v. City & County of Honolulu, 840 F.2d 678, 680 (9th Cir. 1988) (holding that landowner's "claim is not ripe for review in federal court because he failed to seek compensation through adequate state remedies").

[121] "[W]hen the character of the governmental action is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto*, 458 U.S. at 434-35 (citations omitted).

[122] *Id.* at 436 n.12.

property in an exclusive and unfettered manner.[123] When the government permanently occupies physical property, it destroys each of these rights.[124] The owner, then, can no longer put the land to use and is without the power to exclude the intruder.[125]

Central to Justice Marshall's distinction between temporary and permanent occupations is the true owner's right to exclude others from his property. Traditionally, the power to exclude has been hailed as "one of the most treasured strands in an owner's bundle of property rights."[126] The Court has consistently held that the owner's right to exclude is an interest that the state cannot take without compensation.[127] While there are some line-drawing problems at the boundary of the rule, it is clear that the government's invasion will be treated as a permanent physical occupation when the result is to terminate the private owner's power to exclude.[128]

This understanding of the distinction between a temporary and permanent physical occupation can be applied to cases of adverse possession by the government. While the trespasser's unwanted presence interferes with the true owner's right to use and dispose of the property, it does not interfere with the right to exclude.[129] The true owner retains this right until the prescriptive period passes.[130] The original owner's right to exclude is terminated at the point when the statute of limitations on the action for ejectment expires.[131] It is at this point that the government's exclusion is properly found to be a

---

[123] *Id.* at 435.

[124] *Id.* In more metaphorical terms, Justice Marshall noted that, through physical occupation "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Id.*

[125] *Id.* at 436.

[126] *Id.* at 435. *See also* Int'l News Service v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) (stating that "[a]n essential element of individual property is the legal right to exclude others from enjoying it").

[127] Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (holding "that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation").

[128] *Loretto*, 458 U.S. at 436-37. One commentator noted that it appears as if the Court recognized an exception to the physical invasion rule in Nollan v. California Coastal Commission, 483 U.S. 825, 837 (1987), by stating that a permanent physical occupation, that would otherwise be a taking, might be justified as a condition of securing a land use or development permit. CALLIES, LAND USE, *supra* note 48, at 305.

[129] *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 126 (5th ed. 2002).

[130] *See id.*

[131] *See id.*

permanent physical occupation within the meaning of *Loretto*. Therefore, the true owner's state claim for compensation should not accrue until title vests in the adverse possessor.[132]

This discussion should illustrate the logical failings of the state court decisions that held a claim for compensation expires with the passing of the prescriptive period.[133] The takings claim is, most likely,[134] not cognizable until the extinguishment of the true owner's

---

[132] In the principal case, Pascoag Reservoir, LLC argued that the takings claim did not accrue until the Supreme Court of Rhode Island unequivocally declared that the state had acquired title by adverse possession. *See Pascoag Reservoir & Dam*, 337 F.3d at 95; *see also* Brief for Petitioner Pascoag Reservoir & Dam, LLC at 14-16, Pascoag Reservoir & Dam, LLC v. Rhode Island, 72 U.S.L.W. 3406 (U.S. Dec. 15, 2003) (No. 03-597). To support this position, Pascoag Reservoir, LLC cited United States v. Dickinson, 331 U.S. 745 (1947), a case that involved the intermittent flooding of an individual's property. Writing for the Court in *Dickinson*, Justice Frankfurter noted that the Government, by condemnation, could have "fixed" the time when the property was taken, but instead left the taking up to physical events. 331 U.S. at 747-48. This puts the "onus" on the landowner to determine the decisive moment when there is no question that the government has confiscated the property. *Id.* at 748. Acknowledging that a taking by flooding is a continuous process, Justice Frankfurter declared that suit for compensation may be delayed "until the situation becomes stabilized." *Id.* at 749. The Court held that, "when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort to either piecemeal or premature litigation to ascertain just compensation for what is really 'taken.'" *Id.* The landowner can wait to bring suit until the character of the government's action is unquestionably a taking. *Id.*

Pascoag Reservoir, LLC maintained that it did not fail the second *Williamson* prong, the "state action" requirement. It argued that adverse possession by the government was a taking by a continuous process of physical events and had not stabilized until the Supreme Court of Rhode Island clearly rendered title to the state via adverse possession. *Reitsma*, 774 A.2d at 838. The First Circuit rejected this argument, stating that a valid claim of adverse possession requires open and notorious possession by the trespasser. *Pascoag Reservoir & Dam*, 337 F.3d at 95. Therefore, the court determined that the former landowner should have been aware of a cognizable takings claim prior to the decision of the Rhode Island Supreme Court. *Id.*

[133] *See* Weidner v. State, 860 P.2d 1205 (Alaska 1993); Stickney v. City of Saco, 770 A.2d 592 (Me. 2001).

[134] A permanent physical occupation *may* be found when other interests are infringed upon, even though the landowner maintains the right to exclude. Justice Marshall noted that, the "deprivation of the right to use and obtain a profit from property is not, *in every case*, independently sufficient to establish a taking." *Loretto*, 458 U.S. at 436 (emphasis added). Marshall leaves open the possibility that the deprivation of these other rights may, in some cases, be sufficient to give rise to a permanent physical occupation. *Id.* The court will undertake a "more complex balancing process" to evaluate those physical invasions that do not totally dispose the owner of the right to exclude. *Id.* at 436 n.12. The balancing test that Justice Marshall hints at signals a possible application of the "ad hoc, factual inquiries"

right to exclude. The state claim for just compensation begins to accrue at the moment title is vested in the adverse possessor. Accruing the statute of limitations for the takings claim from the moment of actual entry would create an anomalous situation in which the takings claim would expire prior the property having actually been taken.

III. REQUIRING THE GOVERNMENT TO COMPENSATE FOR LAND TAKEN BY ADVERSE POSSESSION WILL NOT UNDERMINE THE RATIONALES UNDERLYING THE DOCTRINE

Some would argue that requiring the government to pay just compensation for land acquired by adverse possession is a *sub silentio* prohibition on adverse possession by the government. To be clear, this Comment does not contest that a state may acquire land by adverse possession. It is well settled in caselaw and legal scholarship that a state may acquire land through such means.[135] Rather, this Comment argues that this acquisition of land creates in the true owner a right to compensation, a right that must be executed within the relevant statutory period. Requiring the government to compensate in this limited context does not subvert the government's right to acquire land by adverse possession. The compensation requirement does not undermine the rationales behind the adverse possession doctrine.

The doctrine of adverse possession appears to be an irregularity within our property regime given our systematic preference for property rights over mere possessory rights.[136] Professor Thomas Merrill's classic article, *Property Rules, Liability Rules, and Adverse Possession*,[137] sets forth the main justifications underlying the doctrine of adverse possession, validating its place in our property regime. Merrill explains that there are four justifications that support transferring the title to the adverse possessor after the expiration of the statute of limitations: the lost evidence, quieting title, sleeping

described by the Court in *Penn Central*. This suggests that the analysis for physical and regulatory takings are not mutually exclusive and that it is only those physical occupations that undeniably sever the landowner's right to exclude that are easily resolved under *Loretto's per se* rule.

[135] *See, e.g.*, *Roche*, 442 A.2d 911; *Hays*, 785 P.2d 1356; *Daley*, 421 N.E.2d 78; *Komberec*, 800 P.2d 166; *Reitsma*, 774 A.2d 826; *Koontz*, 746 P.2d 1264.

[136] *See, e.g.*, Ballantine, *Title by Adverse Possession*, *supra* note 2, at 135 (noting that "the doctrine apparently affords an anomalous instance of maturing a wrong into a right").

[137] Merrill, *supra* note 1, at 1128-32.

owner, and reliance rationales.[138] Merrill argues that requiring compensation (or indemnification) for land acquired by adverse possession in the context of private actors would undermine these rationales. The same cannot be said when the government is the adverse possessor.

The first justification, the lost evidence rationale, is reminiscent of the policy argument invoked in favor of statutes of limitation.[139] This is a common sense and pragmatic rationale recognizing the greater social benefit in repose.[140] The quality and quantity of evidentiary material deteriorates with time and the parties will have to bear greater litigation expenses to find, or corroborate, evidence.[141] Of course, any resulting judicial determination based on an imperfect record will more likely be fraught with error.[142] The adverse possession doctrine removes this concern by eliminating many remote claims.[143]

The second justification for the doctrine of adverse possession is the quieting title rationale.[144] The existence of remote claims on property impairs the marketability of title.[145] Without the adverse possession mechanism, a purchaser of property would have to follow the chain of title to its source so as to identify any remote interests in the property,[146] trace them to their present day successors, and then

---

[138] *Id.* at 1133.

[139] Statutes of limitation "are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence is lost." Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945). *See* Bd. of Regents v. Tomanio, 446 U.S. 478, 485 (1980); United States v. Kubrick, 444 U.S. 111, 117 (1979); Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 428 (1965).

[140] Merrill, *supra* note 1, at 1128.

[141] *Id.*

[142] *Id.* *See also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.12 (6th ed. 2003) (positing adverse possession reduces "error costs that are caused by using stale evidence to decide a dispute").

[143] Merrill, *supra* note 1, at 1128. Merrill notes that with the implementation of the recording acts across the states and the availability of professional title surveys for a reasonable cost, this rationale may not be as important today as in Seventeenth Century England. *Id.* But the lost evidence rationale is still able to address those situations where a title contains errors and omissions, or public records are destroyed. *Id.*

[144] Henry W. Ballantine maintained that the "great purpose" of the adverse possession doctrine is "to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing." Ballantine, *Title by Adverse Possession*, *supra* note 2, at 135.

[145] Merrill, *supra* note 1, at 1129.

[146] Such interests could include "ancient easements, unextinguished spousal

negotiate their release.[147] Adverse possession actually reduces the drag on the market by extinguishing many of these claims.[148]

The sleeping owner rationale is the third justification for the adverse possession doctrine.[149] Adverse possession punishes the true owner for engaging in poor custodial practices, or in other words, sleeping on his rights.[150] The doctrine requires that the true owner periodically visit the property and assert the right to exclude.[151] Like the quieting title rationale, this rationale has the effect of facilitating land transactions.[152] A diligent owner's periodic policing of the property will have the effect of flushing out offers for purchase.[153]

The reliance rationale is the final justification for adverse possession. The general policy is that the law should value the reliance interest the possessor develops through his or her longstanding possession of the property.[154] Professor Merrill expressed the four different accounts of the reliance rationale that have been raised in academia.[155] There is an interest in respecting the personal attachment that the possessor feels with the property, in preserving the peace, and protecting the economic reliance by both the possessor and third parties.[156]

The first account, the property as personhood notion, focuses on the sense of personal attachment that one develops to the property in her possession.[157] The adverse possessor may develop an attachment to the property that is critical to her identity.[158] The

---

rights, grants of future interests, unreleased mortgages or liens." *Id.*

[147] Hold outs and other opportunistic behavior by the owners of these remote interests would be yet another—potentially costly—hurdle to overcome.

[148] *Id. See also* Carol M. Rose, *Possession as the Origin of Property*, 52 UNIV. OF CHI. L. REV. 73, 81 (1988) ("[C]lear titles facilitate trade and minimize resource-wasting conflict.").

[149] Merrill, *supra* note 1, at 1130.

[150] *Id. See also* Rose, *supra* note 148, at 79 (noting that adverse possession is "a wonderful example of reward to useful labor, at the expense of the sluggard").

[151] Merrill, *supra* note 1, at 1130.

[152] *Id.* at 1130-31.

[153] This is for the obvious reason that it is tough to purchase land from an absent owner. *Id.* at 1130.

[154] *Id.* at 1131.

[155] Merrill, *supra* note 1, at 1131.

[156] *Id.* at 1131-32.

[157] *Id.* at 1131.

[158] Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982) (explaining that "[t]he premise underlying the personhood perspective is that to achieve proper self-development . . . an individual needs some control over resources in the external environment").

second account, the preserving the peace notion, coincides with the property as personhood argument. The idea is that after lengthy occupation, the adverse possessor will become attached to the property and any subsequent attempt to vanquish the adverse possessor will result in violence.[159] The third account, the notion of sunk costs or quasi rents, looks at the economic reliance of the adverse possessor.[160] An adverse possessor who has made improvements on the land is in an inferior bargaining position in any future negotiations to buy the property.[161] This results from the common law doctrine of accession, where a property owner has the right to any improvements made to his land.[162] Had negotiations taken place before the adverse possessor had made such improvements, the true owner would only be able to extract fair market value for the land.[163] But in any negotiations subsequent to the improvements, the true owner can seek more, putting the adverse possessor in the position of anteing up in order to preserve his investment in the land.[164] The final account of the reliance rationale

---

[159] *See, e.g.,* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897) ("A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it."). The preserving the peace rationale has been expressed in landlord-tenant law with regard to a landlord's self-help for a tenant in breach who fails to abandon or surrender the premises. The common law rule was that a landlord may retake the premises from the tenant in possession if the landlord is legally entitled to possession and the means of reentry are peaceable. Berg v. Wiley, 264 N.W.2d 145, 149 (Minn. 1978). *See also* Wilder v. House, 48 Ill. 279, 279 (1868) (landlord has "no right to resort to force"); Stone v. Lahey, 133 Mass. 426, 427 (1882) (may remove tenant without using "unreasonable force"); Rich v. Keyser, 54 Pa. 86, 86 (1867) (may retake property if "done without breach of the peace"). A number of courts, fearing the "violent breach of peace" that may occur during landlord self-help have departed from the common law rule and have required the landlord to seek remedy through the judicial process. *Berg*, 264 N.W.2d at 151 (noting that at least 16 jurisdictions have changed from the early common law rule).

[160] Merrill, *supra* note 1, at 1131.

[161] This is the notion of sunk costs or quasi-rents. *Id.*

[162] Accession is defined as "[a] property owner's right to all that is added to land, naturally or by labor, including land left by floods and improvements made by another." BLACK'S LAW DICTIONARY 13 (7th ed. 1999). The modern trend among jurisdictions is to mitigate the harsh application of this doctrine by either legislative reform ("occupying claimant" or "betterment" acts) or judicial decisions emphasizing fairness to the innocent improver (Manillo v. Gorski, 54 N.J. 378 (1969)). DUKEMINIER & KRIER, *supra* note 129, at 152-53.

[163] Merrill, *supra* note 1, at 1131.

[164] The adverse possessor must either pay the price the true owner commands or forfeit the improvements made on the land. *Id.* at 1130.

looks beyond the scope of the adverse possessor/true owner dynamic and focuses on the economic reliance of third parties.[165] There may be third parties, such as subsequent purchasers, with a valid interest in the entitlement.[166] The doctrine of adverse possession protects these individuals who, based on the adverse possessor's unfettered use of the property, have mistaken the adverse possessor for the true owner.[167]

Professor Merrill defends the fact that title is granted to the adverse possessor without any liability to indemnify the true owner, arguing that, if required, indemnification would undermine the basis for this institution.[168] Indemnification would require an inquiry into the value necessary to fairly compensate all parties who have an interest in the property, interfering with the lost evidence and quieting title rationales.[169] When an individual acquires title by adverse possession, the title is deemed to "relate back" to the date of actual entry.[170] So a claim for indemnification would require an inquiry into the value of the property on the date of actual entry.[171] Such evidence relating to the value of the property may not be forthcoming due to the passage of time.[172] Also, the requirement of indemnification would result in all holders of remote or fractional interests in the property[173] lining up to claim their share of the proceeds.[174] Consequently, the litigation necessary to secure title by adverse possession would be much more expensive.[175] Title insurance companies would accommodate this risk by raising premiums,

---

[165] *Id.* at 1132.

[166] Interested third parties could include "vendors, creditors, contractors, tenants, [and] subsequent purchasers." *Id.*

[167] *Id.* Public recording acts, however, are supposed to protect third parties from making such a mistake. *Id.*

[168] *Id.* at 1126.

[169] *Id.* at 1146-48.

[170] Merrill, *supra* note 1, at 1147.

[171] *Id.*

[172] The prescriptive period can vary greatly depending on the jurisdiction. *See* CA. CIV. PROC. CODE § 325 (West 1982) (5 years); N.J. STAT. ANN. § 2A:14-30 (West 2000) (30 years for real estate or 60 years for woodlands and uncultivated tracts). *See* J & M Land Co. v. First Union Nat'l Bank, 766 A.2d 1110 (N.J. 2001) (reaffirming that the 30/60 year statute is the applicable limitations period for an adverse possession claim).

[173] The interests could include: "ancient easements, unextinguished spousal rights, grants of future interests, unreleased mortgages or liens." Merrill, *supra* note 1, at 1129.

[174] *Id.* at 1148.

[175] *Id.*

resulting in an additional drag on the alienability of property rights.[176]

Indemnification also reduces the true owner's incentive to assert the right to exclude, therefore interfering with the sleeping owner rationale.[177] Indemnification provides less incentive for the true owner to adopt good custodial practices.[178] What is more of an incentive to keep diligent custodial practices than the current doctrine, where a true owner who fails to bring action within the statutory period would lose title to the adverse possessor?[179]

Finally, indemnification would undermine the reliance interests of adverse possessors and interested third parties "by imposing a one-time tax on the adverse possessor equal to 100% of the market value."[180] The adverse possessor would be given the ultimatum to either pay this tax or lose the property.[181] Imagine the frustration of third parties who reasonably relied on the adverse possessor's appearance of title if the adverse possessor is unable or unwilling to pay this fee.[182]

But the four rationales that Professor Merrill expressed are not undermined when the state, as the adverse possessor, is required to compensate the true owner. The lost evidence, quieting title, and sleeping owner rationales are sustained by the statute of limitations for the takings claim. As discussed in Part II, a true owner must first seek and be denied compensation by an adequate state procedure before being able to bring suit in federal court.[183] Each individual jurisdiction will have a statute of limitation on the right to seek compensation. A true owner who does not timely file this claim with the state fails to satisfy the *Williamson County* prerequisites for a takings claim and will be forever barred from compensation. Consequently, the projections of owners of remote and fractional interests lining up to collect their just compensation, and therefore undermining the lost evidence and quieting title rationales, will only happen in the rarest of cases where the true owner, sloth to respond to the open and notorious adverse possession over many years, will be inclined to seek compensation within a more limited period of time.

---

[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] Merrill, *supra* note 1, at 1148.
[180] *Id.* at 1149.
[181] *Id.*
[182] *Id.*
[183] *See supra* note 120 and accompanying text.

Similarly, it is unlikely that the potential for compensation will create a disincentive for true owners to police their property, and therefore undermine the sleeping owner rationale, because the claim for compensation is confined to a narrow statutory period. In any case, an owner who sleeps on his or her rights will be ousted from his or her land and barred from compensation.

Most importantly, the compensation requirement does not jeopardize the government's reliance interests in the property adversely possessed. It is important to note that, although compelling when the adverse possessor is a private party, the four expressions of the reliance rationale do not apply with the same force when the state is the adverse possessor. This leaves the compensation requirement little to undermine.

The property as personhood notion is a particularly weak justification. It is tough to envision how a political entity, such as a municipal board of electors, would need control over resources to "achieve proper self-development."[184] The preserving the peace rationale is an equally weak justification to stand on because violence may always result from one person's attempt to recapture property from another. While the potential for violence depends on the tendencies of the particular individual, it is less likely to occur when one is trying to recapture property from the state. The state's overwhelming superiority—embodied in the police power—would be a disincentive for either party to resort to violence.

With respect to the third account, the state's economic reliance is not as seriously imperiled here as it is with a private party. The notion of sunk costs or quasi rents has no applicability when the state is the adverse possessor. The accession doctrine, even in its harsh common law form, will not relegate the state to an inferior bargaining position. The true owner will never hold the state "over a barrel"[185] in future negotiations, because the state can always exercise the power of eminent domain. Depending on the procedure in the particular jurisdiction, condemnation results in either a forced sale with the value of the land determined by the court or a supposed, voluntary sale in the shadow of the state's ability to force a sale.[186] In

---

[184] Radin, *supra* note 158, at 957.

[185] Merrill, *supra* note 1, at 1131.

[186] Condemnation procedure actually puts the state in a superior bargaining position because the state can condemn the land, paying whatever amount of compensation it deems appropriate. The condemnee could then appeal the amount of compensation. Some states require pre-condemnation activity before the

either situation, the state will pay a fair price.

The fourth account, the reliance interest of third parties who have changed their position based on the adverse possessor's appearance as the owner of title, is the soundest of the four reliance rationales. The economic reliance interest of third parties could be seriously undermined by the requirement of compensation if the state were unwilling or unable to pay. Again however, inroads on the reliance rationale are curbed by the statute of limitations for compensation.

IV. THE GOVERNMENT IS NOT EXEMPT FROM PAYING COMPENSATION BECAUSE ADVERSE POSSESSION IS NOT A BACKGROUND PRINCIPLE OF STATE PROPERTY LAW

The Takings Clause is a fundamental limitation that protects against government overreaching on private property rights and it may not be excused by the common law doctrine of adverse possession. The power of eminent domain plays a unique role in civilized government. With this power, the government may coerce the transactions that are necessary to implement omnibus programs for the good of all and to avoid the obstacles typically associated with the commons, such as transaction costs, hold outs, and free riders.[187] The exercise of this power is limited by the Takings Clause, which ensures that private property is not taken for public use without just compensation.[188]

Common law principles should not excuse the government from this limitation. The government cannot trample upon the interests of a citizen that it was designed to protect, and then claim that the Takings Clause does not apply to it because the invasion exceeded

---

condemnor can get judicial determination of the amount of compensation. *See, e.g.,* N.J. STAT. ANN. § 20:3-1 *et seq.* (West 1997) (declaration of taking, deposit the estimated compensation with court, commissioners to determine compensation); N.Y. EM. DOM. PROC. LAW § 101 *et seq.* (McKinney 2002) (public hearing, appraisals, negotiations and offer); VT. STAT. ANN. tit. 24 § 2805 *et seq.* (2003) (offer, public hearing, selectmen to determine just compensation). Some states have "quick take" procedures that allow the condemnor to take title after giving notice to the condemnee and depositing compensation with the court. *See, e.g.,* MINN. STAT. ANN. § 117.042 (West 1997); N.H. STAT. ANN. § 498-A:5 (2003).

[187] EPSTEIN, *supra* note 6, at 5. POSNER, *supra* note 142, at § 3.7. Posner describes the classic example of a hold out–the landowner in the path of advancing railroad tracks. *Id.* Recognizing the high cost of abandoning or altering the course of the railroad after starting it, the landowner could hold out for a higher price. *Id.* The landowner could get much more for the land than it is worth. *Id.*

[188] EPSTEIN, *supra* note 6, at 5.

the prescriptive period. To permit such a result misunderstands the very foundation of American government, the bedrock principle of which is to ensure the security of the people's life, liberty, and property.[189]

At first glance, it appears that the Supreme Court in *Lucas* has narrowed the reach of the Takings Clause by common law principles. Writing for the Court, Justice Scalia laid down the second categorical rule on takings and the now famous "nuisance exception."[190] The Court held that a regulation that deprives the landowner of all economically beneficial use of the land requires compensation unless the restriction is one that the "background principles of the State's law of property and nuisance already place upon land ownership."[191] The idea is that the property owner may *only* suffer a confiscation of those interests that were part of his title to begin with.[192]

This limitation on the Fifth Amendment's requirement that private land may not be taken for public use without just compensation is consistent with the purpose of civil government—to protect established property interests and entitlements.[193] For example, common law nuisance is grounded in the principle that no one has the right to use land in such a way as to injure that of another.[194] The government need not compensate for regulations that purport to abate a nuisance because they are rightfully wielding their monopoly of force to protect and secure the interests of those individuals who would be affected by the impending nuisance.[195]

---

[189] During the Constitutional Convention, Alexander Hamilton noted that, "one great object of Government is personal protection and the security of Property." Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181, 195 (1999) (quoting from 1 Records of the Federal Convention of 1787, at 302 (Max Farrand ed., 1937)); *see also* THE FEDERALIST No. 54, at 351 (James Madison or Alexander Hamilton) (Robert Scigliano ed., 2000) ("Government is instituted no less for protection of the property, than of the persons, of individuals.").

[190] Justice Stevens actually coined the name of the exception. *See Lucas*, 505 U.S. at 1067-68 (Stevens, J., dissenting).

[191] *Id.* at 1029.

[192] The government may "resist compensation only if the logically *antecedent inquiry* into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027 (emphasis added).

[193] EPSTEIN, *supra* note 6, at 5.

[194] The underlying principle for common law nuisance is the maxim, *sic utere tuo ut alienum non laedas* (meaning "so use your own as not to injure another's property"). BLACK'S LAW DICTIONARY 1690 (7th ed. 1999).

[195] *See* Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751, 774 (Pa. 2002) (noting that if the state can prove that surface coal mining within Watershed

The *Lucas* Court did not indicate what other background principles of state property law fall under this exception.[196] Some courts have found that custom[197] and public trust[198] are such principles. Therefore, a government regulation that restricted a private landowner's rights would not be a compensable taking if the land was held in public trust or customary rights are implicated. Again, this limitation on the Fifth Amendment's requirements is consistent with our government's commissioned purpose to protect and secure existing property interests. Such regulations do not require compensation because they protect land that the public has an established interest in from limitation by a private owner.

It might be argued that adverse possession is one of these background principles of state property law.[199] While the Court's treatment of background principles has been too sparse to suggest the direction it will take in the future, it is unlikely that adverse possession will be found a background principle.[200] Adverse

---

area "would unreasonably interfere with the public right to unpolluted water" then the mining can be prohibited without compensation); State v. The Mill, 887 P.2d 993, 1002 (Colo. 1995) (concluding that state nuisance law prohibited landowner from engaging in activities that would spread radioactive contamination and that state regulations to that effect did not constitute a taking).

[196] For an academic discussion on this issue, see David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)Use of Investment-Backed Expectations*, 36 VAL. U. L. REV. 339 (2002); David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, 30 ENVTL. L. REP. 10003 (2000).

[197] *See* Stevens v. City of Cannon Beach, 854 P.2d 449, 456-57 (Or. 1993) (holding landowner had no right to develop dry sand areas of beach because common law doctrine of custom protects the public's use of these areas), *cert. denied*, 510 U.S. 1207 (1994); David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996); Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawaii*, 20 U. HAW. L. REV. 99 (1998).

[198] *See* McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 120 (S.C. 2003) (holding landowner had no right to develop tidelands on his lots because the tidelands are public trust property under state control), *cert. denied*, 124 S.Ct. 466 (2003); Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of* Lucas v. South Carolina Coastal Council *on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1 (1995).

[199] The State of Rhode Island raised this argument in district court. *Pascoag Reservoir & Dam*, 217 F. Supp. 2d at 226. Rejecting this argument, the court stated that the only application of the "background principles of state property law" have been to excuse compensation for regulatory takings. *Id.* Whether the Supreme Court would apply this exception to permanent physical occupations, such as adverse possession, is yet to be seen. *Id.* *Cf.* John R. Sand & Gravel Co. v. United States, 60 Fed. Cl. 230, 239 (2004) (holding that the background principles exception applies to both regulatory and physical takings).

[200] Background principles have only cropped up in three Supreme Court

possession, nuisance, custom, and public trust are similar in that they are all established common law doctrines. But adverse possession differs from the other three, in that it impacts purely private interests. Protection of public rights is not in the calculus.[201]

Common law principles should not abrogate a fundamental constitutional limitation. One possible reading of *Lucas* suggests that the government should not get the benefit of these common law principles unless the result is consistent with the framework upon which our republic was founded. The "background principles of state property law," or "nuisance" exception, fits within this framework, with each instance emphasizing the protection of established property rights and entitlements. To consider adverse possession as such a principle would be antithetic to this understanding of the role of government, permitting unrestrained confiscation by the government of the very private rights it was set to protect.

CONCLUSION

The sovereign's respect for the property rights of its citizens is a pillar upon which this nation was formed. The Framers recognized the inherent right of the sovereign to take land for public good, but limited such power by requiring that its use be only for a public purpose and that the landowner receive just compensation for the private rights confiscated. To allow any intrusion upon this principle by virtue of the common law doctrine of adverse possession would be an impermissible expansion of the sovereign's power.

A government entity's acquisition of land by adverse possession

---

decisions. Justice Scalia first coined the phrase in *Lucas,* 505 U.S. at 1029. Justice Scalia again took up the discussion on background principles of state property law in *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994). In an opinion dissenting from the denial of certiorari, the Justice questioned whether the facts were such that the Supreme Court of Oregon could declare the requirements of custom were satisfied. *Id.* at 1212. The Supreme Court of Oregon had found that the City's denial of a permit to construct on beach lots was not an uncompensated taking under the Fifth Amendment because under the state's law of custom, the proscribed interests were not part of the landowner's title. Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993) (*en banc*). Also, treatment of background principles briefly surfaced in *Bush v. Gore*, 531 U.S. 98, 115 n.1 (2000) (Rehnquist, J., concurring) (illustrating that the constitutional guarantee of the Fifth Amendment would offer no protection if the antecedent inquiry into state background principles ended with a final decision of the state's highest court).

[201] Considerations of public interest are essential to the doctrines of nuisance, custom, and public trust.

is a compensable taking. The few state courts to hold to the contrary reasoned with a misplaced emphasis on *Texaco v. Short* and mechanically applied the adverse possession doctrine in a manner that blatantly ignores the constitutional implications of the state's intrusion on private property—an action that falls within the purview of *Loretto*'s physical takings rule. Requiring compensation will not undermine the four rationales for the doctrine of adverse possession or otherwise act as a *sub silentio* prohibition on adverse possession by the government. The government's power of eminent domain and the statute of limitations for the takings claim mitigate any potential harmful effects that compensation has on these rationales. Finally, the government is not exempt from paying compensation because adverse possession is not a "background principle of state property law" as contemplated by the Court in *Lucas*.