

2013

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### Recommended Citation

Lee Anne Fennell, "Forcings" (Kreisman Working Paper on Housing Law and Policy No. 2, 2013).

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# CHICAGO

COASE-SANDOR INSTITUTE FOR LAW AND ECONOMICS WORKING PAPER NO. 666  
(2D SERIES)

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 449  
KREISMAN WORKING PAPER ON HOUSING LAW AND POLICY NO. 2



COASE-SANDOR INSTITUTE  
FOR LAW AND ECONOMICS  
THE UNIVERSITY OF CHICAGO LAW SCHOOL

## Forcings

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THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

November 2013

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## FORCINGS

*Lee Anne Fennell\**

*Eminent domain receives enormous amounts of scholarly and popular attention, and for good reason—it is a powerful form of government coercion that cuts to the heart of ownership. But a mirror-image form of government coercion has been almost entirely ignored: forced ownership, or “forcings.” While legal compulsion to begin or continue ownership is neither entirely unstudied as an academic matter nor entirely unprecedented as a doctrinal matter, the category lacks a unified treatment. Because coercively imposed ownership can substitute for other forms of government coercion, forcings deserve attention, even if they will rarely dominate other alternatives. Attending to forcings as a conceptual possibility reveals their kinship with existing features of law and highlights one of ownership’s most essential moves: delivering actual outcomes, and not just their expected value equivalents. Unpacking the considerations that might prompt law to impose ownership on unwilling parties points the way to alternatives short of full-strength compelled ownership. The analysis also suggests an additional domain of government action—“relievings”—for unburdening owners of unwanted property.*

## INTRODUCTION

Takings, or involuntary terminations of ownership, have a widely ignored logical counterpart: involuntary impositions of ownership, or “forcings.” Although legal doctrines of long standing sometimes compel people to own or to continue owning property,<sup>1</sup> the phenomenon of compelled ownership remains undertheorized. This paper takes on this neglected conceptual category. Attending to forcings generates important

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<sup>1</sup> See *infra* Part I.A.

theoretical and policy payoffs, including the possibility that compelled ownership could substitute for or augment other forms of government coercion such as eminent domain.

Consider blighted urban properties that have been vacated by defaulting owners and neglected by mortgagees. Eminent domain designed to keep owners in possession is the hot button strategy *de jour* for cities like Richmond, California.<sup>2</sup> But the ends of local governments facing the risk of foreclosure blight might also be achieved by requiring someone—perhaps the lender, perhaps a party developing an adjacent parcel—to step up to the plate of ownership when the owner in possession decamps. More broadly, some of the land assemblies currently pursued through eminent domain might instead be created by requiring existing owners to expand their holdings if they wish to stay in place. Forced ownership might also be used remedially, or as a form of prospective land use control, to compel owners to absorb responsibility for the areas that they impact.

The idea of pressing ownership on an unwilling party might seem like an obvious non-starter for at least two reasons. First, one might think that an unwilling owner will necessarily be a low-valuing owner, and hence an objectively bad owner. If the point of property is to get resources into the hands of the highest valuing user, forcings might seem to push in exactly the wrong direction. Second, the interference with personal autonomy associated with forced ownership might seem so great as to make forcings a normatively toxic idea, as well as a political impossibility. The reactions to the individual mandate in the Affordable Care Act (as well as to the more ominous prospect of forced broccoli purchases) suggest intense popular resistance to forced acquisitions of unwanted things.<sup>3</sup>

These points are undermined by the fact that the law *already* imposes several forms of forced ownership, from remedies for conversion and accession to limits on abandonment. Far from being alien or unprecedented, doctrines that produce and sustain unwanted ownership are threaded throughout the law. Of course, ownership is rarely foisted on parties out of the blue; rather, it is bundled with some earlier act or omission—often, an earlier choice to undertake some form of voluntary ownership. These observations lead to two lines of inquiry that are pursued here. First, what

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<sup>2</sup> See, e.g., Shila Dwan, *A City Invokes Seizure Laws to Save Homes*, N.Y. TIMES, July 29, 2013 (reporting on Richmond's plan to use eminent domain to seize underwater mortgages in order to provide loans with new terms to homeowners); Robert Rogers, *Both Sides in Richmond Eminent Domain Plan Set for Showdown at City Council Meeting*, CONTRA COSTA TIMES, Sept. 6, 2013 (reporting on controversy surrounding the plan, which has already attracted litigation).

<sup>3</sup> See Supreme Court of the United States, Oral Argument Transcript, *Department of Health and Human Services v. Florida*, March 27, 2012, at 13 (Scalia, J.) (asking whether the reasoning supporting the required purchase of health insurance would also justify the forced purchase of broccoli) [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-398-Tuesday.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf); see also James B. Stewart, *How Broccoli Landed on Supreme Court Menu*, N.Y. TIMES, June 13, 2012 (reporting on Justice Scalia's question and tracing the roots of the analogy).

considerations would prompt the law to impose *ownership*, as opposed to a monetary obligation, on an unwilling party? Second, what normative justifications and limits govern the bundling of ownership obligations with earlier choices?

Examining existing forms of forced ownership directs attention to one of property's most essential moves: providing a vehicle for delivering actual outcomes rather than their expected value equivalents. This core feature of the ownership strategy has implications for information costs, risk allocation, and incentive alignment. Social benefits thus may be uniquely achieved through ownership itself. Although these benefits can usually be realized by encouraging willing ownership, such inducements may be insufficient where a given party occupies a monopoly position with respect to a strongly complementary resource or property interest.

The fact that forced ownership can advance social goals does not, of course, complete the case for it. As with takings, forcings can selectively impose burdens that should in fairness be spread across society.<sup>4</sup> And, as with takings, baseline questions quickly emerge when assessing the sorts of uncompensated burdens that individuals should be made to bear. That compensation could be used in tandem with forcings raises interesting untapped possibilities even as it introduces questions about the adequacy (and indeed commensurability) of compensation that mirror those found in the takings arena.

Interestingly, recognizing the category of forcings suggests an additional domain for governmental action, which I term "relievings." As the name suggests, this move would involve the government removing burdensome and unwanted ownership from an erstwhile owner and either retaining ownership itself or imposing ownership on a third party. Those who find forcings to be normatively objectionable should be particularly interested in relievings, because the *failure* to engage in relieving often effectively produces a type of forcing—forced retention. Consider again defaulting mortgagors who have vacated the premises and wish to relinquish ownership, but cannot legally do so. The relevant policy question is not *whether* the government should force someone to own the property in question, but rather *who* it shall force to take on that role.

The analysis here connects to several bodies of prior literature. Forced acquisition equates to the exercise of a put option, a move that has received attention in the literature on entitlement configuration.<sup>5</sup> The compelled

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<sup>4</sup> Cf. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>5</sup> In finance, a put option gives the holder the right but not the obligation to force a purchase of a specified item on the option-writing party at a specified price. See, e.g., RICHARD A. BREALEY & STEWART C. MYERS, *PRINCIPLES OF CORPORATE FINANCE* 503–05 (10th ed. 2011). Scholars have recognized that legal rules could operate in an analogous manner. See, e.g., IAN AYRES, *OPTIONAL LAW* (2005); Ian Ayres, *Protecting Property with Puts*, 32 VAL. U. L. REV. 793, 810 (1998); Madeline Morris, *The Structure of Entitlements*, 78 CORNELL L. REV. 822, 854–56 (1993).

continuation of ownership has been examined in the context of legal limits on abandonment<sup>6</sup> and destruction.<sup>7</sup> Weaker forms of pressure to begin or continue ownership can be found in many other legal features that have received academic treatment, from limits on free alienability to legal requirements that owners accept certain property bundles on an all-or-nothing basis.<sup>8</sup> Finally, forcings bear a family resemblance to givings, which have been previously analyzed as a counterpoint to takings.<sup>9</sup> This paper draws on these disparate strands to provide a unified treatment of a topic that has received surprisingly little attention: the use (and misuse) of governmentally compelled ownership of real and personal property.

The analysis proceeds in four Parts. Part I examines existing instances of unwanted ownership, broadly construed. Part II traces possible rationales for requiring parties to begin or continue ownership. Central to this discussion is an understanding of why ownership that is viewed as individually undesirable might nonetheless be viewed as socially desirable. Part III charts where forcings fit into a broader understanding of property ownership and state power. Part IV suggests ways in which compulsory ownership could be extended, as well as circumstances in which it might be refined or replaced with less coercive approaches or non-ownership alternatives.

Before beginning, a few words about scope are in order. My focus here is on compelled ownership of real property and, to a lesser extent, personal property. Although forcings involving services and benefits also present important issues,<sup>10</sup> my particular interest in this paper is on the way in which the ownership of physical things simultaneously empowers owners to manage inputs and exposes them to the risk of actual outcomes.<sup>11</sup> Although parts of the discussion will reach nonpossessory land use rights, a principal

<sup>6</sup> See, e.g., Eduardo Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191 (2010); Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355 (2010).

<sup>7</sup> See, e.g., Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005).

<sup>8</sup> See, e.g., Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1173-82 (1999); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1374 (1993); Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW 3, 15-16 (J. Roland Pennock & John W. Chapman eds., 1982); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 931 (1985); Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403 (2009).

<sup>9</sup> Past work has considered the governmental conferral of benefits -- "givings" -- as the flip side of takings. See, e.g., WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (Donald G. Hagman & Dean J. Misczynski, eds., 1978); Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001). However, because this work has focused on recapturing windfalls through the imposition of monetary charges rather than the offloading of unwanted property, it has not fully engaged with the concept of "forcings" as developed here.

<sup>10</sup> For example, restitution, although strictly limited in scope, can be understood within its operative domain as the forced purchase of benefits that have been conferred on unconsenting parties. See, e.g., Ariel Porat, *Private Production of Public Goods: Liability for Unrequested Benefits*, 108 MICH. L. REV. 189 (2009) (discussing limits on restitution and proposing that the doctrine be expanded). Insurance purchases are often compelled as well, either expressly or through law or policy. More broadly, the government forces the purchase of various bundles of services through taxation.

<sup>11</sup> It is possible that some forms of intellectual property operate similarly, although I do not take up the question here.

distinction between this work and much of the previous literature on put options is the emphasis that I place on outcomes experienced over time by owners of possessory interests in property.<sup>12</sup>

## I. UNWANTED OWNERSHIP

Forcings involve ownership that is unwanted by the owner herself. In this Part, I examine existing instances of unwanted ownership, broadly construed. To be sure, many of the examples I discuss do not readily lend themselves to the label of “forced ownership”; the unwanted ownership interest follows (or is even generated by) some voluntary choice. This overinclusion is intentional. My goal is not to demonstrate that the law is rife with ownership that is compelled in a strong sense, but rather that unwanted ownership is accepted and even embraced in many legal contexts. Establishing this point sets the stage for Part II’s inquiry into the purposes that might be served by ownership that is aversive to the owner herself.

Section A presents a number of examples organized around the two basic ways in which unwanted ownership arises—through unwanted acquisition and through unwanted retention. Section B lays out the reasons that ownership might be aversive. Section C distills lessons about the category of unwanted ownership and confronts a definitional puzzle about its boundaries.

### A. Existing Examples

How might people end up in unwanted relationships with property? In a purely chronological sense, there are two possibilities: the person did not want to become an owner in the first place (“unwanted acquisition”) or she initially desired ownership but soured on it later (“unwanted retention”).

#### 1. Unwanted Acquisition

Unwanted acquisition sometimes comes about through the direct imposition of a legal remedy, or through a contractual or statutory obligation that would enforce such a remedy. In other cases an unsought (but unrebuffed or unrebuffable) transfer from another party or a natural event produces a legally enforceable ownership obligation. Other unwanted

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<sup>12</sup> Some work on put options has recognized forced purchases of possessory interests (as in trover, accession, and mistaken improver cases), but the analysis has focused primarily on private choices whether to transfer land use rights. For example, the potential role of put options in addressing nuisance claims has received attention in the entitlement literature. *See, e.g.,* AYRES, *supra* note 5, at 29-38. Like the call options to which they are framed as an alternative, the put options under discussion involve entitlements to make certain uses of property or the surrounding airspace, not full fee interests.

acquisitions come from bundling requirements that attach to *desired* property interests.

*Remedial, Statutory, and Contractual Acquisition.* Courts compel purchases remedially in a variety of circumstances. For example, courts will at times order specific performance against an unwilling buyer in a contract to purchase land.<sup>13</sup> Trover, the compelled purchase of chattel property, is the traditional remedy for the tort of conversion.<sup>14</sup> The shopkeeper's warning, "You Break It, You Buy It," may be understood as operating in the shadow of this remedial regime.

In other instances, courts may prescribe a purchase as one of two (or more) remedial alternatives. For example, landowners who have suffered encroachments by innocent improvers may be given a choice between forcing a sale of the underlying land to the encroacher or purchasing the improvements.<sup>15</sup> A landowner who has actively encouraged a mistaken improvement may be treated more harshly; in one case, such an owner was forced to purchase the house that had been built on his land.<sup>16</sup> Principles of accession may similarly require forced purchases where a party has improved raw materials to create a new product: either the party who took the raw materials may be forced to purchase them, or the party who owned the raw materials may be required to purchase the improvements.<sup>17</sup>

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<sup>13</sup> More commonly, specific performance of a real estate contract is imposed on an unwilling *seller*. But courts have shown themselves willing to turn the tables and make the buyer go through with the deal too. *See, e.g.,* *Humphries v. Ables*, 789 N.E.2d 1025 (Ind. Ct. App. 2003) ("The equitable doctrine is that the enforcement of contracts must be mutual, and, the vendee being entitled to specific performance, his vendor must likewise be permitted in equity to compel the acceptance of his deed and the payment of the stipulated consideration.") (quoting *Migatz v. Stieglitz*, 166 Ind. 361, 77 N.E. 400 (1906)); *Ash Park, LLC v. Alexander & Bishop*, 783 N.W.2d 294 (Wisc. 2010) (holding that specific performance was available to sellers of real estate, and declining to add a proviso that would require a finding of no adequate remedy at law).

<sup>14</sup> The plaintiff traditionally had a choice between trover, which forces a sale on the converter, and replevin, which involves recovering the property along with damages. *See* AYRES, *supra* note 5, at 27. In modern times, the forced sale option may not be available where the converted item is returned relatively undamaged. *See* RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, *CASES AND MATERIALS ON TORTS* (10<sup>th</sup> ed. 2012).

<sup>15</sup> *See, e.g.,* *Hardy v. Borrowghs* 232 N.W. 200, 201 (Mich. 1930); *see also* *Pull v. Barnes*, 350 P.2d 828 (Colo. 1960) (granting innocent improver the right to remove the cabin he had constructed, if feasible, or to place a lien on the land equal to the value of the cabin). The owner of the underlying land might instead be forced to sell to the encroacher. *See, e.g.,* *Somerville v. Jacobs*, 170 S.E.2d 805 (Ct. App. W.Va. 1969); *Mannillo v. Gorsky*, 255 A.2d 258, 264 (N.J. 1969). Traditionally, encroached-upon owners could insist on injunctive relief (which might require the encroacher to tear down their structure) or request damages, effectively forcing a purchase of the encroached-upon land. *See* *Pile v. Pedrick*, 31 A. 646 (Pa. 1895); AYRES, *supra* note 5, at 28. Under modern law, a forced transfer is a more likely judicial response to a good faith improvement than injunctive relief, at least where the latter would impose a disproportionate hardship on the innocent encroacher. *See* JESSE DUKEMINIER ET AL., *PROPERTY* 141 (7<sup>th</sup> ed. 2010). For a discussion and analysis of different possible rules for addressing encroachments, see Matteo Rizzolli *Building Encroachments*, 5 REV. L. & ECON. 661 (2009).

<sup>16</sup> *Ollig v. Eagles*, 78 N.W.2d 553, 560 (Mich. 1956) (granting a lien upon the landowner's property for "the reasonable value of the improvements [plaintiff] made to this land, excluding any contribution to the above made by [defendant's] wife and by defendant, and set off by the reasonable rental value of the unimproved land which [plaintiff] used for the years he occupied it").

<sup>17</sup> The general rule is that the owner of "the larger or more valuable input" gets to keep the thing in question. Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459, 466 (2009). Various rules determine the compensation, if any, due to the other party, but one possible outcome is a forced purchase of the other party's input. This may be accomplished through a lien on the property that contains the input. *See e.g.,*



The bounds of remedial ownership remain unclear, however, as a recent example illustrates. A couple in Upper Milford Township, Pennsylvania sued their neighbor, a registered sex offender who had pleaded guilty to an indecent assault on their young daughter, in an effort to force him to purchase their home.<sup>18</sup> The forced purchase of a fee interest in real estate may be an unlikely remedy for the court to order in such a case.<sup>19</sup> But the idea of countering land use conflicts with purchase demands is not unprecedented. Conditional variances in New Jersey offer neighboring landowners a choice between suffering the grant of the variance or making a binding offer to purchase the property for which the offending variance has been sought.<sup>20</sup> The government is given a similar choice—stop regulating or pay up—when a landowner succeeds on an inverse condemnation suit.<sup>21</sup>

Sometimes the law will force a swap of property for property, effectively compelling both a sale and a purchase. For example, judicial partition in kind simultaneously dispossesses the erstwhile co-tenant of a fractional undivided share in the whole property while forcibly conveying a full ownership interest in a portion of the property.<sup>22</sup> Land readjustment schemes may operate similarly to deliver new land in place of old.<sup>23</sup> In

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Richard A. Epstein, *Protecting Property with Legal Remedies: A Commonsense Reply to Professor Ayres*, 32 VAL. U. L. REV. 833, 851 (1998).

<sup>18</sup> See Patrick Lester, *Family Sues to Force Sex Offender to Buy Its House*, MORNING CALL, Mar. 16, 2013. The man had returned to the neighborhood after serving time in prison for the assault. The couple claimed that the house had lost value as a result of his presence and that they felt under great pressure to move. *Id.*

<sup>19</sup> Law professors contacted by the press about the case saw little chance that the court would grant the requested relief. *See id.* (quoting Douglas Laycock for the idea that a forced home purchase might be part of a settlement but “would be odd as a court-ordered remedy”); *id.* (attributing to Anthony Sabino the view that the remedy might violate the 8<sup>th</sup> Amendment); Christina Ng, *Family Sues to Force Sex Offender to Buy Its House*, ABC.com, Mar. 20, 2013 (quoting Jamison Colburn regarding the “extraordinary nature of the relief they’re asking,” which he viewed as presenting “an uphill battle”).

<sup>20</sup> *See, e.g., Nash v. Bd. of Adjustment*, 474 A.2d 241, 246 (N.J. 1984) (holding that the offer must constitute the fair market value that the property would have if the variance were granted). If such an offer is made, the owners of the property have the choice to sell at that price or keep the property without the variance. *See id.* at 245. In other words, the owners who otherwise meet the criteria for a variance will receive either a variance or a put option with a strike price equal to the fair market value of the property with the variance.

<sup>21</sup> Where a taking is found, the government may discontinue its regulation (and pay for the interim taking) or pay just compensation to acquire the property interest. The former situation amounts to a forced purchase of a time slice. *See First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 318–19 (1987). A similarly structured choice was provided under the Columbia River Gorge National Scenic Area Act prior to its 1991 amendment. Michael C. Blumm & Joshua D. Smith, *Protecting the Columbia River Gorge: A Twenty-Year Experiment in Land-Use Federalism*, 21 J. LAND USE & ENVT. L. 201, 218–19 (2006) (examining the “opt-out” provision for Special Management Areas, which required the government to either accept a landowner’s bona fide offer to sell the property at fair market value or release the landowner from the regulations).

<sup>22</sup> Judicial partition operates coercively because it can be unilaterally sought over the objections of other co-tenants. While the co-tenants seeking partition in kind clearly desire the swap in question, the other co-tenants may not.

<sup>23</sup> Land readjustment is not well known in the United States but is used in many other countries. It operates as a substitute for ordinary exercises of eminent domain. Although specifics vary, the basic idea is to reconfigure a development area and return to the initial landowners property within that area that is at least as valuable as that which was taken from them, along with a share of the increase in value associated with the development. *See e.g., ANALYZING LAND READJUSTMENT: ECONOMICS, LAW, AND COLLECTIVE ACTION* (Yu-Hung Hong & Barrie Needham, eds., 2007); Daphna Lewinsohn-Zamir, *Can’t Buy Me Love: Monetary versus In-Kind Remedies*, 2013 U. ILL. L. REV. 151, 188; Frank Schnidman, *Land Assembly by Assembling People*, SP006 ALI-ABA 351 (2009);

these examples, an owner may primarily object to the initial deprivation, for which she does not feel the in-kind payment adequately compensates, rather than to the new grant of ownership. Nonetheless, forced compensation in kind via ownership may be objectionable in its own right, if only for the costs involved in liquidating or otherwise disposing of the interest.

Contractual or statutory provisions may require a party to buy a product (or buy it back) if certain conditions occur.<sup>24</sup> Recent examples include “put-backs” of bad housing loans,<sup>25</sup> and efforts to make mortgagees foreclose on properties that have been vacated by defaulting borrowers.<sup>26</sup> Consider also provisions that turn library book borrowers or video renters into owners (with payment obligations) if they fail to return an item for a specified period of time, and policies or laws that allow retail products to be returned after their purchase, effectively forcing their repurchase.<sup>27</sup>

*Unrebuffed and Unrebuffable Transfers.* Some unwanted acquisitions arise through transfers from other parties that were not rebuffed in time, or perhaps could not have been successfully rebuffed at all. Gifts, bequests, and inheritances all require acceptance by the donee. Nonetheless, as long as the property is valuable, acceptance may be readily inferred.<sup>28</sup> Because disclaiming ownership will often come at some positive cost, unrebuffed transfers can produce unwanted ownership. Factual disputes surrounding acceptance may erupt if ownership turns out to be a losing proposition, as where the owner is liable for significant environmental cleanup costs.<sup>29</sup>

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George W. Liebmann, *Land Readjustment for America: A Proposal for a Statute*, 32 URB. L. 1 (2000).

<sup>24</sup> These put options may be explicit or they may be embedded in contractual or legal arrangements. On embedded options, see, for example AYRES, *supra* note 5; Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 COLUM L. REV. 1428 (2004); George S. Geis, *An Embedded Options Theory of Indefinite Contracts*, 90 MINN. L. REV. 1664, 1686 n.114 (2006).

<sup>25</sup> See, e.g., Scott Suttell, *Mortgage Giants Fannie Mae, Freddie Mac Battle Banks on Who Gets Stuck with Bad Housing Loans*, CRAIN’S CLEVELAND BUSINESS, blog entry of Oct. 4, 2012, 2:00 pm, <http://www.crainscleveland.com/article/20121004/BLOGS03/121009895>; [Nick Timiraos, *Burdened by Bad Loans, Banks Are Slow to Lend Now*, WSJ., Oct. 4, 2012].

<sup>26</sup> Mortgages in non-recourse jurisdictions have sometimes been viewed as granting a put option to sell one’s home back to the mortgagee at the price of the outstanding loan balance. See, e.g., Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics of Subprime Lending*, 80 U. COLO. L. REV. 1, 26–27 (2009). The characterization is imperfect, however, to the extent that mortgagees can refuse to foreclose. See *infra* note 23. Recent efforts to force foreclosure would transform what is now a call option for the mortgagee into a (true) put option held by the mortgagor.

<sup>27</sup> This is a common feature in retail sales; many refund provisions effectively grant the buyer a put option. Hyundai offered an interesting version of this option from early 2009 to early 2011: car buyers who lost their jobs within one year of buying a Hyundai could sell it back, and Hyundai would cover any difference between the outstanding loan balance on the car and the car’s trade-in value. See Peter Valdes-Dapena, *Hyundai Won’t Buy Your Car Back Anymore*, CNNMoney, Mar. 30, 2011.

<sup>28</sup> See, e.g., Gruen v. Gruen, 496 N.E.2d 869, 874–75 (N.Y. 1986) (“Acceptance by the donee is essential to the validity of an inter vivos gift, but when a gift is of value to the donee, as it is here, the law will presume an acceptance on his part.”).

<sup>29</sup> For example, acceptance was disputed in a case involving a dam site that turned out to require \$40,000 in repairs mandated by the New York State Department of Environmental Conservation. Janian v. Barnes, 284 A.D.2d 717 (N.Y. 2001) (finding that the defendant had not expressly rejected a quitclaim deed and was therefore the sole owner of the dam, barring some other defense to the transfer).

Chattel property that is abandoned on one's land by another party without permission presents a kind of transfer that may be especially hard to rebuff.<sup>30</sup> Even though the initial dumping constitutes a trespass, once the goods (or bads) are in place, they become the problem of the owner of the premises. The theoretical ability to bring an action against the party who abandoned the chattels is unlikely to translate into a meaningful practical opportunity to force the removal of the goods. Self-help may be employed to eject the offending item but only to the extent that one can do so without trespassing on the property of someone else. Self-help may also be used to keep such offending objects away in the first place (through the use of high fences, posted guards, and so on) but at some positive cost.

*Natural Occurrences.* Natural occurrences can also produce ownership relationships without any input on the part of the owner. The principle of accession operates in a number of contexts to assign new interests to holders of related interests.<sup>31</sup> Thus, under the doctrine of *ratione soli*, wild animals killed or captured on the land of the owner become the landowner's property.<sup>32</sup> Accretion can deliver new increments of real estate to riparian owners.<sup>33</sup> And the doctrine of increase gives ownership of newborn animals to the owner of the animal's mother.<sup>34</sup> These unsought acquisitions may often be welcome, but they could easily be aversive for particular owners.

The potential burdens associated with such rules push questions about the termination of ownership to the forefront. In a 1909 Georgia case, for example, a court of appeals alluded to the law of increase in concluding that humane destruction of a "worthless" dog must be permitted:

If it were the law that a person might not kill his own dog, the ownership of one of these animals, especially in case it were a bitch, would entail a considerable burden; for one who found himself possessed of a worthless cur bitch would be obliged to care for and support not only her, but also the 'heirs of her body' and all her 'lineal descendants,' which he could not give away, even to the third and the fourth, yes even to the thirty-third and thirty-fourth, generation; for

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<sup>30</sup> A related situation involves the purchase of real estate that contains unwanted chattel property. See text accompanying notes 60-61 *infra*.

<sup>31</sup> See generally Merrill *supra* note 17.

<sup>32</sup> As Merrill explains, *ratione soli* is a competing principle to first possession, and was historically more dominant in England than in the United States. See Merrill, *supra* note 17, at 470. The difference matters only to the extent that private unenclosed lands are open to hunters, since exclusion rights would ensure that only the landowner (or those granted permission by her) could capture or kill animals on the land. *Id.* Moreover, it would seem that even a first possession rule would permit a hunter to abandon a captured or killed animal, making it the property of the landowner.

<sup>33</sup> See *id.* at 465-66.

<sup>34</sup> *Id.* at 460.

under the statute cruelty may consist in neglect as well as in some overt act.<sup>35</sup>

## 2. Unwanted Retention

Owners may find themselves holding or using property beyond the point where it generates positive returns, and even after it begins to impose a burden.

*Limits on Terminating Possession.* Recent scholarship has explored the limits on owners' ability to unilaterally end their possessory relationship with property through abandonment or destruction.<sup>36</sup> Restrictions on alienability can also make getting rid of property more costly or difficult,<sup>37</sup> as can features of the property itself that render it less marketable.<sup>38</sup> These limits are important to the category of unwanted ownership in two ways. First, even ownership that is initially fully voluntary can become aversive over time, making blocked channels for ending the relationship significant on their own in generating unwanted ownership. Second, the categories of unwanted acquisition discussed above would have little bite were it not for blockades to disposing of property cheaply thereafter.

The general common law rule that fee interests in real estate cannot be abandoned has significant implications, as the recent housing crisis has shown. Despite some efforts to force lenders to foreclose when mortgagors vacate the premises and cease paying, defaulting mortgagors may be forced to retain ownership and the obligations that follow from it—including liability for homeowner association dues.<sup>39</sup> A sale of the property is often blocked by the fact that the mortgage balance far exceeds the likely sales price. The inability of the homeowner to come up with the difference locks her into ownership, unless the lender either agrees to a short sale or

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<sup>35</sup> Miller v. State, 63 S.E. 571, 573 (Ga. App. 1909).

<sup>36</sup> Strahilevitz, *supra* note 6; Peñalver, *supra* note 6; Strahilevitz, *supra* note 7; Lior Jacob Strahilevitz, *Unilateral Relinquishment of Property*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 125 (Kenneth Ayotte & Henry E. Smith, eds., 2011); *see also* J.E. PENNER, THE IDEA OF PROPERTY IN LAW 79-80 (1997).

<sup>37</sup> *See, e.g.*, Rose-Ackerman, *supra* note 8.

<sup>38</sup> *See, e.g.*, Fennell, *supra* note 8, at 1427-28 & n. 118 (distinguishing legal restrictions on alienability from marketability constraints and discussing related literature). Ownership that is hard to end due to lack of marketability or other non-legal barriers is sometimes described as “forced.” *See, e.g.*, Bernard Benjamin Hoffman, Jr., *Forced Home Ownership* (dissertation, Syracuse, 1967) (describing the situation of homeowners who wish to leave their present home but are unable to do so due to various factors).

<sup>39</sup> Mhari Saito, *Banks Refusing to Take Back Foreclosed Properties*, NPR, Mar. 3, 2009 (discussing the possibility of legislation “that would force lenders to completely follow through with foreclosure or forgive the homeowner’s debt”); John Gittelsohn, *Homeowner Associations in Need of Cash Sue to Force Foreclosures*, Bloomberg.com, Aug. 23, 2011, <http://www.bloomberg.com/news/2011-08-24/homeowner-associations-in-need-of-cash-sue-lenders-to-force-foreclosures.html> (discussing “mortgage terminator” lawsuits brought by homeowner associations against homeowners and lenders to collect unpaid association dues). Homeowner association dues were at issue in *Pocono Springs Civic Ass’n v. MacKenzie*, 667 A.2d 233 (Pa. Super. Ct. 1995), a leading case holding that there is no right to abandon fee interests in real property.

forecloses on the property—and it may legally choose to do neither.<sup>40</sup>

The ability to abandon chattel property is often also severely constrained. Specific provisions restrict the ability to abandon certain kinds of chattel property, such as automobiles<sup>41</sup> and animals.<sup>42</sup> More broadly, there may be few legal options to discard chattels on the property of others.<sup>43</sup> The simplest examples are bans on littering. Although these prohibitions are usually enforced with fines rather than by forcing the owner to continue in possession, an interesting example of the latter approach can be found in one Spanish town’s approach to pet waste: mailing dog feces back to the errant owners.<sup>44</sup>

*Limits on Terminating Use.* Closely related to the unwanted retention of property is the forced continuation of the property’s current use. For example, rent control laws may effectively require that the property continue in rental use, especially if coupled with other limitations that preclude repossessing the property for personal use, converting it to any other use, or destroying it.<sup>45</sup> Historic preservation ordinances prohibiting the destruction of improvements on property present a similar scenario.<sup>46</sup> Here, keeping the underlying parcel requires keeping the structure as well. While the entire property may be sold, the requirement that the use remain unchanged and that the new owner engage in upkeep of the property limits its marketability.

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<sup>40</sup> See, e.g., *In re Cormier*, 434 B.R. 222 (Bankr. D. Mass. 2010) (finding “no authority under Massachusetts law or the Bankruptcy Code to compel American [the mortgagee] to take immediate title to or possession of the Property”). Land banks offer a possible way out of the conundrum by offering lenders a low-cost way to dispose of the property, but may carry some drawbacks as well. See GAO Report to the Chairman, Subcomm. on Econ. Policy, Comm. on Banking, Housing, and Urban Affairs, U.S. Senate, *Mortgage Foreclosures: Additional Mortgage Servicer Actions Could Help Reduce the Frequency and Impact of Abandoned Foreclosures* (Nov. 2010), <http://www.gao.gov/new.items/d1193.pdf> (examining the incidence of abandoned foreclosures and assessing possible solutions, including land banks).

<sup>41</sup> See, e.g., Conn. Code § 14-150 (making it illegal to leave a motor vehicle on the highway or on another person’s property for more than 24 hours).

<sup>42</sup> Animal protection laws vary considerably from jurisdiction to jurisdiction. For one compilation, see Animal Legal Defense Fund, *Animal Protection Laws of the United States and Canada*, <http://aldf.org/resources/advocating-for-animals/animal-protection-laws-of-the-united-states-of-america-and-canada/>.

<sup>43</sup> The fact that land cannot be legally abandoned means that the land of others must be the site of a successful abandonment—yet the land of another cannot be legally used for this purpose either without their implicit or explicit consent. See Peñalver, *supra* note 6, at 203-07.

<sup>44</sup> Suzanne Daley, *Special Delivery, of Sorts, for Wayward Dog Owners*, N.Y. TIMES, Aug. 6, 2013.

<sup>45</sup> This is the situation that was described in the petition for certiorari in *Harmon v. Kimmel*, a case that involved the application of New York’s rent stabilization laws to properties that were zoned only for residential use, that were landmarked and hence could not be destroyed, and that could not be reclaimed for family use unless a suitable alternative rental was provided to the tenants. Cert. Petition at 32-35. The Second Circuit rejected the Harmons’ claim that the laws worked a taking of their property, and the Supreme Court denied certiorari. See *Harmon v. Markus*, 412 Fed.Appx. 420 (2d Cir. 2011) cert. denied by *Harmon v. Kimmel*, 132 S. Ct. 1991 (2012).

<sup>46</sup> See *Maher v. City of New Orleans*, 516 F.2d 1051 (5<sup>th</sup> Cir. 1975) cert. denied 426 U.S. 905 (1976) (prohibiting the destruction of a cottage adjacent to the landowner’s home in the historic French quarter, pursuant to an architectural control ordinance designed to preserve the “tout ensemble” of the quarter); see also Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 507-08 (1981) (discussing the *Maher* case).

Land use exactions and in “in lieu of” fees may similarly pressure the continuation of existing uses. The California case of *Ehrlich v. City of Culver City* offers an interesting example.<sup>47</sup> There, the landowner had closed its unprofitable tennis club after a string of financial losses and sought approval for a new use. The City conditioned approval on (among other things) the owner mitigating the loss of recreational opportunities in the community by constructing four new municipal tennis courts or paying a \$280,000 fee.<sup>48</sup> Although the court remanded for consideration of whether the fee was proportionate under the *Dolan* standard, it indicated that the withdrawal of recreational uses could impose public costs for which *some* impact fee might be appropriate.<sup>49</sup>

“Use it or lose it” requirements similarly constrain owners by mandating the active exercise of certain prerogatives of ownership.<sup>50</sup> These requirements can be understood as limiting the (temporary) disposition of property<sup>51</sup> and may thereby produce a type of unwanted ownership. Adverse possession imposes a similar, if weaker, requirement that ownership be accompanied by acts characteristic of ownership (use or monitoring), if one does not wish to risk dispossession.<sup>52</sup> Here it is worth flagging an important conceptual point that I will revisit below: once we broaden the understanding of aversive ownership to encompass unwanted *aspects* of ownership or unwanted duties attending to ownership, it becomes difficult to bound the principle or to distinguish it from ownership more generally.

### B. Reasons for Aversion

Why might parties wish to avoid ownership? There are several possibilities. First, ownership might be unwanted because it comes with a

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<sup>47</sup> *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996).

<sup>48</sup> *Id.* at 434-35

<sup>49</sup> *Id.* at 446 (“In short, it is well accepted in both the case and statutory law that the discontinuance of a private land use can have a significant impact justifying a monetary exaction to alleviate it.”); *see also id.* at 448-50 (discussing the standard of “rough proportionality” established by the Supreme Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1993), and remanding the case for further consideration under it).

<sup>50</sup> *See, e.g.*, Daphna Lewinsohn-Zamir, *More Is Not Always Better than Less: An Exploration in Property Law*, 92 MINN. L. REV. 634, 650–60, 681–83 (2008) (discussing “use or lose” provisions). Weaker penalties or subsidies might also be designed to pressure property use. Recent examples include bills introduced by Philadelphia City Council President Darrell L. Clarke to address neglected properties. *See* Troy Graham, *Clarke Plans Bill on Vacant Properties*, PHILA. INQ., June 8, 2013 (describing a bill that would impose a “non-utilization tax” of “10 percent of a property’s assessed value after it had been vacant for more than a year,” with increased taxes kicking in for additional years of vacancy); Jan Ransom, *Council Bills Aim to Make Vacant, Tax-Delinquent Properties Profitable*, Philly.com, Mar. 8, 2013 (describing a mortgage-forgiveness bill for residents below a certain income level “who build housing [and] live on the property for five years”).

<sup>51</sup> *See* PENNER, *supra* note 36, at 79 (“[I]f we regard the idea that a right to exclusive use permits us to decide never to use an object of property again, then it must encompass the lesser decision to forego using it for a day or a month or a year. Such a decision is as much a disposition of the property as is its total abandonment.”).

<sup>52</sup> *See, e.g.*, Thomas W. Merrill, *Property Rules, Liability Rules and Adverse Possession*, 79 NW. U. L. REV. 1122, 1130 (1985).

*payment obligation* that exceeds what the property is worth to the owner. Often, the owned item would be desirable if it could be obtained for free, but not if it must be paid for at the specified rate. This is usually the case when a put option is exercised to force a sale. The circumstances that cause the option to be “in the money” for the option holder are typically ones that also make the forced purchase a bad deal for the party against whom the option is exercised. What is aversive is the price, not the good. Similarly, many remedial applications of forced ownership—such as being required to pay for land upon which one has innocently encroached—would not be aversive (nor remedial) if the transfer were completed for free.

Second, ownership might be unwanted because it comes with *liability exposure*. Expected liability might outstrip the expected benefits that will flow from ownership, or exposure might simply present an unacceptable level of risk to the owner (even though ownership would on the whole present a positive expected value).<sup>53</sup> It is most natural to think of this exposure in terms of liability to third parties—whether governmental entities who impose taxes or environmental clean-up obligations, collectives who demand residential association fees, or individuals who suffer harms while on one’s premises. But ownership may also expose the owner herself to uncompensated harms.<sup>54</sup> These harms may range from small, certain, and chronic (the abiding ugliness of an unwanted gift,<sup>55</sup> the constant upkeep requirements of a suboptimally large lawn) to large, uncertain, and acute (the chance of fatal exposure to dangerous property conditions).

Third, ownership might be unwanted because it will require *costly transfer or disposal efforts* that exceed any value that the owner can realize as a result.<sup>56</sup> Where practical barriers to transfer or disposal exist, legal limits need not be present to make ownership aversive if the property itself is unwanted or expected to become so. Some motivation must still be posited for the aversion to the property itself, however, to explain the desire to transfer or dispose of it. Often the notion of liability exposure, broadly construed, will provide the answer. Ownership carries an opportunity cost, demanding time, space, attention, or effort that the owner might prefer to use in another way. In other cases, a payment obligation associated with the forced purchase generates pressure to liquidate, either because that

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<sup>53</sup> The latter situation will be most likely where robust insurance markets do not exist, whether for adverse selection reasons or otherwise, or (what amounts to the same thing) where part of the risk takes a form that cannot be compensated with money (such as the guilt one would feel if a houseguest suffered an injury on one’s property).

<sup>54</sup> See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 167 n.26 (1970) (using the term “liability” broadly to capture impacts that are left to fall on victims of accidents).

<sup>55</sup> See Strahilevitz, *supra* note 6, at 366 (describing “tyrannical heirlooms”).

<sup>56</sup> Even where the owner expects to realize positive value from the disposition of the property, the ownership may still be unwanted relative to a monetary award to which one might otherwise be entitled and which one might prefer. Here, the cost of disposal or transfer represents the cost of transforming the less preferred in-kind item into the preferred currency of cash.

obligation has caused a financial shortfall, or because the owner does not want to bear the investment risk associated with holding onto the property.

Finally, ownership might be aversive for reasons relating to *autonomy or personhood*. The things that one owns are in some sense an extension of the self and constitutive of one's identity.<sup>57</sup> Just as having one's personally significant property wrested away can interfere with self-definition, so too can having unwanted things thrust upon one.<sup>58</sup> Liability exposure is one reason that people might not wish to be personally associated with things. But the objection to ownership may go deeper, given the potential for people to identify with the things they own and hence with the harms that they inflict.<sup>59</sup> Property holdings can also clash with one's sense of self. Consider, for example, a property owner in the American South who discovers upon clearing her rural tract that it contains an abandoned bus from the mid-20th century marked with segregated seating instructions.<sup>60</sup> This difficult-to-remove bus may become a source of shame to the landowner, who wants no association with its racist message.<sup>61</sup>

### C. Taking Stock

This brief tour of existing forms of unwanted ownership has established that the phenomenon exists: sometimes people do not want the things they own. Their reasons may be idiosyncratic or personal and will not necessarily track the asset's net present value. The discussion above has also established that the law not only tolerates the existence of unwanted ownership, but also actively produces it through a variety of doctrines. However, the pattern of examples suggests that certain features tend to accompany unwanted ownership as it exists on the ground. Taking note of these features will help to develop the basis and limits of forced ownership.

First, ownership is rarely forced in a full and permanent sense, insofar

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<sup>57</sup> See generally Meir Dan-Cohen, *The Value of Ownership*, 9 J. POLIT. PHIL. 404 (2001) (examining connections between ownership and identity).

<sup>58</sup> See, e.g., PENNER, *supra* note 36, at 79 ("One ought not to be saddled with a relationship to a thing that one does not want . . ."); Bell & Parchomovsky, *supra* note 9, at 602 (noting the interference with autonomy inherent in a forced purchase).

<sup>59</sup> See Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 979-81 (1992) (explore the relationship between property and the self using an example in which one's vase blows out the window through no fault of one's own and falls on a passerby).

<sup>60</sup> See Jodi A. Barnes & Carl Steen, *Archaeology and Heritage of the Gullah People: A Call to Action*, 1 J. AFRICAN DIASPORA ARCHAEOLOGY & HERITAGE 167, 201 fig. 11 (2012) (photograph showing a segregated seating notice inside a bus abandoned on rural property near Edgefield, South Carolina).

<sup>61</sup> The effects of repugnant things may linger even after they are physically removed. A powerful example is related in Paul Auster's memoir. He describes moving into a house and discovering some boxes of books that had been left behind by the previous owners. To his disgust, he finds that the collection includes pro-Nazi tracts and a volume defending anti-Semitism. He hauls the books to the town dump, but their taint remains, ultimately forcing him to move out. As he explains, addressing his former self: "It wasn't possible to live in a house with such books in it . . . but even after you had got rid of the books, it still wasn't possible to live there. You tried, but it simply wasn't possible." PAUL AUSTER, *A WINTER'S JOURNAL* (2012).



as it is usually possible to avoid it by incurring some cost or paying some penalty. Even if the law purports to force ownership without any escape hatch, compelled possession is more difficult and unusual to enforce injunctively than compelled nonpossession. This asymmetry makes it likely that only financial responsibility would follow from shirking the duties of ownership.<sup>62</sup> Ownership avoidance opportunities, whether de jure or de facto, are significant. They may help to mitigate the costs to unwilling owners of unwanted ownership, but they may also reduce the benefits that society can realize through such (attempted) compulsion.

Second, unwanted ownership typically follows some earlier, identifiable choice (often, the choice to enter into some *desired* ownership relationship). This makes it possible to recast unwanted ownership as a *wanted* ownership bundle that merely contains some aversive elements—as ownership generally does. Limits on abandonment offer a clear example. By becoming an owner of real property in the first instance, one has effectively signed up to remain an owner until one can find someone else to accept the job; ownership today is bundled with ownership tomorrow. Ownership that begins involuntarily can also be characterized as a bundled choice, insofar as the ownership obligation is tied to some earlier decision that might be characterized as voluntary, whether to obtain some other ownership interest (such as the mother of the animal one now owns against one's will), or to engage in some act or omission for which ownership follows remedially or by operation of law.

These observations make it hard to pin down when we are dealing with a case of involuntary ownership, as opposed to just ownership. Consider the law of increase, which makes the offspring of one's female animals one's own. If circumstances exist in which an owner, Owen, would prefer not to be the owner of a newborn calf recently born to his cow Bossy, can we say that the law has forced ownership of the calf on Owen?

On one account, yes: the ownership came unbidden and is (by hypothesis) aversive. On another, though, we might point out that Owen voluntarily acquired Bossy (or perhaps voluntarily acquired Bossy's mother) and that one of the incidents of owning Bossy is owning Bossy's offspring. Owning Bossy's calf may be an aversive thread within the voluntary ownership of Bossy, but is it any different from being forced to buy food for Bossy, or "owning" the results of damage that Bossy causes if she strays onto someone else's property? Is Owen forced to *be* an owner

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<sup>62</sup> The informal "abandonment" of real property by a judgment-proof owner may be understood in this way, even though true abandonment is a legal impossibility. Similar points have been made in critiquing the distinctions among property rules, liability rules, and inalienability rules pioneered in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). See, e.g., Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 VA. L. REV. 837, 852-53 (1997) (observing that these "rules" governing transfers of entitlements may be broken).

(of the calf), or is Owen just forced to accept the responsibilities that naturally go with ownership (of Bossy)?<sup>63</sup>

There is no obvious answer without resort to external principles about what ownership should entail. Property mavens will notice that this inquiry is the flip side of the baseline problem that emerges in regulatory takings contexts: when owner Olive is prohibited from expanding her cottage, which is located on wetlands, has something been “taken” from her, or is the law instead merely recognizing the inherent limits on her title?<sup>64</sup> The questions quickly devolve into normative ones. Because it is always possible to trace the imposition of an unwanted element of ownership to some prior voluntary act, the question becomes one of which coercive linkages or bundlings should be forbidden, permitted, or required.

I will return to this issue of bundling below. For now, an observation suffices: It is no accident that the existing examples of unwanted ownership tend to involve relatively tight causal connections between earlier choices and later ownership obligations. Without a theory of forcings to rely on—one that might include the prospect of compensation—ownership is unlikely to be imposed except in instances where the associated burdens appear normatively justified. These are likely to also be circumstances in which the resulting ownership bundles appear coherent.

## II. WHY FORCE OWNERSHIP?

Why would the law ever force an individual to start or maintain an ownership relationship that the individual herself did not find desirable? At first blush, the question has an obvious answer. If ownership makes a party responsible for making payments, accepting liability, or bearing the costs of disposal or transfer, it might seem self-evident why there would be a social interest in imposing it over the owner’s wishes. But on closer inspection, the choice of mandating *ownership* requires more exploration. I start with some observations about the “ownership strategy” and how its consequences vary from those produced by a system of damage payments. I will then turn to some reasons why society might prefer to impose

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<sup>63</sup> In other words, where are the natural or logical seams in ownership located? Eduardo Peñalver explores one aspect of this question in observing that one can unilaterally abandon the benefit (only) of a servitude on land, since this does not mean walking away from obligations one has taken on. Peñalver, *supra* note 6, at 212. He continues, contrasting the case of fee ownership for which no abandonment is available: “When ownership is conceived of as a social practice permeated by obligation, all property labors under a sort of servitude for the benefit of the communities in which the property is situated. . . . And, just as the owners of servient estates cannot unilaterally walk away from the obligations imposed by servitudes, the unilateral abandonment of property, especially land, is equally problematic.” *Id.* at 213. This analysis suggests that ownership is an undivided and eternal whole that cannot be temporally broken at a point of the owner’s (unilateral) choosing. Rather, the owner must make an appropriate deal with some third party to accept the associated burdens. Yet this still does not determine the content of those burdens—for that, we need to resort to some external normative theory.

<sup>64</sup> *Cf.* Bell & Parchomovsky, *supra* note 9, at 612-14 (discussing baseline issues in charging for givings as well as paying for takings).

ownership.

### A. *The Ownership Strategy*

Henry Smith has helpfully focused attention on the “exclusion strategy” that property rights typically employ.<sup>65</sup> Boundary exclusion creates a protected realm in which an owner can access resources free of outside invasion, and within which she can use self-help to keep her own impacts inside and those of others outside.<sup>66</sup> The exclusion strategy works in tandem with governance strategies that help to protect the outside world from the activities of the property owner, and vice versa.<sup>67</sup> For example, property’s exclusion strategy allows a factory owner to place a ring fence around the plant to protect widgets from being spirited away, while the complementary governance strategy imposes liability for pollution that spills over the property line.<sup>68</sup>

This influential picture of property is useful but incomplete. Ownership also, and crucially, involves a certain allocation of risk.<sup>69</sup> To own something is to bear outcomes—outcomes that may be influenced only probabilistically through one’s own inputs.<sup>70</sup> Exclusion backed by governance constructs and controls the environment in which inputs are made and outcomes are realized and contained. But risk remains. As a result, owning outcomes is a very different thing than being directly assigned *expected* outcomes. The difference usually goes unnoticed because owners self-select into property ownership when they find the risks worth bearing and leave ownership when this is no longer the case. With freely alienable and marketable property that is protected by property rules, an owner can choose at any time whether to select actual outcomes (become or

<sup>65</sup> Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1755-57 (2004).

<sup>66</sup> See, e.g., Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1012 (2004); Lee Anne Fennell, *Property and Half-Torts*, 116 YALE L.J. 1400, 1446 (2007).

<sup>67</sup> See Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002)

<sup>68</sup> More recently, Thomas Merrill has outlined “the property strategy,” which focuses on “the nature of the prerogatives given to those called owners.” Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2066 (2012).

<sup>69</sup> To be an owner is to be the residual claimant on whatever aspects of a resource have not been parceled out to others. This role should be assigned based on the ability to control those sources of variance. See YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* 78 (2d ed. 1997) (“A party is expected to assume more of the variability, that is, become more of a residual claimant as its effect on the mean outcome increases.”). However, given imperfect insurance markets, there will typically remain additional sources of variance that are not under the owner’s control but that nonetheless influence the outcomes she will experience.

<sup>70</sup> Smith recognizes the significance to property ownership of the ability to place and collect on bets. Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 984 (2004); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1729 (2004). But because his discussion assumes that the bets are voluntarily undertaken, it does not address the possibility that ownership could create aversive risk arrangements. Likewise, Merrill’s explication of “the property strategy” recognizes the incentive effects that accompany making the owner the residual claimant, but devotes little space to downside risk exposure. See Merrill, *supra* note 68, at 2092-93 (suggesting that insurance and social safety nets largely address concerns about risk).

remain an owner) or expected outcomes (cash out now).

There are two situations where the difference between expected outcomes and actual outcomes is starkly presented. One is when ownership is terminated involuntarily, as through eminent domain. The other is when ownership is forced. In the former situation, one loses the right to try one's hand at getting actual outcomes that exceed expected outcomes—although one may also be saved from the risk of getting actual outcomes that are lower than expected outcomes.<sup>71</sup> Forced ownership effectuates a different swap: one is made to bear actual outcomes, rather than simply being charged with expected outcomes. It is a different thing to pay damages (even “permanent damages” designed to cover projected future impacts) than it is to be exposed to ongoing liability. The two situations present different risk profiles and incentive structures.

It is easier to grasp what the ownership strategy does by examining its metaphorical application to a different area of law—tort. Arthur Ripstein has developed a concept of “risk ownership” that makes people owners (in some sense) of the risks they create by acting in the world.<sup>72</sup> On this view, actors are properly saddled with (some) actual outcomes that flow from their behavior, not the expected value of the risks they generate. This, after all, is what it means to be an owner.

The bite of this approach can be seen in its application to the problem of “moral luck.”<sup>73</sup> A moral luck conundrum arises when identical inputs (equally inattentive driving, say, or leaving a baby unattended in a bathtub for an equal amount of time) produce dramatically different outcomes (a catastrophic accident in one case, and nothing at all in another).<sup>74</sup> If only voluntary human inputs (and not randomly generated outcomes) carry moral significance, then it becomes difficult to justify the law's (and society's) divergent treatment of actors in such pairs of cases. The negligent driver or caregiver who causes a death is vilified and subjected to severe legal consequences, while her equally culpable doppelgänger who luckily avoids causing harm walks away unscathed.

Viewing the generator of a risk as its “owner” offers a way to understand or at least normalize this apparent anomaly. Letting outcomes

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<sup>71</sup> The statement in the text assumes that expected returns get built into the fair market value standard used to determine the adequacy of compensation.

<sup>72</sup> ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1999)

<sup>73</sup> See RIPSTEIN, *supra* note 72, at 72-74 (1999). For discussion of moral luck, see e.g. Bernard Williams, *Moral Luck*, in *Moral Luck: Philosophical Papers 1973-1980* at 20 (Cambridge U. Press 1981); Thomas Nagel, *Moral Luck*, in *Mortal Questions* 24 (Cambridge U. Press 1979); Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 387 (David G. Owen ed., Oxford U. Press 1995); John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 *CORNELL L. REV.* 1123 (2007).

<sup>74</sup> See Waldron, *supra* note 73, at 387 (giving the example of two momentarily distracted drivers, one of whom collides with a motorcyclist and the other of whom proceeds without incident); Nagel, *supra* note 73, at 30-31 (“If one negligently leaves the bath running with the baby in it, one will realize, as one bounds up the stairs toward the bathroom, that if the baby has drowned one has done something awful, whereas if it has not one has merely been careless.”).

(both catastrophic and benign) fall on risk generators is arguably no more odd than leaving the upside and downside risks of a vegetable garden or a shopping development on an owner, even though external forces will determine whether certain acts of cultivation or neglect translate into success or failure. We do not usually agonize over the moral luck implications of the fact that one crop or mall succeeds while another fails; this is just the gamble that an owner takes.<sup>75</sup>

The ownership concept sits uneasily in the tort framework, however, as Ripstein recognizes.<sup>76</sup> Tort risks are typically not bounded by exclusion rights in the way that property tends to be. This fact deprives actors of control over how risks will play out,<sup>77</sup> and requires that tort law synthesize some conceptual substitutes for physical boundaries; these are embodied in doctrines like proximate cause, foreseeability, and duty—and, in most contexts, the idea of negligence.<sup>78</sup> There is also the vexing problem that potential *benefits* generated when acting in the world are considerably less amenable to ownership under tort law than are potential harms.<sup>79</sup> Tort doctrines may nonetheless be understood as forcing ownership of a subset of risks thought to align with the boundaries of the actor's own benefit catchment system.

Whether or not one finds the idea of risk ownership to be a satisfying normative answer to moral luck concerns or a helpful descriptive tool for understanding how tort law works, the exercise of considering it does cast new light on the meaning of (actual) ownership. Property can be conceptualized as “a leaky bucket of gambles.”<sup>80</sup> It delivers not a basket of *expected* outcomes, but rather the outcomes themselves, over time. The bucket is leaky and prone to sloshing, however: not all inputs are under the

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<sup>75</sup> Tony Honoré similarly casts tort liability as the outcome of a series of gambles in which most people win more than they lose. Tony Honoré, *Responsibility and Luck*, 104 LAW Q. REV. 530, 539-41 (1988).

<sup>76</sup> See RIPSTEIN, *supra* note 72, at 47 (noting the indeterminacy of ownership “in a world of risks”).

<sup>77</sup> Exclusion offers a way of controlling the background against which risks play out and the identity and characteristics of parties exposed to the risks. For example, members of a household without any young children can keep prescription medicines that are not in child-proof containers out on a countertop without thereby creating any significant risk, assuming no children are invited into the household and ordinary exclusion measures are taken to keep neighborhood children from wandering in unattended.

<sup>78</sup> While strict liability offers perhaps the clearest case of such “outcome-responsibility,” see Honoré, *supra* note 75 at 541, we can understand a negligence regime as merely constraining the set of outcomes for which one will be responsible. Strict liability embeds constraints on liability-producing outcomes as well, albeit along lines other than fault, such as causation. Another way to put the point is to say that “owning” *all* the risk one creates would place actors in unmanageable “common ownership” schemes with large sectors of the population. Limits are clearly necessary. Yet because the limits on liability that the law constructs are not the boundaries that an owner selects, risk ownership is an interesting form of forced ownership (to the extent we think of it as ownership at all).

<sup>79</sup> See, e.g., Porat, *supra* note 10. If all of the costs were charged to one's account and none of the benefits, then there would be too little engagement in activities that do not cause expected harm on net. Indeed, one compelling rationale for limiting the scope of liability is to account for the positive spillovers associated with everyday activities. For an interesting discussion that focuses on the “duty” element's role in providing this limitation, see Keith N. Hylton, *Duty in Tort Law: An Economic Approach*, Boston Univ. School of Law, Law and Economics Working Paper No. 06-04 (February 2006) available at [http://ssrn.com/abstract\\_id=887147](http://ssrn.com/abstract_id=887147).

<sup>80</sup> See, e.g., Fennell, *supra* note 66, at 1405, 1442-43.

owner's control, and not all outcomes get fully charged to the owner. Still, ownership endeavors to achieve a reasonably well-aligned pairing of inputs and outcomes.<sup>81</sup>

Ownership thus amounts to a container within which outcomes are one's responsibility, and for which one bears any attendant risks one has not managed to offload to others.<sup>82</sup> Tort doctrines and governance mechanisms may stretch this container to capture more of the normatively relevant outcomes or avoid capturing normatively irrelevant outcomes.<sup>83</sup> But these same objectives might at times be pursued by extending or forcing ownership itself.

### B. Ownership's Edge

Understanding that ownership's basic strategy entails responsibility for outcomes, not inputs, helps explain the motivation for forced ownership. Identifying an owner means something different from imposing a charge: it is an answer to the question "whose problem is this?"<sup>84</sup> There are sensible reasons why the law might choose to answer *that* question, rather than a series of other questions about the nature, extent, probable solution, and expected value of the problem. The sections below offer a set of (somewhat overlapping) rationales for requiring ownership. Taken together, they focus on the potential for outcome responsibility, when channeled into particular patterns or broken into particular bundles, to address information and incentive problems.

#### 1. Economizing on Information

One reason for forcing ownership is to economize on the costs of gathering and using information. Consider trover, which requires a party who has converted the property of another to purchase that property. It might seem at first that a damage award would serve just as well, and

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<sup>81</sup> Achieving a perfect alignment would be unduly costly, but property should endeavor to charge or credit outcomes to the owner when it can do so cost-effectively. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967) ("[P]roperty rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization.").

<sup>82</sup> As the common availability of homeowner's insurance suggests, owners need not personally bear all risks. The offloading of risk can be conceptualized as the division of ownership. See BARZEL, *supra* note 69, at 6-7 (observing that the supplier of service to a photocopier "is a residual claimant from the servicing operation" and hence a partial owner in the economic sense).

<sup>83</sup> Thus, for example, some property-mimicking doctrines in tort require or encourage actors to behave *as if* they are the single owner, even though they actually are not. For example, the doctrine of private necessity allows a party to appropriate the property of another to preserve property or life, but she must pay for the damage thereby caused.

<sup>84</sup> See RIPSTEIN, *supra* note 72, at 47 (observing that after a normative account of the proper distribution of risks has been established, "talk of people owning risks and misfortunes is simply a way of spelling out the idea expressed in such familiar idioms as 'that's not my problem.'").

indeed the remedy of replevin offers just such an alternative.<sup>85</sup> An advantage of forcing ownership, however, is that it sidesteps the need to calculate damages. Payment is based on the fair market value of the undamaged item; the transfer of the thing itself will credit back any remaining value to the new owner.<sup>86</sup> Disagreements about the extent of the damage need not be entertained, nor must the erstwhile owner bear the risk that the condition of the thing will deteriorate further as a result of additional hidden vulnerabilities (such as hairline fractures in a vase).

In certain nuisance contexts, the forced purchase of affected property could operate similarly: the property might be forcibly transferred at its (unpolluted) fair market value, at the election of the current owners.<sup>87</sup> What is notable about this solution from an information cost perspective is that it does not require calculating damages in advance, or returning to court over time as consequences unfold.<sup>88</sup> The new single owner of the consolidated parcel will also be expected to make optimal decisions about how to coordinate conflicting land uses going forward.

In the examples just given, the problem to which ownership was offered as a response was relatively well defined: a damaged object, a polluted parcel. But the information cost savings associated with the ownership strategy become even more important when the nature of the problems coming down the pike are as yet undefined. The unknown and unknowable nature of future problems contributes to what we might identify as a generalized “fear of the unowned” in property theory. Gaps in seisin are not permitted for real property under the common law, and the same rule applied to chattels until the sixteenth century.<sup>89</sup> A likely reason was to make sure there was always someone who was responsible for the property, and to whom liability could attach if necessary.<sup>90</sup>

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<sup>85</sup> See *supra* note 14, and accompanying text.

<sup>86</sup> See Epstein, *supra* note 17, at 850-51 (“Once the chattel is damaged, it is tricky to figure out what damages are needed to make the plaintiff whole, so that the long-established election of remedy allows the plaintiff simply to liquidate his original investment for cash. The remedy of forced purchase requires the defendant, quite simply, to pick up the pieces when the chattel is destroyed and to take the up and down of its value when the chattel is taken.”).

<sup>87</sup> The literature on put options in the nuisance context has generally contemplated not the forced purchase of a possessory interest in the property, but rather the forced purchase of, say, the entitlement to pollute. It has accordingly focused on a different kind of informational advantage: the capacity of the *exercise* of the put option to reveal information about which party values a given entitlement, such as the right to emit pollutants, more highly. See AYRES, *supra* note 5, at 18-27. As a form of liability rule, put options harness information just as call options do, but may be preferred for distributive or other reasons. See *id.* In the approach discussed in the text, the forced purchase of the possessory interest precedes a series of decisions that the new owner of the consolidated tract will make about how and whether to operate the factory; these decisions made by a single owner, rather than the exercise of the put option itself, will reveal which of two or more conflicting land uses is more valuable.

<sup>88</sup> These advantages may, of course, be overwhelmed by other disadvantages of the approach. The goal here is to focus on unique advantages of ownership, not to suggest this is likely to be the all-things-considered best remedial course.

<sup>89</sup> See A.H. Hudson, *Is Divesting Abandonment Possible at Common Law?* 100 L.Q. REV. 110, 118 (1984).

<sup>90</sup> *Id.*

These rationales relate closely to the risk-bearing and incentive aspects of ownership, which will be developed below. But they find an additional footing in information cost savings by economizing on the very task of finding out who is in a good position to bear risk or respond to incentives. The ownership strategy farms out that entire set of problems, leaving the owner to decide what to do about them. By limiting the ways in which people can rid themselves of both chattels and (especially) real property, the law tries to channel property reassignment into forums in which information costs are bearable. In the meantime, owners are kept paired with their properties, which reduces the costs of learning about their status.

To say that it is useful to have *some* owner of record does not, of course, make a case for the current method for picking out who shall serve in that capacity. Gaps in seisin could be prevented equally well if unwanted property could be decisively ceded to, say, an agency of the state.<sup>91</sup> Where property is objectively negative in value, an auction might be held to see who would accept the property at the lowest price.<sup>92</sup> Some of these approaches might be good solutions in certain contexts, as will be discussed below. Yet all of them cost something to implement. Letting ownership lay where it falls (just like letting liability lay where it falls) has the immediate edge of avoiding the need for society to incur costs identifying a better owner.

## 2. Dispersing Obligations

Ensuring that land remains owned does more than satisfy a societal sense of order. It also maintains a platform for imposing obligations.<sup>93</sup> While the social obligations accompanying property ownership have received a great deal of recent attention,<sup>94</sup> unwanted ownership pushes us to consider why these obligations would ever be imposed in kind. Here another aspect of the information cost story becomes relevant: ownership's ability to capitalize on the advantages of dispersed information gathering

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<sup>91</sup> See Strahilevitz, *supra* note 6, at 394-95 (discussing civil law countries that permit relinquishment of real property to the state).

<sup>92</sup> See, e.g., HERBERT INHABER, SLAYING THE NIMBY DRAGON 41-69 (1998) (providing an accessible account of how a reverse Dutch auction can be used to allocate bads); Herbert Inhaber, *Market-Based Solution to the Problem of Nuclear and Toxic Waste Disposal*, 41 J. AIR & WASTE MGT. ASSOC. 808, 812-15 (1991) (proposing such an auction approach for siting waste); Michael O'Hare, "Not on My Block You Don't": Facility Siting and the Strategic Importance of Compensation, 25 Public Policy 407, 438-56 (1977) (analyzing auction approaches to facility siting).

<sup>93</sup> See Peñalver, *supra* note 6, at 213 (suggesting that the affirmative obligations that accompany ownership explain common law limits on abandonment).

<sup>94</sup> Several accounts of this approach were presented in a 2009 symposium devoted to the topic. See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009); Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2009). See also Ezra Rosser, Essay, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. \_ (2013) (describing and critiquing various strands of the progressive property movement).



and monitoring.<sup>95</sup>

Pervasive private land ownership creates a web of location-specific obligors who can be called upon to collectively accomplish large-scale tasks, like clearing a city's entire sidewalk system of snow.<sup>96</sup> Many of these tasks could be collectively provided and the owners charged, but giving each owner responsibilities over their own location offers a flexible and responsive system that can be scaled up or down and to which new duties can be added as needed. Significantly, the system takes advantage of dispersed information and localized monitoring.<sup>97</sup> Similarly, private measures to safeguard property, such as deadbolts and fences, can also reduce the cost of public enforcement (relative to a baseline in which the land is unowned or publicly owned).<sup>98</sup> Again, the ability to engage in flexible, context specific measures based on local information may make private enforcement a useful complement to public enforcement.

The widespread localized monitoring that accompanies dispersed private ownership also generates expectations among third parties that help to sustain social order. Presumptively owned property may be less likely to be vandalized or broken into, on the assumption someone is looking after it.<sup>99</sup> Likewise, the assumption that property is owned, and not up for grabs, can prevent wasteful or dangerous races to establish new ownership.<sup>100</sup> Warding off these acts is socially desirable; they can have harmful spillovers, in addition to potentially dissipating the value of the property.

Of course, the social harms of non-ownership are not necessarily avoided through forced ownership. People can and do vacate and neglect their properties even if the law continues to recognize them as owners. If they are judgment proof, they may shirk their obligations as owners with relative impunity.<sup>101</sup> Similarly, dangerous and wasteful races can be

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<sup>95</sup> Thus, the law may have an interest in picking out owners who will serve these functions. This might be used to explain, for example, the residency and use requirements associated with the Homestead Act. *See* BARZEL, *supra* note 69, at 121-23 (suggesting that homesteading restrictions might be explained as a means "to induce settlers' self-protection against raids where such protection was cheaper than direct protection by the state," and "to ensure that the land would actually be densely occupied").

<sup>96</sup> *See* Larissa M. Katz, *Governing Through Owners*, 160 U. PA. L. REV. 2029, 2051 (2012).

<sup>97</sup> *See id.* at 2041-42, 2050 (giving an example in which a theater assigns each person a seat and charges her with putting out any fires that break out under that seat, thereby producing a "system of fire control for the entire theater").

<sup>98</sup> *Cf.* Abraham Bell & Gideon Parchomovsky, *The Case for Imperfect Enforcement of Property Rights*, 160 U. PA. L. REV. 1927 (2012) (making the related point that the availability of public enforcement may create moral hazard as to private protective measures).

<sup>99</sup> *See* Hudson, *supra* note 89, at 117-18 (discussing vandalism as a possible risk with unowned property).

<sup>100</sup> Costly races to establish ownership are easy to envision with a first-in-time rule of physical possession. *See, e.g.*, Strahilevitz, *supra* note 6, at 374-75; *id.* at 409-11 (suggesting that a different first in time rule, such as granting rights to the first person to post a reply on a message board, would address concerns about "lawless races"). Other ownership protocols may still produce deadweight losses, if less dramatic ones, as multiple people attempt to simultaneously fulfill the requirements for ownership.

<sup>101</sup> Legal responsibility may have some effect even on the judgment proof, insofar as they may hope or expect to not remain so forever. Ownership also confronts owners with the opportunity cost of failing to make valuable use of the property, if such is possible. Even a largely theoretical responsibility for the downsides associated with the property might cause owners to pay attention to the upsides as well.

produced not only by unowned things, but also by things that an owner offers to transfer at a below-market price.<sup>102</sup> However, it is possible that ownership may operate on owners as a kind of moral suasion that causes them to act more responsibly toward the owned item.<sup>103</sup> Moreover, even if individual owners fall down on the job, the assumption that dispersed, concerned monitors are paying attention and looking out for property may create a kind of herd immunity that pushes back disorder.<sup>104</sup> This rationale falls apart, however, if property neglect becomes obvious and widespread—as may occur when involuntary ownership makes up a larger market share of all ownership.

### 3. Consolidating Complements

Sometimes it is more important to get a complementary set of property rights into the *same* hands than it is to get individual components into the highest-valuing hands.<sup>105</sup> Although parties might be expected to voluntarily put together complementary bundles in most cases, sometimes intervention in the form of forced ownership plays a role.

Accession and mistaken improver cases offer some of the simplest and clearest examples. It is obvious that a canvas and the artwork painted on it should end up in the same ownership, just as it is obviously preferable to have an entire building and the land under it end up in the same hands. Because these situations present bilateral monopolies that may make it difficult for the parties involved to negotiate solutions, unilateral transfers are likely to be attractive alternatives. Forcing one party to sell to the other is one alternative, but so too is forcing a party to buy from the other—and the latter might in some cases seem normatively preferable. Indeed, it is not uncommon to offer the encroached-upon party a choice between such

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<sup>102</sup> For example, the below-market pricing common on “Black Friday” has produced trappings and other outbreaks of violence. *See, e.g.*, Robert D. McFadden & Angela Macropoulos, *Wal-Mart Employee Trampled to Death*, N.Y. TIMES, Nov. 28, 2008; James Serna *Black Friday Melee on Video at Georgia Wal-Mart, Trampling in Texas*, L.A. Times, Nov. 23, 2012.

<sup>103</sup> Maintaining the ownership relationship could also influence the owner’s valuation of the thing in question, which could in turn affect behavior regarding it. Although the nature, causes, and indeed existence of an “endowment effect” has been the subject of extensive recent debate, there is an observable real-world gap between the amount someone will pay to acquire something anew and the amount that one would accept to give the thing up—a gap that may have something to do with certain facets of ownership. *See, e.g.*, Owen D. Jones & Sarah F. Brosnan, *Law, Biology, and Property: A New Theory of the Endowment Effect*, 49 WM. & MARY L. REV. 1935, 1941-49 (2008) (reviewing the literature on the endowment effect). Whether and how such an effect would apply where the property is unwanted has not to my knowledge been studied.

<sup>104</sup> For example, a few unlocked cars or apartment doors in a sea of carefully secured properties will be unlikely to attract casual thieves or vandals, because the returns to trying every door are so low. Indeed, a nontrivial number of people subscribe to a “no lock” philosophy. *See* Joyce Wadler, *The No Lock People*, N.Y. TIMES, Jan. 13, 2010 (reporting on the phenomenon of people who regularly choose not to lock the doors to their homes, including some residents of New York and other major cities).

<sup>105</sup> *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON. S77, S92-99 (2011) (emphasizing the need to attend to the content of property packages, given positive transaction costs).

remedies: buy out or be bought out.

Many of the ways that law assigns rights to previously unowned resources can be understood through the lens of complementarity as well. The law of increase and accretion are good examples—property is added to proximate or logically related existing holdings. Although instances could exist in which the interests will be more valuable if split apart, these are rare enough to make it efficient for the property system to make the assignments in the way that it does—even at the cost of sometimes mis-assigning resources.<sup>106</sup> More generally, default property packages, which can be costly to break apart, are arguably designed to reflect complementarities.

Other policies that pressure or encourage ownership can often be explained by complementarities. For example, New Jersey’s bundling of the right to defeat a variance with the purchase of the property for which the variance was sought may be understood as a way to force information about whether complementarities are present.<sup>107</sup> Complementarities that inure to the benefit of the larger community can explain prohibitions on the destruction of historic properties under the *tout ensemble* doctrine.<sup>108</sup>

#### 4. Aligning Incentives

Some unwanted ownership can be understood as buttressing the self-enforcing incentive system that private property is thought to embody. A standard example of (or metaphor for) the incentive alignment potential of property ownership is that of “reaping where one has sown.” Simple agrarian illustrations are popular, because they present a plausible scenario in which the benefits and burdens associated with one’s acts are confined to the physical plot one owns.<sup>109</sup> The farmer in the example owns her own labor and the land; property law assigns her the crops that result from mixing these elements with inputs that she also owns, such as seeds and fertilizer. There are no significant externalities in the story. Whether property operates in this manner, however, depends crucially on the way in which ownership packages are scaled and defined.

If we posit instead a “flyaway” crop that predictably lands a quarter mile southwest of where it is sown, the story does not work so well, unless the property is redefined to include the catchment area, or the crops themselves can somehow be associated with their sower.<sup>110</sup> We cannot get incentive

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<sup>106</sup> Merrill offers a somewhat different explanation, that the law uses the past ownership of a related interest as a proxy for identifying a fit owner. Merrill, *supra* note 17, at 488-91.

<sup>107</sup> See text accompanying note 20, *supra*.

<sup>108</sup> See, e.g., *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975) *cert. denied* 426 U.S. 905 (1976).

<sup>109</sup> These examples thus predominantly feature “small events,” to use Robert Ellickson’s nomenclature. See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1325, 1327-30 (1993).

<sup>110</sup> Cf. *Ghen v. Rich*, 8 F. 159 (D. Mass. 1881) (distinctive harpoon markings allowed whales to be identified with the harpooning whaler, despite the use of bomb lance technology that did not keep the whale physically

alignment by allowing the crop landing zone to be owned on its own, just as we cannot get incentive alignment if the crops stay put on the owned land but sprout noxious traveling spores whose effects are not charged back to the owner. Property boundaries must be set in a way that produces incentive alignment, or must be buttressed with governance structures that stand in for physical boundaries where the latter cannot realistically be employed.<sup>111</sup> Property's social value, in other words, depends on package construction.

Some unwanted ownership, then, may involve elements added to a given ownership package to better align incentives. If small properties enable more cross-boundary externalities, larger properties might be mandated. If short time slices of ownership lead to dealing in a present-focused way with the land, longer time slices may be mandated. If introducing rental housing or recreational opportunities into an area and then withdrawing them will visit terrible harms on the community, then keeping the use in place for a period of time may be mandated (even if it means that fewer owners choose to provide those opportunities initially).

Ownership bundles may also be constructed to moderate access to local public goods or common pool resources. The Tiebout hypothesis is built on the idea that procuring residential services also means purchasing a basket of local public goods and services.<sup>112</sup> The idea of tying ownership obligations to common resource access is built into other observed arrangements as well, including cattle "wintering rules" used in some Swiss villages, which prohibit sending more cows to the grazing lands than one can feed during the winter,<sup>113</sup> and medieval common field arrangements that scatter individually owned farming strips within a seasonal grazing commons.<sup>114</sup>

### III. CHARTING FORCINGS

The discussion to this point has suggested why ownership that is privately unwanted might nonetheless be socially valuable. This Part examines how forcings fit conceptually into the overall scheme of private ownership and state power.

#### A. Takings, Givings, Forcings, Relievings

The government can reassign ownership of a given piece of property in

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tethered to the whaling boat.

<sup>111</sup> See, e.g., Smith, *supra* note 67.

<sup>112</sup> Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

<sup>113</sup> See ELINOR OSTROM, *GOVERNING THE COMMONS* 62 (1990).

<sup>114</sup> See Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131, 146-54 (2000).

four basic ways: by exercising the eminent domain power (takings), by transferring property to willing parties (givings), by compelling ownership (forcings), or by accepting transfers of property from parties who do not wish to own it (relievings).<sup>115</sup> Takings, givings, forcings and relievings could occur alone or in various combinations as governmental entities attempt to optimize land use. Table 1 sets out the domains within which each of these moves would be minimally plausible as a normative and logical matter.<sup>116</sup>

**Table 1: Domains of Government Action**

	<b>Ownership (By a Nonowner) Is Socially Beneficial</b>	<b>Ownership (By Current Owner) Is Socially Costly</b>
<b>Ownership Is Privately Beneficial (Wanted)</b>	<b>I. GIVINGS</b>	<b>II. TAKINGS (and other coercive dispossessions)</b>
<b>Ownership Is Privately Costly (Unwanted)</b>	<b>III. FORCINGS</b>	<b>IV. RELIEVINGS</b>

The distinction between Table 1's top and bottom rows goes to whether ownership in a given instance is beneficial or costly to a given private party. The question is a subjective one: the fact that property imposes a private burden on *A* does not mean that it would impose a private burden on *B*. This subjective stance explains Table 1's equation of private benefits and burdens with wanting or not wanting the property, respectively.<sup>117</sup> While property with a negative expected value would be unwanted by almost everyone (at least in the absence of a compensating transfer payment),

<sup>115</sup> There are of course many additional tools, such as taxes and subsidies, that the government can use to influence the attractiveness of ownership.

<sup>116</sup> By minimally plausible, I do not mean to suggest that the indicated form of government coercion will always or very often be appropriate, much less that it will always or very often be observed. Rather, these are sets of necessary conditions, which may or may not be sufficient in a given instance to justify the use of government power. It is also obviously possible for the government to engage in the acts named in the chart when the conditions are *not* met – as where eminent domain inefficiently moves property to a lower-valuing user. The point of the chart is not to assert that government always or only engages in these acts when the stated conditions are met, but rather to suggest that these conditions would form a minimum predicate for an appropriate exercise of the power.

<sup>117</sup> I set aside the possibility that people want property that will harm their own subjectively perceived interests or want to be rid of property that will further their own subjectively perceived interests.

property need not have a negative expected value to be unwanted by particular parties; there may be autonomy or personhood issues at stake, or simple risk aversion.

The distinction between Table 1's left and right columns goes to whether ownership by the specified party is socially beneficial or socially costly. Because the table focuses on conditions that might cause the government to *change* the assignment of ownership, the left column involves socially beneficial ownership by someone who is currently not an owner, while the right column involves socially costly ownership by someone who is the current owner. Much turns on the word "ownership." If we assume that the government has free rein to make and collect transfer payments to address distributive or other justice concerns, the only reason to employ coercion to change a property's ownership would be if *ownership itself* in a given pair of hands conferred social benefits or imposed social costs above and beyond what could be conveyed or collected through an expected-value equivalent transfer payment.<sup>118</sup>

The most familiar manifestation of government coercion is found in Cell II: takings and other coercive dispossessions.<sup>119</sup> Takings become plausible when ownership (by the current owner) has become publicly costly<sup>120</sup> yet remains privately beneficial to, and hence wanted by, that owner. If the first condition were not met, the ownership change produced by the taking would lack normative justification, and if the second condition were not met, the transfer would not be coercive.

Consider next Cell I, in which ownership by a given nonowner is both socially beneficial and privately beneficial for that party. The government may confer ownership on the party—a giving.<sup>121</sup> Thus, property condemned through eminent domain may be reconveyed to a private party. Notably, givings are not coercive insofar as the ownership interests they confer are either actively pursued—as is typically the case in the eminent domain context—or passively welcomed. The collection of an associated payment

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<sup>118</sup> The ability of the government to make and collect transfer payments also carries implications for the stability of the rows, as discussed below. See *infra* Part III.D.

<sup>119</sup> "Takings" is a doctrinal term of art that builds in a payment obligation. Because some government actions that dispossess owners coercively do not require compensation (consider, for example, civil forfeitures), the cell's description must be broadened beyond those actions that would count as takings. The term "givings" has not been imbued with a parallel collection requirement and so can encompass both collectable and non-collectable transfers. See Bell & Parchomovsky, *supra* note 9, at 590-604 (distinguishing chargeable from nonchargeable givings); see also *id.* at 549, n.2 (suggesting some ambiguity on this point, and the possibility that nonchargeable givings might not need to be referred to as givings). I will use the terms "forcings" and "relievings" in a similarly inclusive manner. The question of transfer payments to accompany these moves will be examined below. See *infra* Part III.C. For ease of exposition, I will use the unadorned term "takings" to refer to all coercive dispossessions, except where it becomes necessary to draw a distinction between compensated and uncompensated dispossessions.

<sup>120</sup> Ownership might be publicly costly because of direct effects (nuisance, blight) or because of opportunity costs (because it blocks ownership by a higher valuing user).

<sup>121</sup> My use of the term "giving" here corresponds to Bell and Parchomovsky's category of "physical givings." See Bell & Parchomovsky, *supra* note 9, at 564, 567-69.

for a giving may be coercive, however—a point to which I will return below.<sup>122</sup>

The bottom row of Table 1 contains exercises of governmental power with respect to property interests that impose net private burdens. Cell III represents the convergence of privately burdensome but publicly beneficial ownership—circumstances in which forcings might become plausible.<sup>123</sup>

Recognizing forcings suggests a fourth category, here dubbed “relievings.” Relievings lift the obligations of ownership upon approval of the erstwhile owner and place them upon a new owner (who might be the government). This approach becomes plausible when ownership by a current owner is both socially costly and privately burdensome. The relationship between forcings and relievings bears examination. Forcings make relievings less costly by opening up the possibility of compelled transfers to private parties. Conversely, the failure to offer a relieving mechanism will, at least under certain conditions, produce a form of forced ownership by compelling retention.

### *B. Ownership Alignments and Misalignments*

Table I offers insight into mismatches that might occur between private and social payoffs and between these payoffs and the current ownership assignment. In Cells II and III, current ownership aligns with private payoffs but misaligns with societal payoffs. By contrast, Cells I and IV present situations in which current ownership is misaligned with both social and private payoffs. Mismatches between private and social costs present conditions for potential coercion against the party in question (Cells II and III), while correspondence between private and social costs (Cells I and IV) presents conditions in which the party in question might be the beneficiary of coercive action that the government takes against others.

Of course, ownership is often *aligned* with both social and private payoffs. Table II shows how the domains of government action introduced in Table I fit together with ordinary ownership and nonownership, as well as with some additional types of misalignment.

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<sup>122</sup> My focus here is on possessory ownership interests. The broader literature on givings focuses primarily on “windfall recapture” associated with the conferral of nonpossessory benefits on landowners. When coercively applied, this model edges close to a forcing, but remains distinguishable for reasons discussed below. See *infra* Part IV.A.1.

<sup>123</sup> The focus here is on cases where a current nonowner would be compelled to become an owner, but as we will soon see, there is a shadow form of forcings that involves forced retention by a current owner. It should be noted, however, that forced retentions are heterogeneous than the forced acquisitions under consideration here, insofar as private and public acts and omissions can combine in innumerable ways to make it practically difficult or legally impossible to terminate ownership.

**Table 2: Aligned and Misaligned Ownership**

	Ownership By: - Nonowner - <i>Current Owner</i> Is Socially Beneficial	Ownership By: - Current Owner - <i>Nonowner</i> Is Socially Costly
Ownership Is Privately Beneficial (Wanted)	I. GIVINGS  <i>ORDINARY OWNERSHIP</i>	II. TAKINGS  <i>BLOCKED ACQUISITION</i>
Ownership Is Privately Costly (Unwanted)	III. FORCINGS  <i>FORCED RETENTION</i>	IV. RELIEVINGS  <i>ORDINARY NONOWNERSHIP</i>

Table 2 expands the lefthand column shown in Table 1 to include socially beneficial ownership *by the current owner* as well as by a current nonowner, and expands the righthand column to include socially costly ownership *by a nonowner* as well as by a current owner.

When these states of the world are added, two new misalignment possibilities emerge. The first is found in Cell II, where ownership is desired by a nonowner but is socially costly. Blocked acquisition would respond to this particular misalignment of private and social payoffs. For example, eligibility criteria might be applied to would-be landowners to establish that they have the wherewithal to care for the property and to ensure that they will not be able to shirk in ways that will offload costs on society.

An additional misalignment emerges in Cell III, where a current owner finds ownership privately costly, though it remains socially beneficial. Here, a potential governmental response is forced retention. Alienability restrictions and bans on abandonment of real property offer real-world examples. There is, however, an empirical question about whether the compelled prolongation of ownership actually produces social benefits that would justify the Cell III placement, or whether forced retention instead produces the sorts of social costs that might locate the situation in Cell IV, the proper domain of relievings.<sup>124</sup>

Table 2's expanded set of alternatives also includes two ubiquitous

<sup>124</sup> I discuss below one reason that the Cell III characterization might remain accurate even if forced retention itself inflicts costs on society. See text accompanying note 144, *infra*.



cases of complete alignment between private and social payoffs and ownership assignment. The first, found in Cell I, is ordinary ownership; here, the current owner finds ownership beneficial, and so does society. Cell IV contains the opposite (but equally congenial) situation in which a nonowner views ownership as aversive and so too does society. Together, these cells might suggest that private and social payoffs to ownership are not independent of each other. Thus, we might say that in the ordinary case of ownership, the social benefits largely flow from the very fact that the ownership is deemed privately beneficial. Similarly, in the ordinary case of nonownership, social costs stem from the unwanted status of the property.

These observations might lead us to question whether there is any meaningful content in Cells II and III. Underpinning the presumed correlation between private and social returns to ownership, however, is an implicit assumption that the market system works with reasonable efficiency in assigning ownership to high valuers. The fact that a person values ownership enough to win it under such a system makes out a pretty good (although not airtight) case that her ownership will also be socially beneficial. Similarly, the fact that one does not value ownership enough to win it under these same market conditions suggests that one's ownership is likely to impose social costs—at the very least, the opportunity cost associated with keeping the property out of the hands of a higher valuer.

Why then would misalignments occur between the private and social costs or benefits of ownership? To ask the question is to suggest its answer: externalities. Some property entitlements may attract high bidders who are only willing and able to attain that status because ownership offers opportunities to offload costs on others. Conversely, ownership may fail to attract the most socially valuable voluntary owners if too many of the social benefits produced by ownership take the form of positive externalities the owner cannot capture. Holdout problems that impede the movement of property to a higher valuer represent a special case of externalities. Here, overstated private valuations aimed at garnering more surplus from a transfer can actually keep the property from reaching a higher valuer—a social loss that exceeds the harms suffered by the overstater alone.

### *C. Realignments With and Without Compensation*

It is well understood that takings (as well as uncompensated confiscations and regulations) can address externalities. But how could forced ownership do so? There are two possibilities, though we will soon encounter difficulties, familiar from takings jurisprudence, in telling them apart. The first involves using coerced ownership to internalize normatively relevant impacts. Thus, property boundaries might be drawn or redrawn to

require owners to accept a full package of outcomes or nothing at all. Likewise, certain acts undertaken on or with property may be bundled with their consequences (the break and buy rule).

Alternatively, forced ownership might amount to a mandate that a party undertake or continue an ownership relationship that will produce positive spillovers for (or absorb negative spillovers from) the community. Because this alternative is most likely to be valuable to society where the individual's past choices (including existing property holdings) make her especially well-suited to be the owner of the aversive element, it too may appear to present nothing more than a bundling requirement. Accordingly, it cannot be distinguished from the first case solely on the basis of whether the ownership in question is imposed out of the blue or linked to some earlier action or acquisition.

Rather, the two cases are distinguishable only on normative grounds. Is the law merely squaring things up so that the owner shoulders burdens commensurate with her own operations in the world, or is has it slipped into the owner's domain an extra burden that the owner should not by rights have to bear? In the first case, the forced ownership removes a distortion so that ownership's built-in incentive structure can operate unimpeded. In the second case, ownership is imposed to glean some set of societal benefits that the owner has no duty to provide. This need not mean that the forcing is normatively off-limits. Perhaps the benefits it would provide cannot be acquired at all, or cannot be acquired as cost-effectively, through mere monetary obligations. If the forcing is cost-justified but the *burden* it imposes is not distributively justified, compensation might be used in conjunction with coercion.<sup>125</sup>

The normative bifurcation just described mirrors one familiar from the takings arena. In that context, instead of coercively imposing or augmenting ownership, the government is coercively taking away ownership, or whittling it down.<sup>126</sup> Some incursions into property rights are deemed normatively appropriate without compensation because they address impacts that the owner never had any right to impose. The so-called nuisance exception to the takings clause is the clearest example, but there are other "background principles" that are understood to condition title.<sup>127</sup>

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<sup>125</sup> This assumes that other normative hurdles are cleared, and that it is possible to compensate for the losses in question—which may not always be the case where incursions into autonomy are concerned. See *infra* Part IV.B.

<sup>126</sup> Thus, where forcings can be recast as mandatory bundling, takings can be recast as mandatory unbundling. When property is taken through eminent domain, ownership tomorrow is unbundled from ownership yesterday; the unified fee simple package is coercively split. Lesser incursions into property rights may remove certain prerogatives of ownership or physically commandeer certain pieces of a given parcel.

<sup>127</sup> In the case of regulatory incursions, compensation may be unnecessary because the burden is sufficiently slight or sufficiently reciprocal to count as a taking—in the words of Justice Holmes, it does not go "too far." *Pennsylvania Coal v. Mahan*. Regulatory takings analysis is primarily governed by the Penn Central standard. I will consider below what a Penn Central analogue would look like in the forcings context.

In other cases, however, the individual has a clear normative right to the property interest in question, but her ownership is imposing social costs that make it efficient for the state to end it through a taking. If the constitutional requirement of public use is met, the taking can proceed, but just compensation is required.

Just as governmentally coerced ownership changes can come with or without compensation, so too can unaltered ownership states be accompanied by payments flowing to or from the government. More broadly, payments to and from the government can either *substitute for* or *accompany* governmental actions directed at changing or retaining existing ownership assignments. All of the alternatives shown in Table 2 can thus be broken down into compensated and uncompensated versions, as Table 3 illustrates.

**Table 3: Compensated and Uncompensated Alternatives**

<p><b>I. GIVINGS</b> (zero-price or chargeable)</p> <p><i>ORDINARY OWNERSHIP</i> (with or without windfall recapture)</p>	<p><b>II. TAKINGS</b> (compensated takings or uncompensated incursions)</p> <p><i>BLOCKED ACQUISITION</i> (compensated or not)</p>
<p><b>III. FORCINGS</b> (compensated or not)</p> <p><i>FORCED RETENTION</i> (compensated or not)</p>	<p><b>IV. RELIEVINGS</b> (zero-price or chargeable)</p> <p><i>ORDINARY NONOWNERSHIP</i> (with or without liability for taxes, damages, fees)</p>

As Cell III reflects, both forced acquisition and forced retention can be compensated or not. In Cell II, we find takings. Because “takings” is a constitutional term of art that implies mandatory compensation, takings are always compensated. However, uncompensated incursions are certainly possible, such as shutting down nuisances, regulating property uses, or tearing down a house to stop a fire from spreading.<sup>128</sup> As the bottom half of Cell II indicates, blocked acquisitions might also come with compensation if the blockage is socially valuable but the burden it imposes is not

<sup>128</sup> See, e.g., DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 110-20 (2002) (describing categories of governmental actions that are exempted from takings clause scrutiny)..

normatively justified.<sup>129</sup> Likewise a Cell I possessory “giving” (as following eminent domain) might or might not be “chargeable” to the recipient.<sup>130</sup> And a Cell IV relieving might or might not require payment on the part of the owner who is relieved of ownership.

Consider next the Cell I and IV situations of ordinary ownership and ordinary nonownership. These are instances where private and social costs align with the existing ownership arrangement, and no change in ownership is indicated. These states of the world can nonetheless be accompanied with payments to address distributive imbalances or internalize externalities. In the bottom half of Cell IV, we find ordinary nonownership that can be accompanied (or not) by taxes, fees, damages, and so on. Thus, a remedy for damaging or encroaching on property might be in order for distributive or corrective reasons, but it would not necessarily have to take the form of coercively altering the ownership assignment. Similarly, rather than forcing someone to buy additional buffer land around a polluting factory, damages might instead be assessed while allowing nonownership (of that buffer land) to continue. Likewise, Cell I’s ordinary ownership might be accompanied by various forms of “windfall recapture” designed to keep the owner from unfairly enjoying spillovers from other properties. Thus, it may not be necessary to actually consolidate possessory ownership in those other owners or in the windfall recipient in order to align incentives.

The important point to glean from the entries in Table 3 is that questions about the appropriateness of distributive benefits or burdens can be disaggregated from questions about the social benefits or costs uniquely associated with ownership. Payments or collections can occur in conjunction with or instead of coercive changes in ownership. Thus, forced ownership should never be used merely to impose a deserved burden if the expected value equivalent fee or tax would serve as well. By the same token, forced ownership should not necessarily be taken off the table simply because it would impose an undeserved burden on its own, given the ability to accompany it with compensation.<sup>131</sup>

Because the distributive picture can be separately adjusted through transfer payments, the important question is whether starting, ending, or maintaining *ownership itself* in a particular set of hands produces unique benefits or inflicts unique costs. Yet even if we answer this question in the affirmative, alternatives to outright coercion may still dominate, as the next section explains.

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<sup>129</sup> Real world examples of blocked acquisitions tend to be based on normative premises that would make compensation seem inappropriate. For example, a felon may be kept from purchasing a gun without triggering any compensation requirement. We might wonder, however, whether there might be instances in which disabling people from owning property should come with compensation.

<sup>130</sup> See Bell & Parchomovsky, *supra* note 9, at 590-604.

<sup>131</sup> To be sure, there are many questions about the type and amount of compensation that would be adequate in particular circumstances. See *infra* Part IV.B.3.

### D. Repricing Ownership

The tables to this point have treated the private party's desire for or aversion to ownership as a stable fact. But there are many things that the law can do to influence the attractiveness of ownership relative to nonownership—including (but not limited to) taxing it or subsidizing it. If ownership produces social benefits, it might be encouraged rather than forced, and if it produces social harms, it might be discouraged rather than terminated. Such moves could change unwanted property to wanted (and vice versa) generating shifts between the rows in the tables above and addressing misalignments between private and social payoffs through liability rule solutions.

Moreover, if society properly sets the prices, the fact that a payment (or forgone collection) accompanies a given ownership choice could change the societal assessment of whether that ownership choice generates social benefits or costs.<sup>132</sup> Thus, a repricing of ownership could not only produce societally preferred ownership and nonownership patterns, it could potentially lead to a new understanding of which column a given situation is understood to reside within.

It is useful to distinguish the discussion here from the one in the previous section. The previous discussion established that monetary payments to or from the government can often be used to address externalities directly, without tinkering with ownership. This would be the preferred path if ownership itself did not uniquely confer benefits (or impose costs). The discussion here assumes that ownership *does* uniquely confer benefits (or impose costs), but examines ways to bring about *changes in ownership* without directly imposing those changes by fiat. Thus, there are two distinct ways that coercive reassignments of ownership might be dodged: by using a technology other than ownership to address external impacts, and by using a repricing mechanism rather than outright coercion to induce desired ownership patterns.

Wholesale repricing of ownership can be accomplished either through a system of taxes or subsidies, or by altering other aspects of the ownership package.<sup>133</sup> The sections below consider each in turn.

#### 1. Pigouvian Taxes and Subsidies

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<sup>132</sup> I refer here to the well-known information forcing properties of liability rules. See, e.g., Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 725 (1996).

<sup>133</sup> As discussed in Part IV.A.2 below, more targeted or individualized repricing might also be pursued through auction mechanisms or price schedules that are refined to account for complementarities.

Suppose a nonowner would find ownership privately beneficial, but that ownership relationship will impose social costs. Blocked acquisition would be an alternative, as Cell II indicates. But the discussion above suggests another possibility: Pigouvian taxes might be imposed to change an ownership relationship that is desired because of the cost-offloading opportunities it provides into an appropriately priced, and hence unwanted, ownership relationship. If the tax is set right, and if the net social costs are indeed positive,<sup>134</sup> no acquisition occurs and we shift into Cell IV's realm of ordinary nonownership.

A converse possibility is presented by Cell III, where a nonowner would find ownership aversive, but that ownership relationship would produce social benefits. Just as Pigouvian taxes offer an alternative way to address the Cell II misalignment flagged above, Pigouvian subsidies might be used to transform property that is unwanted by a nonowner into property that is wanted by its (new) owner—a Cell I case of ordinary ownership. In the case of real property, this might mean setting a very low or even negative price. For example, Gary, Indiana has recently begun selling vacant homes for just \$1 to qualifying buyers,<sup>135</sup> and Detroit's mayor has introduced initiatives to provide forgivable loans and renovation funds to owners willing to buy vacant houses.<sup>136</sup>

Similar possibilities exist for the other coercive alternatives shown in tables above. Distributive considerations will vary among contexts, but the fact that society can choose between taxes and subsidies (or combinations thereof)<sup>137</sup> offers a great deal of flexibility.<sup>138</sup> There are some difficulties: judgment proof parties may be unable to meet tax obligations,<sup>139</sup> and governmental bodies suffering from fiscal illusion may be unwilling to pay for benefits. But many problems of misaligned ownership can be addressed in this way.

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<sup>134</sup> The social costs in Tables 1 and 2 are net of any benefits that would be enjoyed by the owner (or anyone else). Thus, it is not necessary to balance the private benefits against the social costs. Often, liability rules are used where the private benefits are unknown, as a way to elicit them and gauge whether they exceed the social costs. See, e.g., Kaplow & Shavell, *supra* note 132, at 725.

<sup>135</sup> Steven Yaccino, *A Chance to Own a Home for \$1 in a City on the Ropes*, N.Y. TIMES, Aug. 14, 2013.

<sup>136</sup> Kamelia Angelova, *Detroit Will PAY You to Take One of These 100 Abandoned Homes*, BUSINESS INSIDER, Feb. 16, 2011, available at <http://www.businessinsider.com/abandoned-houses-detroit-2011-2?op=1>

<sup>137</sup> In some cases the distributive picture is more complicated. Consider a case in which the amount that is required to convince a party to voluntarily part with the property is greater than what seems justified on distributive grounds. The party could be given a tax and subsidy combination that together captures the differential in societal value between giving up and keeping ownership. Thus, for example, fair market value might be offered to a landowner who cedes ownership but some additional increment necessary to make up the owner's reservation price might be taxed for *keeping* ownership. The resulting spread between keeping the property and giving up the property would meet or exceed the party's full reservation price, but it would not all have to be paid out in compensation.

<sup>138</sup> For example, if paying to induce the preferred ownership choice would not be appropriate as a matter of distribution, a tax might instead be applied to the less preferred ownership opportunity.

<sup>139</sup> This is a particular issue in the case of abandonment, but one that might be met through a bonding mechanism. See *infra* Part IV.A.3.

## 2. Adjusting the Ownership Bargain

There are many things that society can do to alter the relative attractiveness of ownership and nonownership beyond attaching taxes or subsidies to these choices. Most notably, the bundling together of different ownership elements can alter the attractiveness of each. Where new or continuing ownership obligations attach to other or earlier ownership choices, one can reject the package by never becoming an owner in the first place.<sup>140</sup> Where ownership obligations attach to non-ownership conduct (such as tortious behavior), rejection of the package may take the form of changes in primary behavior. Thus, for example, people may interact less with the chattels of others if they run the risk of being forced to purchase anything that they damage.<sup>141</sup>

In some cases, these avoidance behaviors may be socially valuable. Indeed, they may be the entire point of the bundling exercise in question. For example, Ian Ayres has suggested that put options could provide valuable deterrence where they are granted to victims upon the invasion of their property interests—though he recognizes a risk of overdeterrence if the strike price is not set appropriately.<sup>142</sup> Similarly, making property interests harder to alienate makes them less attractive to those who would acquire them only to gain bargaining leverage over another party.<sup>143</sup>

In other cases, however, added ownership burdens may produce distortions by effectively taxing the earlier ownership or activity decision—and in a manner that does not serve to align private and social costs. This possibility exists, for example, where ownership obligations generate nonreciprocal social gains or impose uncompensated burdens. Recognizing the ways in which bundling can either pull apart or realign the social and private payoffs of ownership leads to interesting lines of inquiry. If widely dispersed private property ownership generally confers benefits on society,

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<sup>140</sup> Obviously, would-be owners are unlikely to swear off ownership altogether in response to a given aversive bundle; rather, they will attempt to find bundles that have acceptable expected values and risks. See Strahilevitz, *supra* note 6, at 400-02 (suggesting that limits on abandonment may lead to less risk-taking in initial acquisition decisions).

<sup>141</sup> See Epstein, *supra* note 17, at 850. In these cases, it might not seem any “ownership bargain” is being adjusted at all, since the triggering condition is tortious behavior and ownership first appears as a penalty. However, remedies like trover can actually be characterized as bundling ownership interests through something like a doctrine of relation back. Having broken the thing, it is *as if* one acquired it *before* the breakage happened. One is made retroactively responsible in a way that is indistinguishable from having been the thing’s owner at the moment one first laid hands on it. It is this earlier proto-ownership relationship that is repriced as a result of the remedial regime.

<sup>142</sup> See AYRES, *supra* note 5, at 34-36. Of course, complicated protocols for setting the strike price would undo the information cost advantages mentioned earlier.

<sup>143</sup> See, e.g., Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403 (2009) (discussing instances in which downstream inalienability—a way of pressuring continued ownership—is used to discourage initial acquisitions); Ian Ayres & Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U. PA. L. REV. 45 (1999) (examining inalienability as a means to control the strategic wielding of legal rights).

aversive elements in the property package deserve examination to see what they are buying society and what they might be costing society (either in unwanted behavioral changes, or in other aspects of the ownership package that counterbalance their effects).

Consider forced retention. It has been suggested prohibitions on abandonment may generate more socially valuable decisions about entering into and carrying on ownership.<sup>144</sup> The ownership package as a whole might produce social value, then, even if a snapshot during the end stages might suggest otherwise. In other words, the ownership relationship might be described as socially beneficial (and hence properly located in Cell III) because the cost of allowing the owner to end it unilaterally would include forgoing certain ex ante owner-selection benefits that exceed the costs that the unwanted ownership relationship inflicts on society ex post. On the other hand, the inability to end an ownership relationship on one's own initiative may produce harmful selection effects ex ante—selecting not for the willingness to accept costs associated with unwanted retention, but rather for the ability to offload the bulk of those costs on society.

Importantly, there are multiple dimensions along which the attractiveness of ownership can be adjusted. Aversive elements of ownership that do not add social value should receive particular scrutiny. One such element comprises risk factors that an owner has no ability to control.<sup>145</sup> Where the relevant risks are amenable to the owner's control, in whole or in part, responsibility for outcomes can help to align incentives—a social benefit. But responsibility for risks that are not under the owner's control cannot do this. Unless the exposure in question is doing something else, such as adding diversification or hedging against specific other risks that the owner faces,<sup>146</sup> it represents a gamble that the owner may not desire and may be in a poor position to bear. Improving the capacity to slice off and neutralize uncontrollable risks is one way to make the overall ownership bargain more attractive to potential owners at relatively low social cost.

Other aspects of the ownership bundle influence the attractiveness of private property ownership as well. Traditionally, owners have been delegated a large measure of freedom in determining how to use their properties.<sup>147</sup> But as urbanization has led to increasingly strict land use

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<sup>144</sup> See Strahilevitz, *supra* note 6, at 401 (“a regime that prevents individuals from abandoning real property might encourage them to use the property in a more sustainable way”); Peñalver, *supra* note 6, at 214 (“The common law's distrust of abandonment seems less alien and arbitrary if we approach it from the perspective of a community in which things are acquired, not in anticipation of quickly throwing them away, but to be kept and (re)used, or perhaps resold or given away.”).

<sup>145</sup> These risks produce a large proportion of the variance associated with homeownership. See, e.g., Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047 (2008).

<sup>146</sup> For example, home equity risk might be used to hedge the risk associated with a future home purchase in the same market or a correlated market.

<sup>147</sup> See, e.g., Henry E. Smith, *supra* note 65, at 1719, 1728, 1754–55 (discussing the ways in which property



controls, and as zoning has classified uses at finer grains, the ability for owners to freely choose their own agendas for the property has become increasingly constrained.<sup>148</sup> However important and inevitable this development may be, it does alter the value of property to owners.

Ownership also grants a spatial monopoly—an attribute that might seem to grow more valuable as urban densities increase. Owners of fortuitously positioned properties might (or might not) be able to leverage that monopoly position into substantial shares of surplus from land use assemblies and other thin-market transactions.<sup>149</sup> The chance of exploiting such a privileged position may be attractive to risk-seeking or optimistic owners. If eminent domain stands ready to step in, or if other doctrines such as “abuse of property right” limit the degree to which owners can hold out,<sup>150</sup> the potential monopoly power of the owner diminishes accordingly. Whatever one may think about this normatively,<sup>151</sup> it presents the interesting positive question of whether curtailing such sources of upside variance reduce the attractiveness of ownership, at least where downside risks remain the problem of the owner.<sup>152</sup>

To be sure, ownership’s attractions, at least for individual households, often run deeper than the allocation of risks and benefits. Ownership may simply push the right psychological buttons by purporting to grant owners an exclusive domain—even if it cannot really deliver on it. There are cultural factors at work as well, along with advantages that may be largely contingent on particular legal and social features. For example, homeowners in the U.S. tend to enjoy much greater security of tenure than renters. Thus, the relationship between private and social benefits is mutable. Different motivations may also resonate with different sorts of owner—a point that may matter to the extent that small-scale widespread ownership is thought to carry advantages that are different than those that can be achieved through large ownership blocks.

The point is a general one: recalibrating the ownership package offers one way to address or arrest misalignments between private and social payoffs to ownership. And it may at times be the least costly way to achieve that result.

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delegates decisions to owners).

<sup>148</sup> See Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 289-93 (2008) (developing the idea of owners as agenda setters).

<sup>149</sup> The well-known potential of holdouts to prevent successful land assemblies or raise their costs makes it highly speculative to what extent any owner might expect to reap an unusually large surplus.

<sup>150</sup> See, e.g., Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L.J. 1444 (2013).

<sup>151</sup> The degree to which ownership can, should, must, or must not embed the power to hold out for more than one’s true reservation price in an effort to glean surplus from another party is a subject of much debate.

<sup>152</sup> Downside risks may be truncated by lenders’ inability (legal or practical) to hold borrowers responsible for mortgage balances that exceed home values. See, e.g., Zywicki and Adamson, *supra* note 26, at 30.

#### IV. THE USE AND MISUSE OF FORCINGS

A better understanding of the category of forcings can both open up new policy alternatives and challenge existing ones. The analysis above pointedly raised questions about why forced ownership would ever dominate the strategy of repricing ownership, or the simple collection of money from parties who have imposed negative externalities or enjoyed positive ones. Section A considers the scope and limits of these and other alternatives short of compelling full-strength possessory ownership. Sections B and C explore how a doctrine of forcings might be formulated and cabined, focusing on compensated and uncompensated forcings, respectively. Section D briefly explores the domain of relievings.

##### *A. Alternatives to Forced Ownership*

Compulsory ownership occupies a potentially interesting niche in property law, but may be used in ways that are neither necessary nor appropriate. Pulling apart the rationales for forcing ownership reveals that very often an alternative short of full-fledged possessory ownership will be more suitable.<sup>153</sup> In some cases, what is really desired is not ownership itself, but rather a collection mechanism for imposing normatively justified burdens. Even when ownership produces unique benefits, it might be encouraged through pricing mechanisms, including auctions. Finally, stakes in a particular property or enterprise could be mandated without requiring possession, or downside risk alone could be assigned through a bonding mechanism.

##### 1. Collections Distinguished

As the discussion above indicated, the fact that it is normatively appropriate to impose a burden on a particular party does not establish, on its own, that the burden should take the form of an unwanted ownership interest. Thus, externalities may often be addressed through systems of payments and collections. Mundane examples include the imposition of taxes, fees, and damages of various sorts when a party's actions cause impacts that her own property ownership interests do not automatically charge against her account. A look at the less familiar realm of governmental givings helps to further illuminate the distinction between collecting funds and imposing ownership.

Governmental actions can bestow benefits as well as impose

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<sup>153</sup> Although these alternatives may be less intrusive, they would not necessarily eliminate the need to evaluate burdens under the takings clause.

burdens.<sup>154</sup> Sometimes these benefits are actively sought by their recipients; at other times, the government simply enacts a policy or plan that benefits a particular area or a particular group, while burdening others. The givings literature has focused on the challenge of recapturing the windfalls that arise through government action.<sup>155</sup> Central questions involve when and how charges can be imposed for benefits conferred.<sup>156</sup>

Abraham Bell and Gideon Parchomovsky have focused on a number of features that they find relevant to the question of charging for benefits.<sup>157</sup> One of these features is what they term “refusability.”<sup>158</sup> They note that a benefit that is forced on a recipient and then coupled with a charge amounts to a put option—i.e., a forcing. Because they find forcings objectionable and inconsistent with autonomy, they suggest instead that charges only apply after the individual has accepted the benefit, or after she has realized a gain associated with it (as upon sale of a benefited property).<sup>159</sup> Their first alternative, actual acceptance, fits well with the term “giving” insofar as it requires the recipient’s consent (though perhaps it is better understood as “selling” given that payment is demanded in exchange).

Bell and Parchomovsky’s second alternative, the coerced collection of a realized gain, sounds more like a forced purchase. Yet in an important sense, it is not. As suggested above, the ownership strategy is crucially about responsibility for outcomes rather than expected values, and hence involves bearing risk. If the governmentally-installed improvement down the street from a given home is expected to generate \$100K in added value for that home, then truly forcing a sale of those benefits would mean collecting now and letting the homeowner bear the risk that the actual value added will be higher or lower. Under Bell and Parchomovsky’s approach, this risk is not borne by the homeowner. Instead, she only disgorges the benefits that she actually realizes upon sale. This has a financial impact on her, to be sure, but it does not require her to bear the risk of outcome-ownership.

## 2. Repricing (and Its Limits)

Ownership in a private party’s hands may dominate a system of transfer payments if that party is better positioned to bear or influence the variance

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<sup>154</sup> Indeed, unless governmental actions are imposed for no reason, they are necessarily accompanied by benefits that go to other parties. Takings thus imply givings. See Bell & Parchomovsky, *supra* note 9, at 549 (“Like a reflection in a mirror, the massive universe of takings is everywhere accompanied by givings.”)

<sup>155</sup> See generally *id.*; Hagman & Misczynski, *supra* note 9.

<sup>156</sup> See, e.g., Rachele Alterman, *Land Use Regulations and Property Values: The “Windfalls Recapture” Idea*, in THE OXFORD HANDBOOK ON URBAN ECONOMICS AND PLANNING (Nancy Brooks, Kieran Donaghy and Gerrit-Jan Knapp, eds., 2012).

<sup>157</sup> Bell & Parchomovsky, *supra* note 9, at 590-605.

<sup>158</sup> *Id.* at 601-04.

<sup>159</sup> *Id.* at 603-04.

associated with potential outcomes. This does not establish that ownership should be forced, however—it might instead be repriced.<sup>160</sup>

Heterogeneity in the benefits or costs produced by ownership in different places or in the hands of different owners can make pricing challenging, as can nonlinearities in the cumulative effects of ownership patterns. The latter phenomenon can be illustrated well by studies showing that clusters of foreclosures within close proximity of each other have disproportionately large effects on nearby property values.<sup>161</sup> Consequently, the social benefits of addressing foreclosure spillovers through changes in ownership patterns might grow nonlinearly as the number of such foreclosures increases. Similarly, inducing ownership *here* may be more valuable than inducing ownership *there*, or a particular spatial pattern of ownership or nonownership may be especially important to achieve or avoid.

Of course, it is not necessary that a repricing strategy be pursued across-the-board for a particular type of ownership; more tailored possibilities exist. For example, if it is essential that a particular parcels pass into private ownership (or into new private ownership) without fail, then some kind of auction mechanism might be used. The fact that a given parcel might have negative expected value presents no impediment; auctions can easily be used to allocate bads as well as goods. This point is readily illustrated by airline oversales procedures, which typically employ an informal auction mechanism to get sufficient passengers to accept the bad—a bump to a later flight.<sup>162</sup>

Repricing can also be tailored to differentially attract different potential owners. Thus, a subsidy program might be limited to people who are especially well-positioned to take on a certain ownership obligation.<sup>163</sup> An example of such selective repricing is found in “blotting” programs that allow homeowners to cheaply purchase city-owned vacant lots that adjoin their own residential parcels.<sup>164</sup> The program can be understood as an

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<sup>160</sup> See *supra* Part III.D.

<sup>161</sup> See, e.g., Jenny Schuetz, Vicki Been, and Ingrid Gould Ellen, *Neighborhood Effects of Concentrated Mortgage Foreclosures*, 17 J HOUS. ECON 306, 317 (2008); [add new studies].

<sup>162</sup> The approach can be classified as a reverse Dutch auction, with increasingly larger amounts offered until enough takers are found. See INHABER, *supra* note 92, at 44-45.

<sup>163</sup> In some cases, minimum financial requirements might be applied in an effort to ensure that the new owners will be able to adequately discharge their obligations. Yaccino, *supra* note 135 (reporting that Gary, Indiana’s program allowing home purchases for \$1 requires “a minimum income threshold (starting at \$35,250 for one person) and . . . the financial ability to bring the neglected property up to code within six months.”) The Gary program also contains a feature in common with earlier homesteading enactments: owners must live in the property for five years before they receive full ownership rights. See *id.*; *supra* note 95.

<sup>164</sup> The term “blotting,” coined by the Brooklyn planning and design firm Interboro comes from the contraction of “block lot.” See David Lepeska, *Is Blotting the Best Solution for Shrinking Cities?* ATLANTIC CITIES, Nov. 10, 2011; City of Chicago, *Adjacent Neighbors Land Acquisition Program (ANLAP)*, [http://www.cityofchicago.org/city/en/depts/dcd/supp\\_info/adjacent\\_neighborslandacquisitionprogramanlap.html](http://www.cityofchicago.org/city/en/depts/dcd/supp_info/adjacent_neighborslandacquisitionprogramanlap.html) ; Kate Davidson, *Blotting Update: Detroit Wants to Sell You This Lot for \$200*, Michigan Public Radio, *Changing Gears*, Mar. 13, 2012, <http://www.michiganradio.org/post/blotting-update-detroit-wants-sell-you-lot-200> .

attempt to capitalize on complementarities that exist between an owners' current holdings and adjacent ones. The obligations of ownership over the vacant lot are likely to be self-enforcing (the owner lives next door and will personally suffer spillovers from any neglect). As a result, society can glean greater net benefits from the ownership arrangement.

The situations in which repricing is least likely to offer a complete solution mirror the situations that justify eminent domain: ones in which several complementary changes in ownership are necessary, and failure to achieve the full set torpedoes the chance for nearly all of the available social gains. In the takings context, offering a payment to a landowner whose privately beneficial ownership of a chunk of land stands in the way of a valuable highway assembly will not always be enough; holdout problems can interfere with the ordinary processes of buying and selling. Similarly, a nonowner's veto power might stand in the way of a desired pattern of ownership under certain circumstances, some of which will be explored below.<sup>165</sup>

### 3. Bonds and Stakes

Ownership's distinctive social value comes from its capacity to place actual outcomes on owners. Full possessory ownership does this in a particular way, by automatically imposing those costs or conferring those benefits that (literally) come with the territory. It is an especially suitable strategy where it is easier to define and contain the set of relevant outcomes by placing physical borders around a resource than it is to enumerate and separately contract over the relevant outcomes.<sup>166</sup> But, as is well recognized, physical boundaries may operate in both overinclusive and underinclusive ways in channeling relevant outcomes to the accounts of owners. For this reason, physical possession alone is not sufficient to fully align incentives. And, importantly for the present discussion, physical possession is not always necessary to address incentive problems, either.

One facet of this point was made above in observing that taxes, fees, and damages can be used to align incentives. However, these monetary impositions are often based on expected rather than actual outcomes, for reasons that relate to administrability. Yet sometimes it is possible to isolate and track actual outcomes as they unfold over time, and to charge those actual outcomes to a party without making that party a possessory owner. Bonding mechanisms and other required forms of stakeholding can often achieve the beneficial effects of compulsory ownership without actually compelling full possessory ownership.

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<sup>165</sup> See Part IV.B.

<sup>166</sup> This approach corresponds to Smith's "exclusion strategy." See text accompanying notes 65-68, *supra*.

Consider laws that mandate the advance posting of bonds. The basic idea can be illustrated by bottle deposits: the up-front payment for the bottle is designed to cover the social costs of its improper disposal, but that payment can be recovered if the bottle is returned.<sup>167</sup> The risk of an improper disposal is thereby shifted to the bottle's owner, who holds a put option to sell the bottle back in recyclable condition.<sup>168</sup> While the bottle deposit operates in a binary way—if you return the bottle, you get the full deposit back—it is obviously possible to have bonding mechanisms that look to some observable indicia of actual outcomes (water quality or air quality, for example) to determine how much of a given bond will be returned.<sup>169</sup>

Nicolaus Tideman has suggested that this approach could be applied to abandoned land.<sup>170</sup> The fact that it can be costly to restore derelict land to a marketable state can explain common law prohibitions on the abandonment of fee interests. It is also the reason that a positive payment might need to accompany at least some abandonments.<sup>171</sup> But suppose landowners were required to pay an amount up front sufficient to cover these costs—whenever they added structures or other improvements to the land, or engaged in uses that might impact the land's future marketability. Then it would be possible for the state to offer a rebate to those who choose to voluntarily relinquish their land in good condition (e.g., free of dilapidated structures, without latent dangers in the yards and driveways, without environmental hazards requiring remediation).<sup>172</sup> Even if the property had some problems, the associated costs could simply be deducted from the rebate, just as damages to a rental unit are deducted from the security deposit.

Bond-posting shifts risk, along with the burden of proof, to the party posting the bond.<sup>173</sup> In the example just given, the bond could enable a

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<sup>167</sup>The bottle deposit is an intuitive example, but the approach has been generalized. *See, e.g.*, PETER BOHN, DEPOSIT-REFUND SYSTEMS: THEORY AND APPLICATIONS TO ENVIRONMENTAL, CONSERVATION, AND CONSUMER POLICY (1981); Don Fullerton & Ann Wolverton, Two Generalizations of A Deposit-Refund System, NBER Working Paper No. 7505 (2000), available at <http://www.nber.org/papers/w7505>. Robert M. Solow and Edwin S. Mills are credited with laying the intellectual foundations for this approach in independent work. *See* Robert M. Solow, *The Economist's Approach to Pollution and Its Control*, 173 SCIENCE n.s. 498 (Aug. 6, 1971); EDWIN S. MILLS, URBAN ECONOMICS 259-60 (1972).

<sup>168</sup> *See* Robert Costanza & Charles Perrings, *A Flexible Assurance Bonding System for Improved Environmental Management*, 2 ECOLOGICAL ECON. 57, 59 (1990).

<sup>169</sup> The bonding idea has even been extended to social policy objectives, with payouts tied to the achievement of certain social goals or improvement along particular metrics. Ronnie Horesh, *Injecting Incentives Into the Solution of Social Problems: Social Policy Bonds* 20(3) ECON. AFFAIRS (2000); [add cites].

<sup>170</sup> T. Nicolaus Tideman, *Integrating Land-Value Taxation with the Internalization of Spatial Externalities*, 66 LAND ECON. 341, 346 (1990).

<sup>171</sup> Such a payment might be made in kind. *See* Strahilevitz, *supra* note 6, at 420 (“An owner seeking to abandon land should be able to do so upon cleaning up or improving the property sufficiently to give it positive market value.”).

<sup>172</sup> These deposits would run with the land, so that expected rebates would get capitalized into negotiated resale prices as well.

<sup>173</sup> *See* Costanza & Perrings, *supra* note 168, at 65.

clean exit from a possessory ownership relationship. Bonds could also stand in for possessory ownership. A party who is thought to occupy an especially good position to bear some risk or influence some result (but who does not need to be in physical possession of a particular piece of property to do so) could be required to post a bond that will be returned in whole or in part depending on actual outcomes. Thus, instead of requiring a new factory to buy up the properties of the surrounding homeowners, the factory owner might merely be required to post a bond that would be sufficient to cover the “worst case scenario” effects of its noise, effluents, and vibrations. This bond, or a portion of it, could be returned after a period of years based on objective measures of these impacts, or of their derived impacts on home values.

Posting a bond is one way of linking one’s own payoffs to future states of the world, and thereby bearing risk and accepting responsibility. The idea can be broadened to all forms of “taking a stake” in a particular property interest, enterprise, or outcome. While owners of possessory interests are obviously stakeholders, it is possible to hold a stake without being in physical possession.<sup>174</sup> Where achieving a social goal depends on the incentive and risk allocations associated with financial stakes, but where the incentives in question can operate without being in physical possession, mandatory stakeholding can be an alternative to full-strength forced ownership.

Although the idea of forced stakeholding sounds unusual, there are some antecedents. As private contracting behavior demonstrates, sometimes property holdings can serve a “hostage” role in channeling behavior.<sup>175</sup> A recent example is Apple’s announcement that CEO Tim Cook will be required to hold ten times his base salary in shares.<sup>176</sup> If a person or entity is thought to be especially well-positioned to determine whether an enterprise succeeds or fails, a required stake in the enterprise might be expected to powerfully harness incentives.

The model could, in theory, be extended to governmental impositions of ownership stakes, as a recent proposal by Gideon Parchomovsky and Endre Stavang illustrates.<sup>177</sup> Because stakeholding can be extended to parties beyond those in physical possession, it offers a flexible alternative to co-

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<sup>174</sup> By the same token, the person who is in physical possession may not be the best person to bear certain risks associated with the property.

<sup>175</sup> See generally Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519 (1983).

<sup>176</sup> Adam Satariano, *Apple Requires CEO Cook to Hold 10 Times Salary in Stock*, Bloomberg.com, Mar. 1, 2013, <http://www.bloomberg.com/news/2013-03-01/apple-requires-ceo-cook-to-hold-10-times-salary-in-stock.html>. Other senior executive officers are required to own shares equal to three times their base salary. *Id.*

<sup>177</sup> Gideon Parchomovsky & Endre Stavang, *Environmental Options* (working paper, ALEA 2013) (presenting a proposal in which a firm might be required to purchase futures in a “green” enterprise). Although the authors call the interest that the business is required to buy an “option,” it is better described as a future because the business is forced to exercise it “even at a loss.”

ownership for parties whose holdings mutually spill over onto each other's. Indeed, the semicommons arrangement in medieval common fields can be understood as a blunt-force way of compelling owners of farming strips to take a stake in the fate of the field as a whole, and not just a segregable corner of it. The possibility of extending this concept to communities and neighborhoods has received some scholarly attention.<sup>178</sup>

Taking a stake in an outcome means effectively placing a bet on it, which can in turn harness parties' ability to influence the outcome of that bet. Allowing multiple parties to take stakes in a single outcome opens up the possibility of elegant solutions to otherwise intractable incentive dilemmas.<sup>179</sup> When more than one party can influence a given outcome, assigning the upside or downside risk to only one of them will weaken the incentives to the others. Various ways of splitting up gains and losses are possible, but each comes with drawbacks. Mechanisms that allow each party to bear the full risk associated with her inputs can help to align incentives.<sup>180</sup>

Of course, the fact that certain arrangements help to align incentives does not necessarily make out a case for *mandating* them. Parties might be expected to opt into beneficial stakeholding arrangements. But there are at least two reasons why it might be helpful to keep the idea of mandatory stakeholding on the slate of possible alternatives.

First, temporarily mandated (or even just subsidized) stakeholding could help to generate an initial critical mass to support the development of voluntary stake-taking markets. Consider, for example, the idea of having local residents buy shares in new developments. This "crowdfunding" idea has been floated as an antidote to NIMBYism.<sup>181</sup> If all homeowners in a particular residential area were automatically endowed with a small stake in the neighboring commercial district, we might expect collective action in support of optimal development to take hold in a way that might not be possible if households could selectively opt in or out.<sup>182</sup>

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<sup>178</sup> See, e.g., Lee Anne Fennell & Julie A. Roin, *Controlling Residential Stakes*, 77 U. CHI. L. REV. 143, 174-75 (2010) (sketching a model in which neighboring jurisdictions would be required to buy a certain number of securities indexed to each other's local property values).

<sup>179</sup> See, e.g., Robert Cooter & Ariel Porat, *Anti-Insurance*, 31 J. LEGAL STUD. 203 (2002); [Robert Cooter & Ariel Porat, *Total Liability for Excessive Harm*, J. LEGAL STUD. (2006)]. The theoretical underpinnings of this move can be found in Robert Cooter's idea of "double responsibility at the margin." Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1, 3-4 (1985); see also Coase, *supra* note 211, at 41 (proposing a "double tax system" for both sides of a land use conflict).

<sup>180</sup> See, e.g., sources cited in note 179, *supra*. This idea underlies, for example, some proposals to decouple the award of tort damages to plaintiffs from the amount of damages collected from defendants. Care must be taken in structuring these arrangements to avoid creating other distortions, however. See Nuno Garoupa & Chris William Sanchirico, *Decoupling as Transactions Tax*, 39 J. LEGAL STUD. 469, 469-72 (2010) (observing that legal rules structured to incentive both plaintiffs and defendants through decoupling may operate as a tax on the transaction as a whole by reducing its joint payoff).

<sup>181</sup> See Matthew Yglesias, *The Real Estate Crowdfunding Scheme That Could Revolutionize Urban Policy by Defeating NIMBYism*, SLATE, June 5, 2013.

<sup>182</sup> Similarly, tenants in gentrifying areas might be required to hold securities that are indexed to property



Second, stakeholding is a less intrusive alternative that might be considered in contexts where forced ownership is currently used or contemplated. When considered in conjunction with the other alternatives to forced ownership discussed above, the possibility of stakeholding further refines and limits the conditions in which an outright forcing would dominate. Rather than viewing these mechanisms as falling completely outside of the domain of forcings, however, it may be more useful to see them as specialized instantiations of it, where the ownership interest in question is narrowly defined to comprise a certain set of outcomes.<sup>183</sup>

### B. Compensated Forcings

Compensated forced ownership offers an interesting conceptual analog to eminent domain, even if its domain is limited in some of the ways already suggested. This section will consider how a doctrine of compensated forcings might be developed, noting places where it might have operative traction.

#### 1. Forcings for Public Use

Consider the possibility that forcings could serve a policy function analogous to (if more limited than) eminent domain. Just as eminent domain represents a call option held by the government, a forcing represents a put option that is held by the government. We might initially wonder why resort to such an option would ever be necessary, given the potential to reprice ownership or to identify willing owners through an auction process. Unlike potential sellers, who may hold a spatial monopoly on a sought-after parcel, potential buyers (or, potential accepters of property) are rarely in a similarly unique position.<sup>184</sup> They can compete against each other even when the interest in question carries negative value, as airline passengers do in the context of oversold flights.<sup>185</sup>

In some cases, though, parties are locked in bilateral monopolies with each other that grant monopoly power to potential buyers as well as

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values—another stake-realigning move that could reduce resistance to certain kinds of community changes. See BRENDAN O’FLAHERTY, CITY ECONOMICS 369 (2005) (“Tenants could get a long-run stake in the community if they were required to buy some variety of security that was pegged to the town’s or neighborhood’s total property value.”); see also Robert I. Lerman and Signe-Mary McKernan, *Promoting Neighborhood Improvement while Protecting Low-Income Families* \*2–3 (Urban Institute Opportunity and Ownership Project No 8, May 2007), online at <http://www.urban.org/publications/311457.html>; Fennell & Roin, *supra* note 193, at 165-71.

<sup>183</sup> Bonding and staking, like the other alternatives to ownership discussed here (and like other governmental actions regarding property) might impose burdens significant enough to trigger compensation requirements.

<sup>184</sup> See Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2093-94 (1997).

<sup>185</sup> See INHABER, *supra* note 92, at 44-45. The system works because there is no realistic ability for the passengers to collude to drive up the price, and no particular individual who must be specifically coerced to skip the flight.

potential sellers.<sup>186</sup> Encroachment and accession cases offer simple examples where restoring unified ownership in complementary goods requires either a purchase or a sale between two specified parties. To take another example, the government might wish to produce a particular spatial pattern of land ownership that packages together complementarities or that disperses ownership among existing landholders in specified ways. Just as voluntary purchases may not always produce the aggregated patterns of land necessary for certain public projects, so too may subsidies fail to do so.

To see the niche that a forcings approach might fill, it is first helpful to step back and consider why eminent domain is valuable to society. It is not just that some uses, such as highways and urban redevelopment, require the aggregation of land. It is that they also require the consolidation of ownership.<sup>187</sup> But why? Lloyd Cohen provocatively explores this question in his analysis of holdouts.<sup>188</sup> He posits that if there were no transaction costs, holdouts would not be a problem because they could simply retain separate ownership. The would-be holdout could continue to own, say, an area within the footprint of a newly developed department store, which he could seamlessly operate as part of the store.<sup>189</sup>

Given the costs of coordination and monitoring, however, the idea breaks down—owners of store fragments could harm each other and benefit themselves with impunity.<sup>190</sup> The corner holdout might steal merchandise from, or toss garbage into, the other portion of the store, or he might simply invest too little in improving the store’s reputation, given that he will reap only a fraction of the benefits. These are, of course, standard “tragedy of the commons” arguments against dividing or sharing ownership in certain ways.<sup>191</sup> The key point is that the allocation of ownership itself matters, given the costs of delivering access to resources.

Perhaps the most likely scenario for a forcing would be in cases of complementarities between an owner’s current properties and related or adjacent properties that she does not yet own. In some instances, a forcing could be presented to the owner as an alternative to eminent domain. Suppose, for example, that our department store holdout were given a choice between having his property condemned through eminent domain and receiving fair market value (FMV) for it, or buying out the developer’s land holdings instead by paying FMV for those properties.<sup>192</sup> A landowner

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<sup>186</sup> See AYRES, *supra* note 5, at 19-20.

<sup>187</sup> See Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015 (2008) (viewing “number of owners” as a central dimension in property, along with asset size and configuration).

<sup>188</sup> Lloyd Cohen, *Holdouts and Free Riders*, 20 J. LEGAL STUD. 351 (1991).

<sup>189</sup> *Id.* at 353. The inducement to operate the corner as part of the larger store would come from the fact that this is its most profitable use.

<sup>190</sup> See *id.* at 354.

<sup>191</sup> Not all common ownership schemes end in tragedy, of course. See, e.g., OSTROM, *supra* note 113.

<sup>192</sup> This model shares some ground with certain techniques for dividing property held in common, such as

who placed a high value on retaining possession of his portion of the property could elect the purchase option. Presumably, the opportunity cost of the large consolidated holding would prompt an owner to employ the property in what society might regard as its highest and best use, but if he did not, he would at least bear the associated cost.<sup>193</sup>

Purchases might also be compelled where eminent domain is not in play. For example, in a case of purely private development, the government might wish to place more property under one owner's control than would be independently selected by the developer, perhaps to generate positive externalities for the surrounding area. Similarly, a local government might address the concerns of the surrounding community by allowing residents or businesses to force purchases of their properties on developers who would transform an area in ways that would make them wish to leave. Again, these ideas would be most plausible in instances where there is a particular owner, who because of her other holdings (or proposed other holdings), is especially well positioned to also own the properties in question.<sup>194</sup>

Contrast with this model the idea of turning ownership of unwanted parcels into a randomly imposed civic burden, like the military draft or jury duty.<sup>195</sup> To make such an idea minimally workable, it would be necessary to carefully define the eligible pool and place restrictions on reconveyance.<sup>196</sup> However, a lottery among subsidized (and pre-screened) volunteers or an auction designed to find the eligible person who will accept

the "Texas Shootout" approach to partnership dissolution. *See, e.g.*, Richard W. Brooks, Claudia M. Landeo, & Kathryn E. Spier, *Trigger Happy or Gun Shy? Dissolving Common-Value Partnerships with Texas Shootouts*, 41 *Rand J. Econ.* 649 (2010); Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 *VA. L. REV.* 771, 838-43 (1982). In that model, one party makes a valuation and the other party can choose to either buy out or be bought out at that price. Another analogy is found in the entitlement literature in which parties receive pairs of choices, such as receiving damages or shutting down an offending use. *See* Ronen Avraham, *Modular Liability Rules*, 24 *INT'L REV. L. & ECON.* 269 (2004); Ian Ayres & Paul M. Goldbart, *Optimal Delegation and Decoupling in the Design of Liability Rights*, 100 *MICH. L. REV.* 1 (2001).

<sup>193</sup> Complementarities could also justify a different sort of forced purchase arrangement in the eminent domain context. When the government acquires property through eminent domain, the purchase does not appear as a "forced" one from the government's perspective--the government is free to purchase or not purchase the property, and to decide what to purchase. However, sensitivity to complementarities that may be disrupted by condemnation might argue at times for putting the government to a choice between condemning nothing and condemning a larger chunk than it might otherwise prefer (and compensating for it). Abraham Bell and Gideon Parchomovsky hint at this idea in discussing the possibility that eminent domain might at times take too little property rather than too much. *See* Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 *U. CHI. L. REV.* 1015, 1064-65 (2008). In one application of this idea, a takee (or set of takees) from whom the government proposes to take just a small slice might receive a put option that would enable her to force a sale to the government of the full parcel at its fair market value.

<sup>194</sup> *Cf.* Merrill, *supra* note 17, at 488-91 (describing accession as a way of identifying a fit owner).

<sup>195</sup> On the use of randomization strategies to allocate goods and bads, see JON ELSTER, *SOLOMONIC JUDGEMENTS*, 53-78 (1989).

<sup>196</sup> For example, perhaps only residents within a certain radius of the subject property would be included. Screens based on income and credit history (or willingness to post a bond) could be applied to ensure that the person would be in a position to bear the obligations of ownership, and hardship exemptions would be available to those who lacked sufficient time or liquidity to manage the property. Restrictions on reconveyance would be necessary to ensure that the goals of the program would not be undone through reconveyance to, say, a judgment-proof individual.

the property at the lowest negative price would likely be more attractive alternatives. Unless there is some civic value generated by the random assignment itself, or the random assignment is simply much cheaper to operate,<sup>197</sup> mechanisms that make the transfer voluntary appear preferable.

Consistent with takings doctrine, not all forced purchases would require compensation,<sup>198</sup> nor would compensation necessarily have to be in cash.<sup>199</sup> The next section considers how tests used to assess burdens in the takings context might be adapted to forcings, and section 3 turns to questions of compensation.

## 2. Regulatory (and Judicial) Forcings

Forced ownership tends to be most plausible in settings where the owner has already voluntarily undertaken ownership (or some other possessory action) with regard to a connected or complementary interest. This is because coercion will only dominate other alternatives (such as an auction) where there is a form of monopoly leverage in play, and the typical source of that leverage will be a party's existing holdings or possessory interests. The question then becomes whether requiring ownership of this additional interest is a type of burden for which compensation is due, or whether it should be understood as a normatively appropriate adjunct to the voluntary ownership interest.

Evaluating the burdens associated with forced ownership raises questions that are familiar from regulatory takings doctrine, though not easily resolved. What kinds of background conditions are (or should be) understood to inherently condition title? How much should it matter if one had notice of an unwanted restriction before one acted or invested?<sup>200</sup> How much of a diminution in value must be borne without payment? When is an owner being required to confer benefits on society, the costs of which should be spread more broadly? All of the difficulties and unanswered questions that plague takings law find counterparts in forcings analysis. For example, the possibility that courts as well as the political branches can engage in takings raises the question of whether a corresponding doctrine of

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<sup>197</sup> One reason it could be cheaper to operate relates to adverse selection. People who take on ownership burdens for pay may be willing to do so for less money because they know they have a greater capacity to dodge the obligations of ownership. This puts more pressure on the screening mechanisms than in a purely volunteer or randomized system.

<sup>198</sup> The question of which governmental interferences with property require compensation has been the subject of extensive analysis and numerous doctrinal wrinkles. For a classic and influential treatment, see Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

<sup>199</sup> See RICHARD A. EPSTEIN, TAKINGS 195-215 (1986) (discussing "implicit in-kind compensation"); *id.* at 195 ("The Constitution speaks only of 'just' compensation, not of the form it must take.").

<sup>200</sup> See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (examining the effect of a change of ownership on a takings claim).

judicial forcings should be developed.

Recognizing these commonalities might suggest that forcings can be comfortably folded into existing takings law. To some extent this is true. As a matter of constitutional doctrine, the takings clause is probably the right place to locate the analysis of burdens associated with property ownership—including the burden of additional or prolonged property ownership. The analysis becomes trickier when the precondition for unwanted ownership is not another form of ownership, but rather some other activity, such as tortious conduct. In a broad sense, we might say that the takings clause is meant as a countermajoritarian check against burdensome governmental interferences with one's chosen property arrangements, whether those arrangements involve ownership or nonownership.

Importantly, however, the takings clause presupposes legitimate action that requires for its validation only the payment of just compensation—a liability rule. The due process clause and other constitutional provisions stand guard against illegitimate government conduct that cannot be validated through payment. To the extent that forcings interfere with liberty interests or violate other constitutional provisions, they could not be legitimated through the payment of compensation. The idea of compensated forcings presupposes, however, that there are some forms of forced ownership that are legitimate if (and only if) they are compensated. The idea makes intuitive sense: the normative justifications for imposing ownership cannot always be expected to line up with situations in which the *distributive* consequences of forced ownership are justified. But as a doctrinal matter, there is room for debate about the extent, and even the existence, of a zone in which forcings are both permissible and compensable.

In deciding whether a permissible forcing requires compensation, the correct normative analysis would have much in common with takings analysis insofar as it involves a search for baselines, an analysis of deviations from those baselines, and consideration of the extent to which investment-backed expectations have been undermined. When is *ownership itself* the sort of burden, or surprise, or burdensome surprise that makes its uncompensated imposition normatively problematic? These inquiries always threaten to turn circular in the takings context, and the same is true when it comes to forcings.

### 3. Compensation

If just compensation were required for a forcing, what would it look like? Here, as with eminent domain, FMV would presumably be the

constitutional touchstone. When ownership carries positive value, a forced governmental purchase (the government's exercise of a put option) would typically involve the government collecting money, not paying it out. Of course, it is entirely possible for property to carry a negative FMV. Depending on the obligations that go with the ownership interest in question, then, the strike price for the governmental exercise of a put option might be either positive or negative.<sup>201</sup> Typically, though, at least some of the compensation due would be provided in kind through the ownership interest itself.

Eminent domain is controversial in significant part because of factors for which the government's just compensation measure does not adequately compensate.<sup>202</sup> Mirror-image concerns arise in the case of forcings. First, there is the question of how and whether subjective valuations should play into compensation. In place of the positive subjective premium typically attributed to existing owners, there is a presumptive subjective deficit associated with forced ownership. Just as we can assume most condemnees have valuations above FMV (given that they have not already sold), we can assume that most forced purchasers have valuations below FMV (given that they have not already bought).

Second, whereas condemnees are deprived of opportunities to realize gains from trade (or other above-expected-value returns), forced purchasers are made to bear the chance of losses to the extent ownership assigns them actual outcomes.<sup>203</sup> Thus takings swap an expected value (derived through FMV) for an actual outcome, while forcings do the opposite. If people are thought to be risk averse, then there could be an asymmetry between the two situations. While just compensation (as currently constitutionally defined) does not give condemnees anything for giving up a chance at a larger-than-average gain from trade (nor charge them anything for relieving them of worse-than-expected results), it is an open question whether a forcing should require some compensation for taking on the risks of ownership, beyond the expected value that those risks present.

Third, as already noted, there is an autonomy or dignitary interest that is implicated to the extent that ownership affects one's self-definition.<sup>204</sup> This consideration is the trickiest to address, here as in the case of eminent domain, because it is not truly amenable to monetary compensation. In the

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<sup>201</sup> A negative strike price would mean that the holder of the option (here, the government) could force ownership on an individual, but would have to pay the individual. Viewed from another angle, we might say that the government in this scenario holds a call option that enables it to pay a positive price to engage in an activity that imposes costs: the offloading of ownership. Nothing turns on which term is used. Because puts usually involve forcing ownership onto another party, I have used that terminology here.

<sup>202</sup> See, e.g., *DUKEMINIER ET AL.*, *supra* note 15, at 1077 (suggesting that the measure of compensation provides at least a partial explanation for why property owners are concerned about the definition of "public use").

<sup>203</sup> It is also true that condemnees may be saved from experiencing actual losses, and that forced purchasers may experience actual gains. The focus in the text is on the aversive side of the compelled change in ownership.

<sup>204</sup> See text accompanying notes 57-61, *supra*.

forcings context, autonomy concerns might be addressed either by allowing an escape hatch,<sup>205</sup> or by limiting the uses of forcings to contexts where autonomy concerns are unlikely to be implicated. Here, it would be fruitful to consider differences with respect to autonomy among types of owners and types of property. Corporate owners might have fewer autonomy concerns than individuals, and fungible property interests might present fewer autonomy concerns than properties of a more personal nature.<sup>206</sup>

### C. Uncompensated Forcings

Existing examples of involuntary ownership, such as trover and accession, tend to be uncompensated. The implicit assumption behind these remedies is that they represent normatively appropriate burdens associated with earlier acts. As already emphasized, burdens can be assessed without resorting to burdens that take the form of ownership. The interesting question is whether existing forms of uncompensated forced ownership represent all of the instances, or only those instances, in which putting a normatively justified burden into the form of mandatory ownership would best serve social goals.

#### 1. Owing Consequence Zones

Scholars have already examined how put options might be used in place of other nuisance remedies.<sup>207</sup> However, the analysis has typically focused on the question of being forced to buy an entitlement to, say, emit effluents at the price of the expected damage that is caused. The goal of this literature has been to devise ways to get “the entitlement” to the highest valuer. The implicit assumption is that this task can be completed once and for all time by carving out and allocating the specific land use right that is in dispute. A different model would involve the compulsory purchase of the affected property itself. For instance, residents who are bothered by a nearby factory might have the option to force the sale of their fee simple interests to the factory, not just the sale of the right to emit pollutants.<sup>208</sup>

Under certain circumstances, forcing the sale of the fee interest might offer advantages over the more well-studied model of forcing the sale of

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<sup>205</sup> See *infra* Part IV.D. (discussing the use of relievings as an escape hatch).

<sup>206</sup> Cf. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). Thanks to Eduardo Peñalver for comments on this point.

<sup>207</sup> See, e.g., Ayres, *supra* note 5.

<sup>208</sup> Permanent damages awarded in nuisance effectively place a servitude on the affected land. See *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 875 (N.Y. 1970). A plaintiff that is entitled to elect permanent damages could thereby force the party causing the nuisance to purchase the servitude. *But see* Epstein, *supra* note 17 at 843 (observing that a defendant cannot be forced to continue polluting, and suggesting that only temporary damages could be imposed on a defendant who elected to shut down instead).

just the entitlement to emit. In cases where there is sharp disagreement about the actual impacts that will be realized over time, a transfer of ownership may offer *both* parties a more acceptable solution than would permanent damages based on an expected value.<sup>209</sup> Second, putting ownership into the same hands avoids the kinds of incentive problems going forward that have been raised in the permanent damages context.<sup>210</sup> A polluter who has already paid permanent damages may not innovate to reduce harm even when it could be done cost-effectively, but a polluter who owns the land that will be polluted would retain that incentive.<sup>211</sup> The solution is also better incentive-wise than a series of damage judgments over time that would reflect realized harm, at least to the extent that the victims in the story could influence the impacts that they will suffer. A single owner will pursue whichever alternative offers the highest payoff, whether taking precautions on the adjacent land, adding scrubbers to the factory, or doing nothing at all.

A single-owner approach also differs from the “risk ownership” idea propounded by Ripstein. Rather than metaphorically owning the consequences of one’s acts within normatively constructed conceptual and causal bounds, one would actually own “consequence zones”—physical places where certain kinds of impacts are likely to be realized.

Consequence zone ownership need not be imposed only on the party that desires the more active or invasive use. It would also be possible to make the party with a complaint about a neighbor’s use buy up that neighbor’s property. New Jersey’s conditional variances, in which stopping the grant of a variance means purchasing the property in question, does something very much like this.<sup>212</sup> Following the Coasean idea of reciprocal harm,<sup>213</sup> we can understand the objecting neighbor as being required to absorb the negative impact that her demands have on the value of the nearby property—the opportunity cost of keeping the land in its current use.

If forced purchases sound like extreme overkill in managing spillovers and a radical departure from current practices, consider the fact that we

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<sup>209</sup> While it might seem that one party is bound to be wrong, the ability of parties to influence outcomes can turn the game into a positive sum one. Another approach to uncertainty about impacts is to use a bonding mechanism, as discussed above. See *supra* Part IV.A.3.

<sup>210</sup> See *Boomer*, 257 N.E.2d at 876 (Jasen, J., dissenting) (“[O]nce such permanent damages are assessed and paid, the incentive to alleviate the wrong would be eliminated, thereby continuing air pollution of an area without abatement.”).

<sup>211</sup> As with all other inefficiencies, the shortfall in past-payment innovation is the product of positive transaction costs. See R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 8 (1960). If the residents could costlessly bargain with the factory to invent a better pollution-stopper, this would occur. But of course if the residents could costlessly bargain with the factory, there would have been no need for a lawsuit and an award of permanent damages in the first place. Ownership is not the only way to address this problem, however. A bonding mechanism that granted refunds based on actual results is another alternative, as discussed below.

<sup>212</sup> Ownership is not actually forced on the neighbor under New Jersey’s conditional variance model; rather, her ability to defeat the variance depends on her willingness to buy the property. See note 20, *supra* and accompanying text.

<sup>213</sup> See Coase, *supra* note 211, at 2.



already do something very similar through zoning. People are not allowed to acquire and use property interests of any size and shape whatever. While concerns about later reconfiguration costs represent one rationale, a more basic one is that too-small holdings produce a profusion of boundary lines, and hence more spillovers that must be managed at positive cost. Indeed, Peter Colwell observed that governmentally imposed land use restrictions could be jettisoned altogether if holdings were required to be large enough (he gives the example of 640 acres) and edges were subject to certain requirements (such as “very tall berms”).<sup>214</sup>

There are countervailing considerations, of course. As Yoram Barzel has observed, there are disadvantages of consolidating ownership in one person or entity, including scale mismatches between labor and non-labor inputs and specialization losses.<sup>215</sup> Yet zoning operates prophylactically to mandate minimum bundles for all (even if they are orders of magnitude smaller than Colwell’s thought experiment). Because forcings could operate more selectively where spillovers have actually shown themselves to be troublesome, they would not necessarily increase average parcel size, and could indeed diminish the incidence of unwanted ownership of excess land.

## 2. Addressing Territoriality

A forcings model might also be used to require ownership of bundles that correspond to observed patterns of behavior, including territorial behaviors. Consider the concerns that have been raised about “curb territoriality”: the phenomenon of homeowners claiming exclusive rights in the street parking spots that their homes front upon. A particularly intense (albeit episodic) subspecies of the problem is found in the “dibs barriers” that Chicagoans use to mark claims over spaces that they have dug out of the snow.<sup>216</sup> In both cases, the concern is the same: asserting exclusive private ownership over public parking spaces impedes the efficient rotation of cars in and out of spaces over the course of a day or week. One prescription is to deny private claims over the spaces to ensure that they remain in the commons.

The analysis here suggests another alternative that builds on rather than fights owners’ territorial impulses. The adjacent landowners could be required to purchase rights to the parking spaces that front their homes or businesses, and then be allowed to market those rights in exchange for

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<sup>214</sup> Peter F. Colwell, *Tender Mercies: Efficient and Equitable Land Use Change*, 25 REAL ESTATE ECON. 525, 529 n.6 (1997).

<sup>215</sup> BARZEL, *supra* note 69, at 51-52 (2d ed. 1997).

<sup>216</sup> This practice has received significant scholarly attention. See, e.g., Richard A. Epstein, *Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. S515, S528-33 (2002).

micropayments from parkers.<sup>217</sup> Such exchanges may soon become feasible at low cost due to the ubiquity of smart phones that could be equipped with parking apps. We might also expect services to emerge to handle the transactions on behalf of owners. If it becomes possible for would-be parkers to quickly learn about available spaces and pay to occupy them, the landowners would be confronted with the opportunity cost of keeping spaces out of circulation. While some might choose to bear the expense, most presumably would not.

The question remains whether such an ownership obligation could or should be imposed without compensation. One possibility would be to link the purchase requirement to acts of possessory behavior toward the parking spaces, such as attempting to reserve them even when empty. This would be a variation on the “you break, you buy” approach. It would also seem relatively uncontroversial to apply a mandatory purchase requirement in the case of new development; it would be no different from requiring that a business make adequate provision for parking.

### 3. Rethinking Existing Uncompensated Forcings

So far I have focused on possible extensions of uncompensated forcings. But it is also possible that some existing uncompensated forcings are not really justified. As noted, burdens can be imposed in a form other than ownership if ownership itself does not produce advantages. I have focused primarily on the ability of ownership to deliver outcomes going forward. However, sometimes the advantages that ownership produces are not of this nature; they instead involve economizing on information costs about past and present events, including decision costs about the allocation of ownership itself.

Consider again the remedies of accession and trover. Here, the reason for assigning ownership may simply be to save society the costs of figuring out damages. Yet it is quite possible that society could readily put a figure to *the costs* of calculating damages. An actor who is willing to bear those calculation costs (as well as the costs of the damages themselves, once calculated) could be relieved of ownership without imposing any costs on society as a whole. Similarly, abandonment may be primarily socially costly because it creates confusion or involves the offloading of land that has already been damaged in some way. If these costs could be covered, as

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<sup>217</sup> If individual ownership of parking rights proved too difficult to implement, collective ownership of the parking rights by a group of adjacent residents is another possible approach. Cf. GEORGE W. LIEBMANN, *THE LITTLE PLATOONS: SUB-LOCAL GOVERNMENTS IN MODERN HISTORY* 58-59 (1995) (describing an approach used in St. Louis County in which “title to the bed of a street is deeded to the residents adjacent to it, subject to assessments enforceable by a lien,” with the streets then managed by an association of the owners). This approach is similar in spirit to unitization, and similarly might be enabled to proceed on less than unanimous agreement. See *id.* (noting that legislation has allowed street privatization in St. Louis upon petition by 95% of the residents).

through a bonding mechanism, ending ownership would not inflict social costs. These observations suggest the utility of the converse of forcings, relievings.

#### *D. Relievings*

Most of the discussion in this paper has focused on the situation in which ownership is socially valuable but privately burdensome. Yet many situations in which ownership is compelled actually involve social as well as private costs. Offering a way out of ownership holds social value to the extent it relieves those who are ill-suited to bear the associated risks or make the necessary decisions. If ending ownership would be a Pareto improvement, why does it not happen? To observe that there is currently no established mechanism through which unwilling owners can be readily relieved of ownership only begs the question.

The law does at times exhibit a sensitivity to the costs of ownership and the realities of being forced to continue bearing its burdens. For example, *In re Pratt*, a First Circuit case, involved a GMAC-financed Chevy Cavalier that GMAC refused to repossess after a debtor in bankruptcy surrendered it.<sup>218</sup> No junkyard would accept the now-worthless car without a lien release from GMAC, but GMAC would not release the lien. The owners, the court found, “were confronted with the grim prospect of retaining indefinite possession of a worthless vehicle unless they paid the GMAC loan balance, together with all the attendant costs of possessing, maintaining, insuring, and/or garaging the vehicle.” It held that GMAC’s actions, even if permitted under state law, were “coercive” in effect and thus in contravention of the discharge injunction under bankruptcy law.<sup>219</sup>

What the court did in *Pratt* amounted to a relieving, though it was not given that name. But relievings are relatively uncommon. Why? Clearly there are costs associated with providing relief from ownership. Not only may it be costly to administer a system that delivers such relief, the end result may be ownership that the government does not want, or the costs associated with inducing (or forcing) another party to take up ownership. But suppose some relievings would produce net gains, despite their costs. The problem may be that it is deemed normatively inappropriate for society to bear the costs associated with the relieving—both the costs of administering the system, and the costs that ending ownership will impose, including heightened information costs, the costs of retransferring the property, and so on.

This is where the idea of chargeable relievings comes in. Just as there

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<sup>218</sup> 462 F.3d 14 (1<sup>st</sup> Cir. 2006).

<sup>219</sup> *Id.* at 20.

may be cases where the social value of ownership does not line up with the distributive fairness of imposing ownership's burdens, there may be cases where the social costs of ending ownership do not line up with the distributive fairness of relieving the owner of the related burdens. Compensated forcings on the one hand and chargeable relievings on the other can accommodate these misalignments. On reflection, the idea of a chargeable relieving is not odd at all. Relievings amount to put options against the government; decisions about the charges that will accompany them simply amount to selecting the strike price.

Put options against the government have been offered in relatively limited situations, such as the buyback of guns,<sup>220</sup> gas guzzling "clunkers,"<sup>221</sup> and fishing boats.<sup>222</sup> But they might be offered more broadly.<sup>223</sup> As already suggested, an especially promising application would be in enabling would-be abandoners to rid themselves of their property in an orderly manner by paying the costs that their termination of ownership imposes.<sup>224</sup> Similarly, a tortfeasor subject to trover could be allowed to avoid forced ownership by paying the costs of appraising the damage. Such an approach would allow a party to transform her position from outcome-bearer to damage-payer. Thus, relievings can often constitute a complementary strategy to—or an escape hatch from—forcings.

#### CONCLUSION

Government coercion can be used to impose or prolong private ownership, just as it can be used to cut it short. Yet forcings as a form of government compulsion has not received a systematic exploration, despite its evident connection to existing bodies of literature. One might contend that this neglect is appropriate because the real-world domain of forcings is likely to be limited or nonexistent for normative or practical reasons. But that claim cannot be evaluated until we recognize the category itself. Doing so directs attention to existing forms of forced or pressured ownership, and prompts exploration of the reasons behind them and the limits on them.

Recognizing a category of forcings focuses new attention on how ownership, as a mechanism for assigning actual rather than expected outcomes, can hold social value even when it proves privately burdensome.

<sup>220</sup> See Morris, *supra* note 5, 854-55 (discussing gun buybacks as examples of put options)

<sup>221</sup> See Atif R. Mian & Amir Sufi, *The Effects of Fiscal Stimulus: Evidence from the 2009 "Cash for Clunkers" Program* (September 2010) <http://ssrn.com/abstract=1670759> (studying the impact of the summer 2009 "Cash for Clunkers" program that enabled U.S. motorists to turn in fuel-inefficient cars for destruction in exchange for a credit against certain new vehicle purchases).

<sup>222</sup> See, e.g., L.S. PARSONS, *MANAGEMENT OF MARINE FISHERIES IN CANADA* 191 (1993) (discussing fishing license buyback programs).

<sup>223</sup> See, e.g., Fennell, *supra* note 140, at 1457-59 (discussing the use of put options in conjunction with alienability limits).

<sup>224</sup> For a discussion of these costs and some ways to address them, see generally Strahilevitz, *supra* note 6.

The ability to save on information costs, to allocate risk, and to align incentives may motivate choices to compel ownership over the objections of the owner herself. Of course, forced ownership will rarely be the best answer; there are typically other alternatives that can serve the relevant social purposes at lower cost. Yet isolating the conditions that could call for the imposition of ownership shows not only how forcings might be extended but also where existing forms of involuntary ownership might be replaced with less coercive alternatives. Finding the niche that forcings occupy on the slate of policy alternatives also illuminates another unappreciated domain for governmental action—that of relieving owners of burdensome ownership.

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