

# Legal Claims as Private Property: Implications for Eminent Domain

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## Introduction

A lawsuit is property. A plaintiff has a private property right in his claim of action—i.e., in the right to sue—and in his lawsuit once filed. The United States Constitution, as well as those of the several states, specifically protects private property rights;<sup>1</sup> accordingly, a claim of action in some instances warrants constitutional protection from interference by state or federal government.

In a sense, this is a controversial proposition. Historically, claims of action, choses in action, rights of suit, and lawsuits themselves have been treated as personal and inalienable; indeed, three doctrines developed since

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1. U.S. CONST. amend. V (“No person shall be . . . deprived of . . . property, without due process of law”); *id.* (“nor shall private property be taken for public use, without just compensation”); U.S. CONST. amend. XIV § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”). Similarly, every state except North Carolina has a takings clause. See DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 2 (Foundation Press 2002).

the time of Greek and Roman law to prohibit the transfer or sharing of lawsuits.<sup>2</sup>

Nevertheless, causes of action are increasingly being seen as alienable and, in various contexts, as forms of property.<sup>3</sup> Recent scholarship has discussed the alienability of legal claims and the wisdom or viability of creating markets for them. Syndication of lawsuits has increased and in some cases has withstood legal challenge. Long-standing prohibitive doctrines have been scaled back or abolished. And for some constitutional purposes, courts have explicitly acknowledged individuals' property rights in the right to sue. But some constitutional implications of these moves have been under explored. Specifically, to the extent that legal claims are seen as private property, the constitutional protection of both the Due Process and the Takings Clauses are implicated. May the government eliminate your right to sue? If so, what sort of due process rights must be afforded?

Less examined than the due process concerns, and likely more controversial, are concerns arising under the Takings Clause.<sup>4</sup> May the government in fact *take* your right to sue or your lawsuit and exercise it—or take your right to sue or your lawsuit and deliberately *not* exercise it? Even more controversial, may the government condemn your legal claim and, consistent with its broad eminent domain powers as delineated in *Kelo*, transfer that claim to another private party to pursue (or not)? In this Article, I explore these questions, examining the Takings Clause implications of considering the right to sue as private property.

I proceed in three parts. First, I address whether a legal claim may in fact be considered private property. Without such a showing, of course, constitutional protection of private property rights is not implicated, and

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2. E.g., Isaac Marcushamer, Note, *Selling Your Torts: Creating a Market for Tort Claims and Liability*, 33 HOFSTRA L. REV. 1543, 1550–51 & nn.33–35 (2005) (identifying and defining doctrines of champerty, maintenance, and barratry); Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48 (1936) (tracing historical development of the three doctrines). Despite some ambiguity about their scope, the doctrines have generally been applied to bar the transfer or division of lawsuits.

3. See cases cited *infra* note 44; State *ex rel.* Coffey v. Dist. Court, 240 P. 667, 669 (Mont. 1925) (noting that holder of a chose in action was “anciently” barred from transferring it, but noting that in modern law, choses in action are assignable and constitute “property of some character”); see also *id.* (reviewing similar case law from other jurisdictions, including Connecticut, Alabama, Massachusetts, Indiana, and Maryland).

4. See, e.g., Olivia A. Radin, Note, *Rights as Property*, 104 COLUM. L. REV. 1315, 1319–20 (2004) (noting the rarity of the Takings Clause analysis and therefore focusing her discussion of rights as property on the due process context, rather than the takings context).

this Article would be very short indeed.<sup>5</sup> Both as a matter of theory and practice, however, I suggest that viewing legal claims in this way is appropriate, and that they are thus subject to the exercise of eminent domain by the government.

Two limitations are placed on the government's eminent domain power, however. Private property may only be taken "for public use" and if "just compensation" is given to the private property owner.<sup>6</sup> Thus, in the second part, I address what sort of purposes—some benign and even laudable, some more unsavory—the government might have in condemning an individual's right to sue another party. This part also addresses issues of what it means for such property to be "taken" within the meaning of the Clause. In the third part, I explore how just compensation might be determined. Doing so is somewhat challenging, particularly because of the indeterminate likelihood of a lawsuit's success. It is also a challenge, however, because of a lack of clarity regarding exactly how a lawsuit should be categorized in terms of value. That is, there is ambiguity as to whether the procedural or the substantive right is what is valued, and whether it is valued as an asset or as an option. Throughout, I note policy implications of taking this view of legal claims.

I should make three points explicit. First, the paper is primarily exploratory. Starting from the perspective that legal claims are "property" for Takings Clause purposes, I bring together somewhat disparate doctrinal threads and explore the picture that emerges. Spinning out the logical implications—both positive and negative—of this perspective and these doctrines raises questions of law and policy that warrant further discussion. Second, I focus *only* on the eminent domain analysis, where there is a naked transfer of ownership, title, or control of a lawsuit from a private claim holder to the government or to another private party. This is quite different from the context in which the nexus between takings and causes

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5. Cf. CHARLES DICKENS, *OLIVER TWIST* 1 (Dodd, Mead & Co. 1941) (1838) ("For a long time after it was ushered into this world of sorrow and trouble, by the parish surgeon, it remained a matter of considerable doubt whether the child would survive to bear any name at all, in which case it is somewhat more than probable that these memoirs would never have appeared; or, if they had, that being comprised within a couple of pages, they would have possessed the inestimable merit of being the most concise and faithful specimen of biography extant in the literature of any age or country.").

6. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–32 (2003) ("[T]he Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner."); see also *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987) (noting that Takings Clause does not prohibit government takings, merely places limits on the government's power to do so); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.").

of action has been discussed (on the few occasions it has been). That is, the typical discussion is in the regulatory takings context, where some statute or regulation diminishes or eliminates the value of, or the ability to use or control, a lawsuit. Thus, I distinguish a substantial proportion of the possible takings of legal claims—for instance, legislation that curtails or abrogates a potential claim or defense, or procedural rules such as statutes of limitations of rules of evidence. I do so for two reasons: First, this different focus encourages discussion of the previously neglected possibility that a government body might take ownership of an individual's right to sue—rather than simply the possibility that government regulatory action might influence the management or viability of an individual's suit; second, the focus comports with the U.S. Supreme Court's emphasis on distinguishing eminent domain and regulatory takings analyses.<sup>7</sup> The third point to make explicit is that my focus on the Takings Clause subordinates consideration of the due process analysis. As sketched below, although that analysis is also comparatively rare, it is more common even than the regulatory takings approach, and has been addressed before.<sup>8</sup> Moreover, similar to the regulatory takings distinction made above, making the due process/takings distinction emphasizes that the Article's purview is not the due process *deprivation* or withholding of a property right, but the actual *taking away* of that right from an individual by the sovereign, whether for its use or use by a third party.

### I. Legal Claims are Constitutional Property

In evaluating whether a legal claim is a form of property for constitutional purposes, one might begin with apparently straightforward judicial statements. Indeed, the U.S. Supreme Court has “squarely” held that even an unadjudicated cause of action is constitutional property.<sup>9</sup> In fact, in *Logan v. Zimmerman Brush Co.*, the Court considered that

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7. *E.g.*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002) (“This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.”); *Brown*, 538 U.S. at 233 (distinguishing sharply between physical and regulatory takings); *cf.* Eduardo Moises Peñalver, *Is Land Special?: The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 *ECOLOGICAL L.Q.* 227, 231 (2004) (distinguishing between confiscatory action, even of intangible property, and regulatory action).

8. See Radin, *supra* note 4 (discussing due process analysis); see also *infra* notes 9–22.

9. Thomas Merrill, *The Landscape of Constitutional Property*, 86 *VA. L. REV.* 885, 913 (2000).

proposition “settled,”<sup>10</sup> basing its assertion on *Mullane v. Central Hanover Bank & Trust Co.*<sup>11</sup> In *Mullane*, the Court had held that a proceeding by the Bank for a judicial settlement of its accounts was in part unconstitutional, because of the potential to limit beneficiaries’ property rights. This might occur in two ways, either by limiting beneficiaries’ rights to have the trustee Bank answer for impairing their interests, or by using resources to compensate “one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest.”<sup>12</sup> *Logan* further noted that a “tort or discrimination action” is “a property interest.”<sup>13</sup> And elsewhere the Court seemed to have “little doubt” that an unsecured claim—specifically, a cause of action against a decedent’s estate—was a property interest,<sup>14</sup> as was a claim under state tort law.<sup>15</sup> Such statements seem clear enough.

Relying on the seeming clarity of these statements, however, would be disingenuous. These cases concerned *due process* protection, rather than *Takings Clause* protection, and as such reflect a due process approach to defining property.<sup>16</sup> Indeed, in each case in which the intangible right to sue was framed as a property interest, the Court limited its definition to the due process context.<sup>17</sup> Of course, the constitutional text in both the Due Process and Takings Clauses simply refer to “property.” As such, the two categories of constitutional protection might be considered co-extensive, and precedent and reasoning from one line of cases might be applied to the other.<sup>18</sup> In practice, however, this has usually not been the case.

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10. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (considering it “settled” that “a cause of action is a species of property”).

11. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

12. *Id.* at 313.

13. *Logan*, 455 U.S. at 430 n.5.

14. *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 485 (1988).

15. *Martinez v. California*, 444 U.S. 277, 281–82 (1980) (state tort claim is, “[a]rguably,” a form of property).

16. See *Logan*, 455 U.S. 422; *Mullane*, 339 U.S. 306.

17. E.g., *Martinez*, 444 U.S. at 281–82 (stating that tort claim is property “protected by the Due Process Clause”); *Logan*, 455 U.S. at 428 (“[A] cause of action is a species of property protected by the Fourteenth Amendment’s Due Process Clause.”); see also *Tulsa Prof'l Collection Servs.*, 485 U.S. at 485 (“[A] cause of action . . . is property protected by the Fourteenth Amendment.”). Some cases do inappropriately conflate the two analyses, for instance by applying the definition of property from due process cases to takings claims. See, e.g., cases discussed *infra* Section I(C).

18. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 459 n.11 (Foundation Press 2d. ed. 1988) (1978) (noting a “broader definition of property interests now employed in the law of procedural due process” and suggesting that there is “no good reason” not to apply that broader definition in the takings context); Stephen J. Massey, Comment, *Justice Rehnquist’s Theory of*

Commentators have recognized that at least since *Flemming v. Nestor* in 1960,<sup>19</sup> the scope of constitutional property protection is different for the Due Process and Takings Clauses, with due process protection typically considered broader.<sup>20</sup> Most recently, the Court in *Lingle v. Chevron, U.S.A.* carefully distinguished the due process and takings approaches, indicating that a due process test has “no proper place” in takings jurisprudence.<sup>21</sup> As such, something more is needed than facile quotations.<sup>22</sup>

That something more exists. Both as a theoretical and a positive matter, legal claims should be considered property for Takings Clause purposes.

### A. Theory and Doctrine Justify Treating Causes of Action as Constitutional Property

First, the due process cases are not entirely irrelevant. Though they should be distinguished from the takings cases, they do comport with a historical approach recognizing that private property in the takings context is not limited to real property;<sup>23</sup> nor, more important, is such property limited to tangible objects. The due process decisions recognized property rights in employment and welfare or other government benefits;<sup>24</sup> takings doctrine, too, has historically recognized a wide range of tangible and intangible property rights. The Supreme Court made this explicit almost a

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*Property*, 93 YALE L.J. 541, 541 n.5 (1984) (noting the Court’s use of property definition from a due process case in the context of takings clause claim in *Texaco v. Short*, 454 U.S. 516 (1982)).

19. *Flemming v. Nestor*, 363 U.S. 603 (1960); see Massey, *supra* note 18, at 541 n.5. *But see* TRIBE, *supra* note 18, at 459 n.11 (contrary view).

20. Merrill, *supra* note 9, at 958; Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 301 (1988); Massey, *supra* note 18, at 553 n.71 (suggesting that a “precise analogue between the due process and just compensation cases is therefore impossible”).

21. *Lingle v. Chevron, U.S.A.*, 544 U.S. 528, 540 (2005).

22. An early case indicating that certain causes of action are “property” for Takings Clause purposes is *Gray v. United States*, No. 7, French Spoliations, 1800 WL 1537 at \*38 (Ct. Cl. May 17, 1886). In *Gray*, the Court addressed certain claims against France for indemnity that were affected by 1885 American legislation. The Court declined to say “that for all purposes these claims were ‘property’ in the ordinarily accepted and in the legal sense of the word”; but, it asserted, “they were rights which had value, a value inchoate, to be sure, and entirely dependent upon adoption and enforcement by the Government; but an actual money value capable of ascertainment the moment the Government had adopted them and promised to enforce them.” *Id.* Modern courts have distinguished *Gray* as simply an advisory opinion. *E.g.*, *Abraham-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997). Note, however, that *Abraham-Youri* recognized that a particular claim, brought before an international tribunal, was “property.” *Id.* at 1465–66.

23. This seems so despite an evident favoritism for land in terms of affording takings protection. *E.g.*, Peñalver, *supra* note 7 (noting such a favoritism, though in the context of regulatory takings doctrine rather than physical takings).

24. See sources cited *supra* notes 9–11.

century ago: “[The eminent domain] power extends to tangibles and intangibles alike. A *chose in action*, a charter, or any kind of contract are, along with land and movables, within the sweep of this sovereign authority.”<sup>25</sup> Franchises have long been considered property for takings purposes,<sup>26</sup> as have various intellectual property rights such as trade secrets,<sup>27</sup> football teams,<sup>28</sup> hunting rights,<sup>29</sup> interest on attorney-client trust funds,<sup>30</sup> and, arguably, copyrights<sup>31</sup> and patents.<sup>32</sup>

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25. *City of Cincinnati v. Louisville & Nashville R.R. Co.*, 223 U.S. 390, 400 (1912) (emphasis added); *see also City of Oakland v. Oakland Raiders*, 646 P.2d 835, 840 (Cal. 1982) (“Numerous . . . decisions both federal and state have expressly acknowledged that intangible assets are subject to condemnation.”). *But cf. Lisa J. Tobin-Rubio*, Casenote, *Eminent Domain and the Commerce Clause Defense: City of Oakland v. Oakland Raiders*, 41 U. MIAMI L. REV. 1185, 1191–92 (1987) (noting some courts’ reluctance to allow condemnation of intangible property rights, either because of difficulty of determining value or because of contingent nature of property rights).

26. *E.g., W. River Bridge Co. v. Dix*, 47 U.S. 507, 534 (1848) (“A franchise is property, and nothing more; it is incorporeal property. . . . It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment.”); *id.* (approving “[t]he power of a State, in the exercise of eminent domain, to extinguish immediately a franchise it had granted”).

27. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003–04 (1984) (trade secrets are property protected by Takings Clause). As Professors Dana and Merrill have noted, “[T]he application of the Takings Clause to intangible rights will probably become an increasingly important issue in the coming decades.” DANA & MERRILL, *supra* note 1, at 228.

28. *Oakland Raiders*, 646 P.2d at 835.

29. *Swan Lake Hunting Club v. United States*, 381 F.2d 238 (5th Cir. 1967).

30. *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1988).

31. *See, e.g., Roberta Rosenthal Kwall*, *Governmental Use of Copyrighted Property: The Sovereign’s Prerogative*, 67 TEX. L. REV. 685 (1989).

32. *E.g., James v. Campbell*, 104 U.S. 356, 357–58 (1881) (“That the government of the United States when it grants letters-patent for a new invention or discovery in the arts, confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser, we have no doubt.”); *see also DANA & MERRILL*, *supra* note 1, at 239 (“If the government were to transfer title in a patent to itself . . . then there is no doubt this would constitute a taking.”). There is nevertheless some debate over whether patents are in fact private property for takings purposes. The passage in *James* has been written off to some extent as dicta. *See Thomas F. Cotter*, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 FLA. L. REV. 529, 543 (1998); Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents under the Takings Clause*, 87 B.U. L. REV. 689, 709 (2007); Davida H. Isaacs, *Not All Property is Created Equal: Why Modern Courts Resist Applying the Takings Clause to Patents, and Why They Are Right to Do So*, 15 GEO. MASON L. REV. 1 (2007). Case law is also somewhat in tension. *Compare Zoltek Corp. v. United States*, 442 F.3d 1345 (Fed. Cir. 2006) (indicating that patents are not private property for takings clause purposes), *with Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 772 (2002) (drawing from regulatory takings doctrine to suggest that patent rights reflect owners’ legitimate expectations). Professor Mossoff suggests that as a historical matter, patents were protected as private constitutional property, though modern courts and scholars are, he claims, no longer aware of the line of cases showing that.

Second, and importantly, a range of more abstract *rights*—that is, not simply intangible *property*—have been viewed as private property protected by the Takings Clause, in a variety of contexts.<sup>33</sup> Contractual rights,<sup>34</sup> liens,<sup>35</sup> and lease rights,<sup>36</sup> for instance, have all been so seen. Even more critical for the present analysis, the right not only to bring a takings claim,<sup>37</sup> but also the right to sue more generally, may be considered private property for other purposes, including aspects of due process,<sup>38</sup> the mail fraud statute,<sup>39</sup> RICO cases,<sup>40</sup> and even post-divorce division of property.<sup>41</sup>

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Mossoff, *supra*, at 700–11 (reviewing nineteenth-century cases recognizing Takings Clause protection for patents).

33. James Madison's classic statement that a "man may be . . . said to have a property in his rights," James Madison, *Property*, NAT'L GAZETTE (March 5, 1792), in JAMES MADISON, *THE MIND OF THE FOUNDER* 186 (Marvin Meyer ed., 1981), may be somewhat of an overstatement for present purposes. See William C. Heffernan, *Privacy Rights*, 29 SUFFOLK U. L. REV. 737, 757 n.117 (1995). There is little question, however, that a range of intangible rights has been recognized as property.

34. *U. S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("[C]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."); *City of El Paso v. Simmons*, 379 U.S. 497, 534 (1965) (Black, J., dissenting) ("Contractual rights, this Court has held, are property, and [under the Fifth Amendment a state may take] those property rights as it would any other property, provided it is willing to pay for what it has taken."); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (holding that valid contracts are property protected by Takings Clause).

35. *E.g.*, *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (holding that property right in liens is protected by Takings Clause).

36. *E.g.*, *Kaufmann's Carousel, Inc. v. City of Syracuse Indus. Dev. Agency*, 750 N.Y.S.2d 212, 218 (N.Y. App. Div. 2002) (holding that lease rights were private property subject to condemnation through eminent domain).

37. *Dunlap v. Toledo & A.A.R. Co.*, 15 N.W. 555 (Mich. 1883); Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 CONN. L. REV. 7, 34 (2003) (arguing that a takings claim is itself a form of private property); Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law,"* 42 N.Y.L. SCH. L. REV. 345, 392 (1988) (arguing that "the taking of a takings claim is . . . itself a taking").

38. *E.g.*, *Richards v. Jefferson County*, 517 U.S. 793, 804 (1996) (in due process context, chose of action is property interest "in its own right"); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) (a chose in action is a "constitutionally recognized property interest").

39. *United States v. Adler*, 186 F.3d 574, 576 (4th Cir. 1999) (in mail fraud context, plaintiff creditor "clearly had a property interest in the chose in action"); *United States v. Holzer*, 840 F.2d 1343, 1348 (7th Cir. 1988) (in mail fraud context, suggesting that chose in action is a property right itself).

40. *E.g.*, *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 792 F.2d 341, 354 (3d Cir. 1986) (in RICO context, noting that "[a] cause of action, of course, is a form of 'property'").

41. *E.g.*, *Schauer v. Mandarin Gems of Cal., Inc.*, 23 Cal. Rptr. 3d 233, 238 (Cal. App. 4th 2005) (in divorce context, potential cause of action was personal property retained by potential plaintiff, absent express provision otherwise); *Redfern v. Collins*, 113 F. Supp. 892 (E.D. Tex. 1953).



Third, for Takings Clause purposes, “property” is defined by state law. That is, because “the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to ‘existing rules or understandings that stem from an independent source such as state law.’”<sup>42</sup> Consensus among states’ definitions of property is suggestive that the object—here, a cause of action—is one so well recognized that it warrants constitutional protection.<sup>43</sup> Most states clearly define choses in action and the right to sue as “property.”<sup>44</sup>

Fourth, under the federal Bankruptcy Code, causes of action are explicitly considered the type of “legal or equitable interests” that constitute *property* of the debtor’s estate.<sup>45</sup> This is the case whether the lawsuit has been filed or not, so long as the injury occurred before the commencement of the bankruptcy.<sup>46</sup> It is also so whether the cause of action would ordinarily be one that the plaintiff could not transfer or assign,

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42. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1988) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). At least one commentator has noted serious potential difficulties if this statement is taken fully at face value. See Gregory Gelfand, “*Taking*” *Informational Property Through Discovery*, 66 WASH U. L.Q. 703, 713 (1988); see *infra* note 111 and accompanying text.

43. Gelfand, *supra* note 42, at 714–15 (“[T]he fact that the law of most or all states defines something as property is strong evidence that it is general property,” that is, property meriting Takings Clause protection); see also 2 JULIUS SACKMAN ET AL., *NICHOLS ON EMINENT DOMAIN* § 5.01[5][c], at 5–35 (3d. 1997) (stating that the first question for defining “property” for eminent domain purposes is whether the interest is recognized as property under state law). *Cf. infra* notes 127–131 and accompanying text.

44. *United States v. Stonehill*, 83 F.3d 1156, 1159–60 (9th Cir. 1996) (referring to California Civil Code and case law as including causes of action, whether sounding in contract or tort, as property); *Rhyn v. K-Mart Corp.*, 594 S.E.2d 1, 12 (N.C. 2004) (“Without question, vested rights of action are property, just as tangible things are property.”); *Duckworth v. Mull*, 55 S.E. 850, 852 (N.C. 1906) (“A right to sue for an injury is a right of action; it is a thing in action, and is property.”); *Valero Eastex Pipeline Co. v. Jarvis*, 990 S.W.2d 852, 855 (Tex. App. 1999) (“The general rule in Texas is that a cause of action is a property right.”); *Hall & Farley v. Ala. Term. & Improv. Co.*, 39 So. 285 (Ala. 1905); *Galarza v. Union Bus Lines, Inc.*, 38 F.R.D. 401, 404 (S.D. Tex. 1965) (stating that under Texas law, recovery for personal injuries is a property right); *Redfern v. Collins*, 113 F. Supp. 892, 895 (E.D. Tex. 1953) (noting that under Texas law, right to sue for damages in tort is chose in action and is a property interest); *Button v. Drake*, 195 S.W.2d 66, 69 (Ky. Ct. App. 1946) (holding that choses in action are personal property); *Md. Cas. Co. v. Brown*, 321 F. Supp. 309, 311 (D. Ga. 1971) (applying Georgia law recognizing that “a right to bring an action is property, whether actual or compensatory damages are involved” (citing *Sterling v. Sims*, 72 Ga. 51 (Ga. 1883) (citation omitted))); see also *Angle v. Chicago, St. P., M. & O. Ry. Co.* 151 U.S. 1, 19 (1894) (“A right of action to recover damages for an injury is property.”).

45. 11 U.S.C. § 541(a)(1) (2006); see, e.g., *Parker v. Goodman*, 499 F.3d 616 (6th Cir. 2007); *In re Cannon*, 277 F.3d 838, 853 (6th Cir. 2002); *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 709 (9th Cir. 1986). I thank Charles Tabb for bringing this context to my attention.

46. *Parker*, 499 F.3d at 625, 628.

such as tort actions<sup>47</sup> (a factor that becomes important in the discussion below<sup>48</sup>). Thus, federal bankruptcy courts<sup>49</sup> are comfortable with the view that even causes of action sounding in tort—the category of legal claim courts are most reluctant to see as alienable—are private property interests that become part of the debtor’s bankruptcy estate,<sup>50</sup> and that may be assigned or sold under the bankruptcy trustee’s authority.<sup>51</sup>

Fifth, other federal courts have recognized legal claims as potentially implicating the Takings Clause, notably the Court of Federal Claims and the Federal Circuit<sup>52</sup>—courts with jurisdiction to hear suits against the federal government, in particular suits based on contracts with the United States.<sup>53</sup> Recently, for instance, the Federal Claims Court held that although the government may be liable for a particular breach of contract, a plaintiff had no Takings Clause claim when the government’s breach did not deprive the plaintiff “of the right to seek damages for breach of that contract.”<sup>54</sup> This approach echoed previous cases at the circuit level that held that when a plaintiff is left with the recourse of bringing suit in some forum, no taking of the contract right occurs—that is, that plaintiff’s property right in the right to sue was not taken, despite the government’s breach.<sup>55</sup> Finally, these courts have acknowledged even more explicitly

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47. See, e.g., Harold R. Weinberg, *Tort Claims as Collateral: Impact on Consumer Finance*, 49 CONSUMER FIN. L.Q. REP. 155, 162 n.35 (1995).

48. See *infra* notes 71–74.

49. Each federal circuit has held that a cause of action can constitute “property” of a bankruptcy estate. See *Off. Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1149 (11th Cir. 2006); *In re Bogdan*, 414 F.3d 507, 512 (4th Cir. 2005); *Off. Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 356 (3d Cir. 2001); *Howe v. Richardson*, 193 F.3d 60, 61 (1st Cir. 1999) (assigning the debtor’s claims arising from a motor vehicle accident, breach of contract, and a dishonored check to the trustee of the debtor’s bankruptcy estate); *Matter of Swift*, 129 F.3d 792, 795 (5th Cir. 1997); *In re RCS Eng’rd Prods. Co.*, 102 F.3d 223, 225 (6th Cir. 1996); *In re Hedged-Inv. Assoc., Inc.*, 84 F.3d 1281, 1285 (10th Cir. 1996); *Matter of Geise*, 992 F.2d 651, 655 (7th Cir. 1993); *In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1101 (2d Cir. 1990); *In re Ozark Rest. Equip Co.*, 816 F.2d 1222, 1225 (8th Cir. 1987); *Skelton v. Clements*, 408 F.2d 353, 354 (9th Cir. 1969); *Carmona v. Robinson*, 336 F.2d 518, 519 (9th Cir. 1964) (adopting the doctrine that causes of action are property even under the former bankruptcy code).

50. E.g., *Parker*, 499 F.3d at 624; *Jones v. Harrell*, 858 F.2d 667 (11th Cir. 1988) (personal injury claims included).

51. *Jones*, 858 F.2d at 669.

52. See, e.g., *Griffin Broadband Comms., Inc. v. United States*, 79 Fed. Cl. 320 (Fed. Cl. 2007); *Castle v. United States*, 301 F.3d 1328, 1342 (Fed. Cir. 2002).

53. See 28 U.S.C. § 1491(a)(1) (2008) (setting forth jurisdiction of the Court of Federal Claims).

54. *Griffin*, 79 Fed. Cl. at 324.

55. *Castle*, 301 F.3d at 1342 (stating that there is no taking because “plaintiffs retained the full range of remedies associated with any contractual property right they possessed”); see also

that such legal claims are constitutional property—the Federal Circuit in *Alliance of Descendants of Texas Land Grants v. United States*<sup>56</sup> and *Abraham-Youri v. United States*,<sup>57</sup> and the Court of Claims in *Shanghai Power Co. v. United States*.<sup>58</sup> In *Alliance*, the Court examined plaintiffs' argument that a 1941 treaty between the United States and Mexico had implicated a taking by the U.S. government of certain land grant claims. As a preliminary to analyzing the substantive claim, the Court first inquired whether those claims constituted property that had in fact been "taken," and had no qualms about ruling that they did.<sup>59</sup> *Abraham-Youri* involved a claim before an international tribunal that was extinguished by the U.S. government as a result of a settlement with Iran; again, the Court held that the claim was "property."<sup>60</sup> Finally, in *Shanghai Power*, a U.S. company based in China had property there expropriated by the Chinese government. The company brought an action against China that was settled, without its consent, by the U.S. government. The settlement value was less than the value of the claim, and the company brought suit against the U.S. for a taking of its property—i.e., the claim against the Chinese government. The Court of Claims held that the cause of action qualified as a property interest for such purposes.<sup>61</sup>

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United States v. Sperry Corp., 493 U.S. 52, 63 (1989) (noting that there is no taking because although United States was taking away the attachment, it did not take Sperry's "claim against Iran"); Lynch v. United States, 292 U.S. 571 (1934) (where statute abrogated plaintiff's right to bring a breach of contract claim altogether, just compensation was appropriate); *In re Consol. U.S. Atmos. Testing Litig.*, 820 F.2d 982, 989 (9th Cir. 1987) (holding, in the regulatory takings context, that a statute that did not fully abrogate plaintiffs' claims did not warrant recognizing a takings claim); *Palmyra Pacific Seafoods, L.L.C. v. United States*, 80 Fed. Cl. 228, 233 (Fed. Cl. 2008) ("The Government is not liable to plaintiffs for a taking because the government actions at issue . . . neither appropriated plaintiffs' contract rights for public use nor removed plaintiffs' right to enforce their contractual licenses or to seek a contractual remedy with their licensors."); *Castle v. United States*, 48 Fed. Cl. 187, 219 (Fed. Cl. 2000) ("[T]he Takings Clause would be implicated in the present case if the government had taken away the range of remedies associated with the vindication of a contract."); *Janicki Logging Co. v. United States*, 36 Fed. Cl. 338, 346 (Fed. Cl. 1996) (finding no taking where government did not impair plaintiffs' ability to enforce the rights delineated in the contract).

56. *Alliance of Descend. of Tex. Land Grants v. United States*, 37 F.3d 1478 (Fed. Cir. 1994).

57. *Abraham-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997).

58. *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237 (1983), *aff'd*, 765 F.2d 159 (Fed. Cir. 1985).

59. *Alliance*, 37 F.3d at 1481 (stating that claimants "allege that the United States 'took' away their legal right to sue for compensation for that land. Because a legal cause of action is property within the meaning of the Fifth Amendment, claimants have properly alleged possession of a compensable property interest." (citations omitted)).

60. *Abraham-Youri*, 139 F.3d at 1465–66.

61. *Shanghai Power*, 4 Cl. Ct. at 239–41.

## B. Incidents of Property Justify Treating Causes of Action as Constitutional Property

Each of the previous approaches supports a view that a legal claim is property for Takings Clause purposes. Another approach might use the familiar “bundle of sticks” metaphor, in which various incidents of property are identified; to the extent an asset or right possesses these incidents, it may be considered “property.” For instance, according to the Supreme Court, it is clear that “property” for takings purposes denotes the “entire group of rights inhering in the citizen’s [ownership,] . . . as the right to possess, use and dispose of [his property].”<sup>62</sup> To the extent legal claims reflect such rights, the case for their being constitutionally protected property increases. The more inductive approach taken by the influential property scholar Thomas Merrill provides yet another perspective. Professor Merrill infers a relatively narrow definition of property for Takings Clause purposes from a review of how the Supreme Court has decided takings cases: “property-as-ownership,” with a property right being recognized where “nonconstitutional sources of law confer an irrevocable right on the claimant to exclude others from specific assets.”<sup>63</sup>

As sketched below, legal claims do reflect the doctrinally defined incidents of property—use, destructibility, disposition, exclusion, and, in some instances, alienability and heritability—in a number of ways. Professor Merrill’s descriptive “property-as-ownership” definition also seems satisfied.

In terms of specific incidents of property, obviously, a plaintiff has the power to decide whether, and how, to *use* his cause of action. He may pursue a claim for remedy (or not). Subject to procedural rules concerning venue and jurisdiction, he may decide the forum in which to pursue the claim.<sup>64</sup> Further, once a lawsuit is filed, the plaintiff (at least nominally)

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62. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 n.6 (1980). This broad approach, emphasizing possessory rights and not simply the right to exclude, reflects a long historical approach to property rights. Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 376 (2003) (discussing “integrated” theory of property and suggesting that the “concept of property is explained best as an integrated unity of the exclusive rights to acquisition, use and disposal”).

63. Merrill, *supra* note 9, at 969 (italics omitted). Cf. Susan Eisenberg, Note, *Intangible Takings*, 60 VAND. L. REV. 667, 704 (2007) (proposing that “in order to receive protection under the Takings Clause, an intangible interest must (1) be a well-defined asset, that (2) contains exclusionary rights, and (3) carries an expectation of protection based on the enduring nature of the interest”).

64. *E.g.*, *Eichman v. Fotomat Corp.*, 880 F.2d 149 (9th Cir. 1989) (“When a plaintiff has both state and federal law antitrust claims, he has the discretion to pursue a remedy in state or federal court.”); Steven A. Ramirez, *Caveat Plaintiff*, 67-Nov. J. KAN. B.A. 16, 18 (1998) (noting that “a plaintiff may always forgo federal claims and seek relief under state law; thus, a plaintiff

controls the direction and extent to which the claim will go forward.<sup>65</sup> Similarly, a plaintiff may *destroy* his legal claim.<sup>66</sup> Before filing a lawsuit, he may elect not to pursue a claim at all and allow the statute of limitations to expire, thus ending his use rights. Even after a suit is filed, a plaintiff retains the right to terminate it. At common law this right was nearly absolute;<sup>67</sup> under contemporary rules of civil procedure a plaintiff retains the right, subject to some restrictions. Under the federal rules, for instance, a plaintiff's right to terminate his action simply by filing notice is absolute and unconditional, so long as notice is filed before a defendant serves an answer or summary judgment motion.<sup>68</sup> Once such a pleading is served, a plaintiff's use rights are constrained somewhat, as a "voluntary" dismissal may only occur by stipulation or by court order.<sup>69</sup> (Such limitations might be analogized to the use rights incident to ownership of real property, where an owner's right to use might involve agreements with a neighbor or be subject to the approval of a local zoning board.)

More ambiguous, perhaps, are the rights to *transfer*, *assign*, or *alienate* a legal claim, or to *exclude* another from using it. There is a substantial body of case law on whether legal claims may be assigned.<sup>70</sup> Much of it turns on whether the cause of action is based on an injury to a person (not transferable/assignable) or to property (transferable/assignable),

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has wide discretion over which claims to pursue"); cf. Alan Hanson, *Cost Recovery or Contribution?: An Overview and Resolution of the Controversy Surrounding Private PRP Standing Under CERCLA Sections 107(a)(4)(b) and 113(f)(1)*, 10 GEO. INT'L ENVTL. L. REV. 199, 211 (1997) (suggesting Congressional intent in CERCLA instances to allow plaintiff to choose among different causes of action).

65. E.g., MODEL RULE OF PROF'L CONDUCT R. 1.2 (1989) (noting attorney's obligation, subject to some constraints, to abide by client's decisions about management of legal action). *But see* Peter H. Huang, *A New Options Theory for Risk Multipliers of Attorney's Fees in Federal Civil Rights Litigation*, 73 N.Y.U. L. REV. 1943, 1955–57 (1998) (noting the view that in practice, plaintiffs' attorneys are more likely to control lawsuit progress).

66. For a useful discussion of the right to destroy one's property, see Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005).

67. E.g., Michael E. Solimine & Amy E. Lippert, *Deregulating Voluntary Dismissals*, 36 U. MICH. J.L. REFORM 367, 371–72 (2003); *Castator v. Boyes & Blandford*, 192 N.W. 696, 697 (Mich. 1923).

68. FED. R. CIV. PROC. 41(a)(1)(i); *Wilson v. City of San Jose*, 111 F.3d 688, 692 (9th Cir. 1997) (right is absolute); *Finley Lines Joint Protective Bd. v. Norfolk S. Corp.*, 109 F.3d 993, 995 (4th Cir. 1997) (right is "unconditional" (citations omitted)). State rules of civil procedure generally mirror the federal rule governing voluntary dismissals. Solimine & Lippert, *supra* note 67, at 376–77 (noting that thirty-seven states essentially follow Fed. R. Civ. Proc. 41(a)(1)(i)); *see id.* at 406–18 (providing appendix with all states' rules).

69. FED. R. CIV. PROC. 41(a)(1)(ii) (dismissal only by stipulation); *Id.* at 41(a)(2) (dismissal only by court order "upon such terms and conditions as the court deems proper").

70. The transfer of claims against the federal government is for the most part prohibited. 31 U.S.C. § 3727 (2000).

or on whether the action survives the death of the plaintiff (in which case it is transferable/assignable).<sup>71</sup> On the one hand, this may limit the categories of causes of action that might be considered private property for Takings Clause purposes. That is, to the extent a particular right of action lacks the incident *transferability*, it might be less likely under this approach to be recognized as property. On the other hand, it is clear that an asset may be considered “property” whether it is capable of being transferred or not.<sup>72</sup> Thus, to the extent state law defines a chose in action as property, its assignability need not affect whether it is property for Takings Clause purposes. That is, whether something may be transferred need not affect whether the government may exercise eminent domain powers and seize it from the present holder, so long as that thing may otherwise be considered private property.<sup>73</sup> Moreover, some states hold that a cause of action is property and *is alienable*, even if it may not be assigned. Texas does so, for instance, as long as the lawsuit has been filed.<sup>74</sup> In fact, the assignability or alienability of a cause of action may properly go more toward a determination of its market value than of its status as a property interest, and is thus more appropriately a just compensation question. Finally, at least in the specific context of the federal tax lien statute, the U.S. Supreme Court has held that whether an asset has monetary value and whether it is transferable are relevant, but by no means dispositive factors to consider in determining whether the asset is property.<sup>75</sup>

Finally, causes of action *are* alienable, in at least three ways. The first is the controversial one, in the sense that it involves actually selling to a

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71. *E.g.*, *Accrued Fin. Servs., Inc. v. Prime Retail, Inc.*, 298 F.3d 291, 296–97 (4th Cir. 2002) (noting that existing and potential choses in action are assignable, so long as the underlying cause of action would survive the death of the assignor).

72. Professional licenses, for instance, or prescription drugs. Tension exists in this context. Compare 2 SACKMAN ET AL., *supra* note 43, § 5.01[5][c], at 5–35 (“The mere fact that a specific right or interest has value does not, in and of itself, give it the status of property within the meaning of the constitutional inhibition upon the taking of property without compensation.” footnote omitted), with *id.* (“Property has been held to include every kind of right or interest, capable of being enjoyed and recognized as such, and upon which it is practicable to place a money value.” (footnote omitted)); Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1295–96 (2000) (arguing that the fundamental purpose of considering something “property” is to facilitate its transfer and alienability); Michael J. Hostetler, Note, *Intangible Property Under the Federal Mail Fraud Statute and the Takings Clause: A Case Study*, 50 DUKE L.J. 589, 605–06 (2000) (suggesting that “courts recognize that if someone is willing to bargain for and exchange some form of consideration for an intangible right, then that intangible interest is property”). See *infra* Section III(A).

73. This may be either through statutory or judicial declaration, as just alluded to, or by the more general inductive approach or, as discussed below, by a broader definitional approach.

74. See TEX. PROP. CODE ANN. § 12.014(a) (Vernon 1984).

75. *Drye v. United States*, 528 U.S. 49, 60 n.7 (1999).

third party the right to sue an existing defendant. Traditional objections have focused on A's transfer or sale to C of the right to sue B. Despite a long history of criticism,<sup>76</sup> this is not barred in all places, and the alienability of causes of action to third parties seems to be developing more approbation. Second, although it also was initially subjected to some champerty objections, the practice of contingent fee arrangements reflects an assignment of some portion of the right to recover.<sup>77</sup> Third, A can always settle with B, essentially selling A's right to recover to B—that is, relinquishing the right for a set fee.<sup>78</sup>

*Exclusion* is a focal feature under Professor Merrill's description of property for Takings Clause purposes.<sup>79</sup> Again, that definition suggests

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76. See generally Marcushamer, *supra* note 2 (discussing development of champerty, barratry, and maintenance, but noting that more and more states are doing away with these doctrines, either through case law or statute).

77. Courtney R. Barksdale, Note, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707, 716–17 (2007) (“[T]here are many exceptions to champerty laws—most notably, attorney contingent fees.”); Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?*, 30 AM. BUS. L.J. 485, 489–91 (1992) (similar discussion); Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 625 (2007) (noting initial prohibition under champerty doctrine, as well as relaxation of prohibition at the turn of the twentieth century).

78. Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 744 (2005) (“[O]ne form of alienation is permitted—settlement.”); Ari Dobner, Comment, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1537–38 (1995–96); Merrill, *supra* note 9, at 988–89 (“[A]n adjudicated cause of action often has a monetary value—it can be settled before trial for consideration.”). Foreshadowing the discussion in Section II, one reason the government might want to condemn A's right would be to avoid such settlement; for instance, perhaps the government would want a case to go to judgment.

79. Merrill, *supra* note 9, at 969. Indeed, Merrill has argued that exclusion is the paramount feature of property generally. Thomas P. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (right to exclude is the “*sine qua non*” of property); *id.* at 731 (right to exclude is a “necessary and sufficient condition of identifying the existence of property”). He does so even more strongly than the usual panegyrics to exclusion as the hallmark right of property. *E.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (“The hallmark of a protected property interest is the right to exclude others.”); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (right to exclude is “universally held to be a fundamental element of the property right”). *But see* Eric Claeys, *Property 101: Is Property a Thing or a Bundle?*, SEATTLE U. L. REV. (forthcoming 2009) (critiquing the centrality of the right to exclude).

*College Savings Bank* is especially relevant in the present context, given its apparent focus on exclusion to reject plaintiff's putative claim that its cause of action was a property right. According to some, “Justice Scalia held that an adjudicated cause of action for false advertising was not ‘property’ because false advertising protections do not grant any exclusionary rights.” Eisenberg, *supra* note 63, at 699; *see also* Merrill, *supra* note 9, at 910. *But cf. infra* Section I(C) (criticizing cases holding that adjudicated causes of action do not qualify as property for Takings Clause purposes).

If that statement were correct, the argument here might be challenged, especially in this exclusion context. A close reading of the case at the district court and Supreme Court levels,

that protection under the Clause exists when what is to be taken is a specific asset, upon which nonconstitutional sources of law have conferred upon the owner an irrevocable right to exclude others.<sup>80</sup> In the context of a cause of action, this definition may be problematic; one might argue that there is no specific asset from which another user might be excluded. Nor is it immediately obvious that there is a clear way in which “exclusion” might function. Under a strict reading of Merrill’s definition, this might defeat the idea of causes of action as property.<sup>81</sup>

This exclusion objection, however, is not fatal. First, as sketched above, the right to sue (or the reified lawsuit brought to vindicate the injury underlying that right) *is* an asset, not simply a right or an incident of

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however, suggests that it is an imprecise characterization of the holding. Justice Scalia asserted that the Lanham Act did not create a property right in what the bank was trying to sue to protect—not that it did not create a property right in the suit itself. That latter issue was simply not addressed. The Court framed the bank’s requests as “two species of ‘property’ rights: (1) a right to be free from a business competitor’s false advertising about its own product, and (2) a more generalized right to be secure in one’s business interests,” *Coll. Sav. Bank*, 527 U.S. at 672—neither of which was recognized as property, but neither of which involves the actual right to sue. Similarly, the district court framed what the Act protected as “the right to be free from false advertising,” and found no precedent to suggest that that right was a property interest. *Coll. Sav. Bank v. Fla. Prepaid Postsec. Educ. Expense Bd.*, 948 F. Supp. 400, 426 (D.N.J. 1996). The Supreme Court agreed. However, neither court in fact considered whether the *right to sue* was a property interest, because that was simply not at issue. Moreover, the courts’ analyses emphasized the due process context, not the Takings Clause context.

*College Savings Bank*’s focus on abrogation does not undercut this. That is, one response to this point might be that the statute’s effect was that the bank could not sue; consequently, the bank’s takings argument should be framed as the loss of that right, and that what was being taken away was property. But the district court’s opinion shows that not to be the case; the abrogation question addressed whether the sovereign immunity waiver was undertaken pursuant to proper authority. To be under proper authority it could only be undertaken under § 5 of the Fourteenth Amendment. To be a valid waiver under § 5 of the Fourteenth Amendment it had to be enforcing a Fourteenth Amendment right. That right was to be protected from being deprived of property without due process (note, again, the conflation of the due process definition with the takings definition). And the district court, and later the Supreme Court, focused explicitly on whether “the right to be free from false advertising” was a property right that was being deprived. *Coll. Sav. Bank*, 527 U.S. at 672. Neither that, nor (over Justice Stevens’s objection) “the activity of doing business or in the activity of making a profit,” was held to be a property interest, and thus—following the logic back again—there was nothing to warrant Fourteenth Amendment protection. *Id.* at 693 (Stevens, J., dissenting). Thus, there was nothing to enforce under § 5; thus no proper authority under which to waive sovereign immunity; and, thus, no valid waiver.

80. Merrill, *supra* note 9, at 969.

81. See, e.g., Alfred Hill, *In Defense of our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 585 (2001) (“If the right to exclude is an indispensable attribute of property rights generally, then not only choses in action, but also contractual interests generally do not constitute property.”); see also A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 131–32 (A.G. Guest ed., 1961) (noting that debts due and choses in action constitute a type of claim—something that can be owned—but “[n]o right to exclude others is involved”).



property. Second, there are reasons for not placing exclusion at the center of the definition of property.<sup>82</sup> In a review of some of the philosophical groundings for the constitutional view of property, for instance, Adam Mossoff highlights political philosophers' emphasis on the other incidents of property—the right to use, dispose, possess—as precursors of the right to exclude.<sup>83</sup> For instance, he frames the right to exclude as reflecting only the “formal claim” that a property holder has against others, not the substance of that claim or of the relevant property: “[I]f one speaks only of the right to exclude, the unanswered questions remain: a right to exclude from *what*? And *why* a right to exclude?”<sup>84</sup> Mossoff's response: the focus is “the right to exclude from the *right of use*, or more specifically, from the rights of use, acquisition, and disposal.”<sup>85</sup> Thus, the right to exclude “is the formal means by which Anglo-American rules identify and protect the substantive core of rights that constitute property.”<sup>86</sup> A recent essay by Elizabeth Glazer echoes this point, suggesting that the right to exclude acts in the service of other rights, in particular the right to *use*: otherwise confusing exceptions to the right to exclude may be made sensible if they are seen as privileging the right to exclude when it validates the other, more substantive rights.<sup>87</sup> These approaches reverse Professor Merrill's argument that those other rights are only derivative of the right to exclude.<sup>88</sup> Others to raise questions about the central role for the right to exclude include Shyamkrishna Balganes, who suggests that in part due to vagueness about what the right to exclude in fact constitutes, its centrality “has in more recent times receded into the background.”<sup>89</sup> Similarly,

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82. The most trivial reason in the eminent domain context is that, of course, ownership never affords a *total* right to exclude because property is always held subject to the eminent domain power as a liability rule. So long as there is a public purpose for government condemnation, and just compensation is given, an owner may *not* exclude the government. *E.g.*, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 22 (1949) (“[A]ll property [is held subject to] condemnation for the common good.”).

83. Mossoff, *supra* note 62. Mossoff's discussion implies that exclusion might better be thought of as *exclusivity*—that is, as “I am the only one who possesses this.” The exclusivity emphasis is well-articulated, and more explicit, in Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L. REV. 275 (2008). This view is consistent with the useful discussion of “virtual property” in Eisenberg, *supra* note 63.

84. Mossoff, *supra* note 62, at 396.

85. *Id.*

86. *Id.* Cf. Brown, *supra* note 37, at 72 (“The right of disposition is tantamount to the right of exclusive possession and should be afforded similar protections.”).

87. Elizabeth M. Glazer, *Rule of (Out)Law: Property's Contingent Right to Exclude*, 156 U. PA. L. REV. 331 (2008).

88. Merrill, *supra* note 79.

89. Shyamkrishna Balganes, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593 (2008).

Anthony Honoré famously omitted the right to exclude from his list of what constitutes a property right.<sup>90</sup> Honoré's point was that the incidents he did identify largely reflected the owner's subjection to "characteristic prohibitions and limitations"—that is, that the right to exclude is so vulnerable to constraint that it would be inappropriate to place that right solely at the center of "ownership."<sup>91</sup> Finally, well-known case law demonstrates that even the fundamental right to exclude may give way to other important interests.<sup>92</sup>

Third, even if exclusion were the paradigm incident of property rights, aspects of exclusion are present in causes of action and legal claims. The bankruptcy example gives one sense of how exclusion might work in this context. Recall that a cause of action, whether filed as a lawsuit or not, is a property interest that becomes a part of the debtor's estate and that is subject to the trustee's authority.<sup>93</sup> The trustee may transfer or sell that right to sue, even over the debtor's objection<sup>94</sup>—that is, the trustee may now exclude even the debtor from exercising any use rights. Nor may the creditors pursue the cause of action in order to satisfy the debtor's original debt; the trustee may exclude them from pursuing their potential interests as well.<sup>95</sup>

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90. Honoré, *supra* note 81, at 131; see Massey, *supra* note 18, at 547 n.42.

91. Honoré, *supra* note 81, at 131. Honoré continued, however, by defining the "right to possess" to include having "exclusive physical control of a thing" and "the claim that others should not without permission interfere." *Id.*

92. *E.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); State v. Shack, 277 A.2d 369 (N.J. 1971); see also Fashion Valley Mall, LLC v. NLRB, 172 P.3d 742 (Cal. 2007). *Shack* is one of the "confusing exceptions" Professor Glazer believes is clarified by de-emphasizing exclusion to some extent.

93. See *supra* notes 45–51.

94. Parker v. Goodman, 499 F.3d 616 (6th Cir. 2007).

95. *E.g.*, Matter of Educators Group Health Trust, 25 F.3d 1281, 1284 (5th Cir. 1994) (holding that where a cause of action is part of the bankruptcy estate, "the trustee has exclusive standing to assert the claim"). It is true that the Bankruptcy Code in some instances protects property of the estate even from state condemnation through eminent domain. 11 U.S.C. § 362(a)(3) (2006) (providing for an automatic stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate"). See Matter of Chi., Milwaukee, St. Paul & Pac. R.R., 738 F.2d 209 (7th Cir. 1984); *In re PMI-DVW Real Estate Holdings, L.L.P.*, 240 B.R. 24, 32 (D. Ariz. 1999) (condemnation proceedings do not fall under § 362(b)(4) exception to automatic stay provision). Note, however, that the reasoning of *In re PMI-DVW Real Estate Holdings, L.L.P.* may be called into question, to the extent it distinguished between the standards to be used in eminent domain proceedings and regulatory takings, a distinction that was rejected in *Tahoe-Sierra President Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002). Moreover, even under the automatic stay of § 362(a), where the condemnation will not unduly interfere with a debtor's reorganization plan, the state's authority may trump the jurisdiction and authority of the bankruptcy court. The analogy need not be pushed too far; the point is simply that causes of action are clearly considered

Finally, the well-known standing doctrine is consistent with a right to exclude, and with viewing causes of action as property.<sup>96</sup> Standing doctrine, of course, prevents someone who does not possess a right to sue from bringing suit. Courts will simply not recognize the right of such a “non-owner” to bring suit and will dismiss such cases. Several points are relevant here. First, a plaintiff does not actually have a *right* to exclude a third party from his lawsuit, in the sense that infringement of that right would lead to an enforceable legal remedy. Nevertheless, a plaintiff’s “ownership” of that suit (or potential suit) *will* be enforced by state mechanism—a court applying the rules of standing will recognize and enforce that ownership. That is, although there is no remedy for infringement on the property right involved (the right to sue)—indeed, it is difficult to see how it is *possible* to infringe—by definition, no one else may make use of that right, and the state will enforce, through the standing doctrine, that unique right.<sup>97</sup> Such state action reflects the classical approach to property rights—exclusion enforced by the state.<sup>98</sup> Second, again using Professor Merrill’s approach, such action can imply property for Takings Clause purposes: “[I]f a state confers on an individual the right to exclude others from a discrete asset, that individual would have property whether or not the state calls the interest property.”<sup>99</sup> Third, when a cause of action is validly transferred or assigned, it is the assignee that now has standing as a result—as the U.S. Supreme Court recently reaffirmed.<sup>100</sup> Statutes granting litigant status only to a “real party in interest” emphasize that once the cause of action is assigned, the assignor may not control the

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property of a debtor’s estate, and in some circumstances the property of a bankruptcy estate may be subject to condemnation by the state for a public purpose and with just compensation.

96. Cf. Balganesch, *supra* note 89 (emphasizing that the right to exclude is a *right* in the Hohfeldian sense, imposing a duty on others not to interfere with the asset).

97. Cf. *Gray v. United States*, No. 7, French Spoliations, 1800 WL 1537 at \*37 (Ct. Cl. May 17, 1886) (“A right often exists where there is no remedy.”).

98. Felix Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954).

99. Merrill, *supra* note 9, at 954 n.260; see also J. Peter Byrne, *What We Talk About When We Talk About Property Rights—A Response to Carol Rose’s Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 1049, 1050 (1996) (“[T]he law will support and facilitate the property holdings that it recognizes and sanction those who interfere with them without legal warrant.”).

100. *Sprint Comm. Co., L.P. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2538–39 (2008) (approving of assignee’s Article III standing in suit for collection); see also, e.g., *Tango Transp. v. Healthcare Fin. Servs.*, 322 F.3d 888, 889 (5th Cir. 2003) (recognizing derivative standing for assignee of ERISA-based suit); *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 706 (Tex. 1996) (holding that a plaintiff may have standing by virtue of a valid assignment of a cause of action); Pamela H. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. 939, 974–78 (2002) (arguing that where government assigns a cause of action to a private citizen, that citizen obtains standing to pursue the legal claim).

action or “receive its fruits,”<sup>101</sup> and the assignee is the one who owns the legal claim. Thus, as in the bankruptcy context, even the injured party is excluded from exercising use rights once a valid transfer has been enacted.

### C. The “Vested Rights” Approach Justifies Treating Causes of Action as Constitutional Property

One other important aspect of treating legal claims as property interests must be addressed. A number of cases and commentators assert that even if a cause of action might be considered property under some circumstances, it will not be so viewed until it “vests.” The Ninth Circuit has suggested, for instance, that “a plaintiff has no vested right in any tort claim for damages under state law.”<sup>102</sup> The U.S. Supreme Court has spoken similarly, stating that “[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.”<sup>103</sup> Indeed, according to the Ninth Circuit, this remains true all the way until a “final unreviewable judgment is obtained.”<sup>104</sup> Such an extreme view, however, is probably wrong, at least as a matter of history, logic, analogy, and doctrine.

#### 1. History

As a matter of history, Blackstone argued in the eighteenth century that the right to sue vests at time of injury: “If a man promises or covenants with me to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a chose in action, for . . . a right to some recompense *vests in me at the time of the damage done.*”<sup>105</sup> Similarly, though this is more recent history, “[O]nce a cause of action under a particular rule of law accrues to a person by virtue of an injury to his rights, that person’s interest in the cause of action and the law which is the basis

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101. *E.g.*, *Spencer v. Standard Chemicals & Metals Corp.*, 143 N.E. 651, 652 (N.Y. 1924) (defining party in interest as the party possessing the right to a cause of action and control over it, as well as the right to “receive its fruits” (citation omitted)).

102. *In re Consolidated U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 988 (9th Cir. 1987) (citation omitted); *see also* *Ileto v. Glock*, 421 F. Supp. 2d 1274 (C.D. Cal. 2006); *Jung v. Ass’n of Am. Med. Colls.*, 339 F. Supp. 2d 26, 43 (D.D.C. 2004) (“Causes of actions only become actionable property interests upon the entry of final judgment.” (citing *Adams v. Hinchman*, 154 F.3d 420, 424 (D.C. Cir. 1998))); *Grimesy v. Huff*, 876 F.2d 738, 744 (9th Cir. 1989) (“[A] party’s property right in any cause of action does not vest until a final unreviewable judgment is obtained.”).

103. *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917).

104. *Atmospheric Testing*, 820 F.2d at 989; *Grimesy*, 876 F.2d at 744.

105. 3 WILLIAM BLACKSTONE, COMMENTARIES \*397 (alteration in original) (emphasis added).

for a legal action becomes vested.”<sup>106</sup> This approach illustrates that some sort of right vests in an injured person—indeed, that a right to recover in the form of a chose in action vests in that injured person. To the extent a chose in action is considered a property interest,<sup>107</sup> then the vesting of a chose in action thus vests a property right as well.

## 2. *Logic*

As a matter of logic, it may nevertheless be the case that no person has a vested right allowing him to expect that the substantive law will remain unchanged. Even so, however, that says nothing about whether something that could be defined as property may be taken. Under the “no vested right” approach, a person has no absolute vested right to expect that a state legislature might not revoke all forms of property ownership tomorrow. That is, under this approach, an individual has “no vested interest” that permits him to expect that a state’s “rule of law” as to traditional forms of property must “remain unchanged.” But that cannot mean that the government may not take private property, or that private property exists but is unprotected by the Fifth Amendment. Professor Byrne has made a similar point in the context of reversionary interests, which at common law were inalienable, but which states have more recently made alienable.<sup>108</sup> He suggests that if a state legislature changed its mind and returned to the inalienability of such interests, a reversionary interest holder might have “a colorable regulatory takings claim.”<sup>109</sup> A more extreme example of such manipulation highlights the difficulty of *only* attending to state law in the definition of private property interests for constitutional purposes. Gelfand has noted that if state law really is the final word as to defining “property” for federal constitutional purposes, the state could simply redefine “property” for its benefit.<sup>110</sup> The state could, for instance, “redefine property to exclude land just before beginning an ambitious highway project.”<sup>111</sup> Finally, again as a simple logical matter, whether a cause of action has vested or reached final judgment has no impact on its alienability; thus, to the extent that a cause of action is defined as property by whether it may be transferred or sold,<sup>112</sup> the vesting issue is irrelevant.

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106. *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 676 (Utah 1985).

107. *See cases cited supra* note 44.

108. Byrne, *supra* note 99, at 1052.

109. *Id.*

110. Gelfand, *supra* note 42, at 713.

111. *Id.*

112. *See supra* note 72; *infra* Section III(A).

### 3. *Analogy*

As a matter of analogy, the distinction between vested and contingent future interests is instructive. That is, courts' emphasis on vested rights that have not proceeded all the way to a final judgment reflects, in part, a concern about the contingent nature of those rights. This emphasis suggests that (1) because they may be subject to legislative change, and (2) (as the focus on a "final, unreviewable judgment" suggests) because the outcome of the suit is indeterminate and thus difficult to value, property interests in the lawsuit are too remote or contingent to be considered compensable.<sup>113</sup>

For a number of reasons, however, this reasoning is inapposite. First, although the majority approach may be not to afford compensation to the holder of a contingent future interest when the land in which that interest is held is condemned, that approach is questioned both by case law and commentators on equitable and logical grounds.<sup>114</sup> Indeed, at least one prominent commentator sees no constitutional difference between the two types of remainder.<sup>115</sup> Second, there is debate over whether other indeterminate or "remote" property interests should be compensated when the land in which that interest is held is condemned. Again, although a majority view sees inchoate dower rights as too remote or difficult to value, several courts have been reluctant to take this approach.<sup>116</sup> Further, when that approach is taken, it reflects a due process perspective that focuses on vested rights, not a Takings Clause perspective that

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113. *E.g.*, Laura A. Burney, *Just Compensation and the Condemnation of Future Interests: Empirical Evidence of the Failure of Fair Market Value*, 1989 B.Y.U. L. REV. 789, 802-03; *cf.* Tobin-Rubio, *supra* note 25, at 1191-92 (noting some courts' reluctance to allow condemnation of intangible property rights, either because of difficulty of determining value or because of contingent nature of property rights).

114. *Patrick v. Miss. State Highway Comm'n*, 184 So.2d 850, 853 (Miss. 1966) ("We decline to follow the majority rule which denies compensation to owners of all future interests taken by the state. There is no rational basis for such a general doctrine. It is not equitable, and is not consistent with other legal principles related to such existing estates in land."); *see* Burney, *supra* note 113, at 801 (noting courts' and legislatures' consistent recognition "that the owners of reversions and remainders, whether vested or contingent, are entitled to share in a condemnation award based on the fair market value of the entire fee"); *id.* at 802-10 (reviewing approaches to the compensation of future interest holders). *Cf.* *Watson v. United States*, 34 F. Supp. 777, 779 (D.C.N.C. 1940) (suggesting that a remainderman, *vested or contingent*, "ha[s] an immediate cause of action" and should make a claim for compensation upon the condemnation, not wait until the remainder interest comes into being).

115. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 226 (1985) (arguing that there is no "distinction between vested and contingent remainders: both are property, albeit in different forms and with different values").

116. *See* 2 SACKMAN ET AL., *supra* note 43, § 5.03[6][a], at 5-151 to 5-152 (discussing cases on inchoate dower rights).

emphasizes the transfer of title from an individual to the sovereign.<sup>117</sup> Finally the majority view of restrictive covenants in fact recognizes such interests—contingent and difficult to value as they are—as compensable under the Fifth Amendment.<sup>118</sup>

Third, a different approach is taken by the Restatement of Property, called the imminency or probability test.<sup>119</sup> This approach typically denies compensation to future interest holders unless the event that would trigger the interest holder's taking possession is imminent, that is, will occur within a reasonably short time.<sup>120</sup> Again, this approach—rejected as unfair by some courts<sup>121</sup>—emphasizes the remoteness or indeterminacy of the future interest becoming possessory; such lack of imminency mandates that it does not qualify as a compensable interest.

However, applying this test to the actual taking of a cause of action leads to a flawed outcome. It may be that the outcome of the lawsuit is indeterminate (and thus more like a contingent than a vested future interest). But under the present analysis, it is the right to sue itself—the lawsuit itself—that is being taken away, *not* the final outcome. The lawsuit is determinate, and is a valid, possessory interest, though the outcome may be uncertain. A better analogy might be that the *remainder itself* was being taken by eminent domain, not the land in which the remainderman had an interest, increasing the chances that the interest taken would be compensable.<sup>122</sup>

#### 4. *Doctrine*

Finally, and most importantly, doctrinal factors militate against such a strict reading of the vesting issue in defining causes of action as property for Takings Clause purposes. One such factor is the distinction between common law claims and those based on statutory authority, as highlighted in a line of Illinois cases. These cases suggest that legal claims based on common law claims vest upon accrual of the cause of action—as Blackstone and *Berry* suggest—but statutorily derived causes of action do

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117. *Id.* at n.177.

118. *Id.* § 5.07[4][a], at 5-378. *But see id.* nn.90–93 (citing cases arguing that restrictive covenant are not property interests but rather contract rights that are enforceable against others but not against the government, and, thus, taking them is not taking a vested interest).

119. RESTATEMENT OF PROPERTY § 53 (1936).

120. *Id.* cmts. b & c.

121. *E.g.*, *State v. Indep. School Dist.*, 123 N.W.2d 121, 129 (Minn. 1963); *Ink v. City of Canton*, 212 N.E.2d 574, 578 (Ohio 1965); *Hemphill v. Miss. State Highway Comm'n*, 145 So.2d 455 (Miss. 1962); *Columbus & Greenville Railway Co. v. City of Greenwood*, 390 So.2d 588, 591–92 (Miss. 1980).

122. *Burney*, *supra* note 113, at 801.

not vest until reduced to judgment and appeals are exhausted.<sup>123</sup> Federal courts applying Illinois law have recognized the distinction as well,<sup>124</sup> and at least one commentator has read the Supreme Court's case law to suggest that when "an abrogated right is a traditional common law right, such as a tort right," it will be protected "as a property interest."<sup>125</sup>

Moreover, this distinction mirrors the Supreme Court's approach in other areas of takings doctrine, in particular, the recurring notion of settled expectations regarding property as warranting heightened property rights protection. This idea is prominent, of course, in the Supreme Court's regulatory takings analysis. However, it also reflects the Court's early statements in *Munn v. Illinois*, where Chief Justice Waite stated that a "person has no property, no vested interest, in any rule of the common law."<sup>126</sup> The Chief Justice continued, nevertheless, "[r]ights of property which have been created by the common law cannot be taken away without due process[.]"<sup>127</sup>

It is relevant too to the way in which the Court has treated the definition of property rights for Takings Clause purposes. Specifically, the Court emphasized in *Phillips* that federal courts must look to sources other than the federal Constitution in defining property interests—to state law in particular.<sup>128</sup> As Professor Merrill points out, *Phillips* emphasized "established" common law rules, ones "firmly embedded in the common law of the various States," ones that reflected "traditional property law principles," ones that had a long "historical pedigree."<sup>129</sup> He argues that for the Court, more recent definitions of property interests, as well as statutory definitions, could not justify an individual holding settled expectations

123. Robert C. Feldmeier, *Armstead and its Progeny: The Illinois Supreme Court's "Vested Rights" Approach to the Application of Statutory Amendments to Pre-Existing Cases or Causes of Action*, 25 S. ILL. U. L.J. 95, 121 (2000); see also 3 BLACKSTONE, *supra* note 105; see generally Berry *ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 676 (Utah 1985).

124. See *Kopec v. City of Elmhurst*, 193 F.3d 894, 906 (7th Cir. 1999) (Posner, C.J., dissenting) (noting that under Illinois law, "common law rights, unlike Illinois statutory rights, can vest"); *Jackson v. Resolution, No. 94 C 255*, WL 158319 at \*11 n.5 (N.D. Ill. Mar. 31, 1997) ("While a vested cause of action, 'whether emanating from contract or common law principles, may constitute property beyond the power of the legislature to take away,' it is clear that causes of action created by a legislature through statute do not generally constitute vested property rights." (citing *DeRodulfa v. United States*, 461 F.2d 1240, 1257 (D.C. Cir. 1972), *aff'd*, 136 F.3d 1130 (7th Cir. 1998))).

125. Radin, *supra* note 4, at 1336–37; see *id.* at 1349 ("When a plaintiff has an accrued cause of action based on established common law doctrines, courts are likely to find a property interest.").

126. *Munn v. Illinois*, 94 U.S. 113, 134 (1877) (due process context).

127. *Id.*

128. See sources cited *supra* note 42.

129. Merrill, *supra* note 9, at 897 (citations omitted).



about the property defined, and that the Court thus ignored such definitions in determining the relevant property interests.<sup>130</sup> This perspective also undergirded the Court's reluctance to find a property interest in cases involving rights to benefits conferred by statute. Merrill concludes that "long-established common law rules [may be] central to the identification of "'true'" property interests, whereas rules enacted by regulatory agencies are not."<sup>131</sup> Of course, the "historical pedigree" of the right to sue to vindicate one's interests is as old as the institution of law itself.

But even this distinction may be overbroad or inapposite. Again, the inquiry here goes toward defining property for condemnation purposes, not regulatory takings. Cases holding that no property right vests are typically in the context of regulatory takings analysis. For example, *Atmospheric Testing* addressed whether legislative action substituting a claim against the government for a claim against a private contractor constituted a taking of property.<sup>132</sup> The court there applied *Penn Central*'s "ad-hoc" regulatory takings test by looking at plaintiffs' expectations, the nature of the property right, and the nature of the government action.<sup>133</sup> Again, this is a fundamentally different analysis from the more straightforward eminent domain tests:<sup>134</sup> as the federal circuit has noted, applying the former test is problematic where "the choses in action were not simply regulated in some manner, but were terminated[.]"<sup>135</sup>

When they do not involve regulatory takings, these cases apply due process analysis, rather than takings analysis. For instance, *Adams v. Hinchman*, cited above, framed its question as a due process one, explicitly applying the due process test later rejected by *Lingle*.<sup>136</sup> The Ninth Circuit's *Atmospheric Testing* discussion was similar, to the extent that it cited *Zimmerman Brush* and *Mullane* in defining causes of action as "species of property"; this was so despite the Court's recognition that a due

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130. *Id.* at 897–98.

131. *Id.* at 898.

132. *In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 988 (9th Cir. 1987).

133. *Id.* at 988–89.

134. *See supra* note 7 and accompanying text.

135. *Abraham-Youri v. United States*, 139 F.3d 1462, 1465–66 (Fed. Cir. 1997) (recognizing that the trial court had applied the *Penn Central* regulatory takings analysis, and noting the potential difficulties in doing so).

136. *Adams v. Hinchman*, 154 F.3d 420, 424 (D.C. Cir. 1998); D. Benjamin Barros, *Hadacheck v. Sebastian* 6 (Widener Law School Legal Studies Research Paper Series, Paper No. 08-08, 2008), available at <http://ssrn.com/abstract=1086468> (noting that "in its 2005 decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, however, the Court expressly recognized that the substantive due process analysis contained in these early cases should not be applied in contemporary regulatory-takings cases, casting doubt on the continuing relevance of early [such] cases.").

process claim for the deprivation of property should be distinguished from a claim that property was taken without just compensation.<sup>137</sup> Finally, even these due process cases recognize the distinction between prospective and retrospective interference with causes of action.<sup>138</sup> Prospective regulations that diminish or eliminate unaccrued causes of action (or defenses) do not implicate property rights.<sup>139</sup> However, where “a law changes the legal consequences of *past* actions, it interferes with vested rights, and courts have found that property . . . is implicated.” That is, a cause of action vests upon the occurrence of an injury, and that “vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference.”<sup>140</sup>

Scholarship reflects these tensions as well. For example, in a recent article addressing certain procedural restrictions on asbestos litigation, the authors apply the vested rights line of cases that hold that a cause of action does not vest until it is final and unreviewable.<sup>141</sup> However, the article also acknowledged the contrary opinion that it does vest before that point.<sup>142</sup> But their discussion of vested rights is explicitly in a due process context.<sup>143</sup> When they subsequently do turn to a takings analysis, they acknowledge that there “is not a taking in the classic sense, such as occurs when the government appropriates land for road expansion or some other government use. *Unimpaired plaintiffs retain ownership of their causes of action and the benefits to be derived from them.*”<sup>144</sup> Importantly, the authors note a state court case holding that no taking occurs where a plaintiff retains access to the justice system—a holding consistent with

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137. *Atmospheric Testing*, 820 F.2d at 988–89.

138. See Radin, *supra* note 4, at 1328–33.

139. Radin, *supra* note 4, at 1328–29 (collecting examples); see *Borgnos v. Falk Co.*, 133 N.W. 209, 222 (Wis. 1911) (“The right to bring an action in the future . . . is subject to change by the lawmaking power at any time.”); *Sayles v. Foley*, 96 A. 340, 347 (R.I. 1916) (stating that until “the occurrence of an accident there is no property right growing out of it”). But cf. EPSTEIN, *supra* note 115, at 97–98 (“If you deny the plaintiff the prima facie right to recover against a stranger without proof of negligence, then you have taken a limited property interest; if you deny the plaintiff the right to recover for certain nuisances, then you have created an easement to cause a nuisance.”). The latter is what happened (albeit in the regulatory takings context) in *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998), where state-created agricultural centers that gave users immunity from nuisance suits (similar to “right-to-farm” statutes) were struck down as having taken neighbors’ right to be free from nuisances.

140. *Pritchard v. Norton*, 106 U.S. 124, 132 (1882).

141. Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 REV. LITIG. 253 (2005).

142. *Id.*

143. *Id.* at 281–86.

144. *Id.* at 294 (emphasis added).

federal courts.<sup>145</sup> Because in adjusting the asbestos litigation docket there is no actual seizure of the right to sue qua property, the authors, emphasizing the *Tahoe* distinction on which I have also focused, move to a regulatory takings analysis—the sort of analysis I suggest is inapposite under my framework—i.e., where there *is* an actual seizure of the plaintiff's property, and an attendant denial of the plaintiff's access to court.

The authors do briefly address the takings issue further by suggesting that, given their earlier discussion of vested property rights, there is simply no property right at issue.<sup>146</sup> First, however, this imports a due process definition of property to the takings context, which I have suggested is inappropriate (though the authors do recognize the distinction).<sup>147</sup> Second, their discussion involves delays in the progress of a plaintiff's lawsuit, not the confiscation of that lawsuit or the plaintiff's right to sue.<sup>148</sup> Third, they suggest that a claimant must show a property interest in having his claim resolved “quickly or by a particular date.”<sup>149</sup> This last focus seems misplaced, however, especially given the substantial case law suggesting that it is the cause of action that is property—that is, the property right inheres in the claim itself, not in how that claim is resolved.

##### 5. *Summary: Vested Rights Doctrine*

In light of the above discussion, it is clear that when an injury occurs, a cause of action arises in which the injured party has a property interest. Some case law suggests that this interest may not be a vested right, and thus is insufficient to warrant Takings Clause protection. For a number of reasons, however, I suggest that this case law has taken the wrong perspective. The better approach reflects Blackstone's emphasis on the point at which the injury accrues: If a right to sue is taken before a tort or other injury happens, then no property interest has been infringed upon. However, if the right is taken away *after* the injury, then there has been interference with a vested right and thus constitutional protection is warranted. This seems to be what the vested versus unvested distinction boils down to (or should).

Even if the case law's approach is more persuasive, and the property right does not vest at the time of injury, a stronger case might be made for

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145. See *id.* at 294 for discussion of the state case. For examples of federal courts taking this approach, see *supra* note 55.

146. Behrens & López, *supra* note 141, at 294–98.

147. *Id.* at 297.

148. *Id.* at 298.

149. *Id.* at 297.

the vesting of that property interest once a lawsuit is filed. When an injured plaintiff commences an action, complying with established guidelines for how to obtain the remedy associated with that injury, doing so activates expectations about how the machinery of the state will be used. Condemning that lawsuit through eminent domain takes a property interest and violates those settled expectations, thus warranting just compensation.

A number of different lines of reasoning support this perspective. First, it is consistent with the Court's case law. In particular, it is consistent with the important aspects of *Roth's* approach to defining property. Again, property interests stem from the independent source of state law<sup>150</sup>—i.e., the rules that establish the procedures and settled expectations accompanying the process of a lawsuit once filed (or even the rules that establish that an injury has occurred, such that once an injury occurs an interest is created). And again, in addressing the infringement on individual rights, the focus is on the importance of protecting an interest once an individual obtains it, not before.<sup>151</sup>

Second, it is consistent with useful scholarship on the constitutional protection of causes of action, whether in the due process or takings context. Of course, it comports with the prospective/retrospective distinction made above.<sup>152</sup> That is, once a lawsuit is filed, subsequent action by the sovereign interferes not with possible or potential rights that might accrue in the future, but with existing expectations and rights that have accrued—that have “vested”—and that constitute a property interest.<sup>153</sup> Similarly, Professor Beermann has applied Reich's “new property” analysis to argue that “a cause of action might be thought of as an entitlement to employ the state's adjudicatory machinery which can only be denied for cause, cause being the failure to establish the elements of the cause of action or to comply with reasonable procedural requirements.”<sup>154</sup> This reflects the Court's other definition of the “hallmark” of property in *Logan*: “an individual entitlement grounded in state law, which cannot be removed except for cause.”<sup>155</sup>

Third, the distinction between the right to sue once an injury accrues and the entitlement afforded by the commencement of that suit—with the stronger constitutional protection warranted by the latter—highlights scholars' approach to defining property for Takings Clause purposes.

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150. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

151. *Roth*, 408 U.S. at 576.

152. *See supra* notes 138–40 and accompanying text.

153. *See supra* note 140 and accompanying text.

154. Beermann, *supra* note 20, at 305 n.121.

155. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982)

Determining whether vested rights exist implicates whether the property owner has a “legitimate claim of entitlement.”<sup>156</sup> This is, of course, the language Professor Merrill uses to distinguish property that warrants constitutional protection from that which consists of a mere “expectation,” such as certain government benefits, that does not warrant such protection.<sup>157</sup> Clearly, the plaintiff has no “entitlement” to the damages sought, or to any form of successful resolution of the lawsuit, as he might lose on the merits or because of procedural aspects of the case. But just as clearly, the plaintiff’s interest in the lawsuit itself should qualify as an “entitlement that may be terminated only for cause” that should warrant constitutional protection.<sup>158</sup>

#### **D. Practical Considerations Justify Treating Causes of Action as Constitutional Property**

Finally, quite apart from this extended academic analysis, causes of action may, in practice, be treated as property. First, calls for a market for legal causes of action, even in the tort and personal injury context, have been made, directly or indirectly, in a number of disparate contexts.<sup>159</sup> Although these ideas have not yet widely taken hold, economic and other normative arguments have developed a framework for that possibility.<sup>160</sup> Further, syndication of lawsuits has increased and in some cases has withstood legal challenge.<sup>161</sup> In related fashion, courts are doing away with champerty and maintenance doctrines that once precluded the sale of legal claims.<sup>162</sup> In contractual contexts, or others in which agreements can be made ex ante, canny choice-of-law arrangements could select a jurisdiction where so-called “champertous” agreements are allowed.<sup>163</sup> Second, as discussed further in Section III, a lawsuit may be seen as a real option.<sup>164</sup>

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156. Kenneth R. Kupchak et al., *Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawai'i*, 27 U. HAW. L. REV. 17, 25 (2004).

157. Merrill, *supra* note 9, at 921–22.

158. *Id.* at 928.

159. Martin, *supra* note 77; Marcushamer, *supra* note 2; Abramowicz, *supra* note 78; Dobner, *supra* note 78; Roy D. Simon, Jr., *Lawsuit Syndication: Buying Stock in Justice*, 69 BUS. & SOC. REV. 10 (1989).

160. E.g., Abramowicz, *supra* note 78; Dobner, *supra* note 78.

161. See Martin, *supra* note 77; see also Simon, *supra* note 159.

162. See, e.g., Andrew Hananel & David Staubitz, Current Development, *The Ethics of Law Loans in the Post-Rancman Era*, 17 GEO. J. LEGAL ETHICS 795, 802 (2004) (noting that New Jersey and Massachusetts have done away with champerty and maintenance doctrines).

163. See Dobner, *supra* note 78, at 1531–38 (noting this possibility).

164. See generally Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation*, 58 STAN. L. REV. 1267 (2006); Huang, *supra* note 65. But see generally Robert J.

Several recent commentators have discussed markets in real options; such an approach suggests (to the extent that alienability defines property interests) that an option—the right to take or decline action vis-à-vis another person, such as whether to sue—could be a property right.<sup>165</sup> Indeed, the modern trend in case law suggests that for takings purposes, options are compensable property rights.<sup>166</sup>

### E. Summary

A plausible case can thus be made that causes of action are private property for Takings Clause purposes and, as such, are subject to seizure through eminent domain by a government body. Why would a government body do so, and what obligations might it incur if it does? I turn in the next Sections to the *public use* and *just compensation* limits on the eminent domain power.

## II. “Taken for Public Use”

It is unsurprising that government actors might seek to condemn land in order to use it themselves for public purposes. It is also no surprise that government might regulate the use of land in order to maintain the public welfare, as in the prototypical regulatory takings case. Nor is it unusual for legislatures to pass or revoke laws that affect what might be seen as property rights in government benefits or largesse.

What might seem odd, however, is for the government to actually take away someone’s cause of action—that is, not to regulate the form, manner, and procedure in which an individual may sue, but to actually transfer ownership of that action to itself or to another private party. In this Section I sketch possible reasons why the government might take such action. In addition, I connect this discussion with current takings doctrine’s characterization of the operative terms “take” and “public use.” When the

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Rhee, *The Effect of Risk on Legal Valuation*, 78 U. COLO. L. REV. 193 (2007) (critiquing Grundfest and Huang’s approach).

165. *E.g.*, Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1412 (2005) (discussing the right that an option contract gives); Bradford Cornell, *The Incentive to Sue: An Option-Pricing Approach*, 19 J. LEGAL STUDIES 173, 174 (1990) (“Filing a lawsuit is analogous to purchasing an option.”); *see also* 2 SACKMAN ET AL., *supra* note 43, § 5.08[2], at 5-388 (identifying a case where Supreme Court of Washington held that the right of first refusal to buy property was a “fundamental attribute of ownership and a valuable property right” that could not be taken from property owners under the eminent domain provision of the state’s constitution).

166. *E.g.*, *Peerless Park v. Cent. Holding Corp.*, 42 S.W.3d 814 (Mo. Ct. App. 2001) (lease with option to purchase land established property right in the option); 2 SACKMAN ET AL., *supra* note 43, § 5.02[3][a], at 5-66 (“Recent legal trends support the conclusion that an owner of an unexercised option to purchase land possesses a property right that is compensable in eminent domain.”).

government acts in this way, is it in fact “taking” an individual’s private property? Is that taking in fact “for public use?”

Government condemnation of a party’s right to sue could come in at least four contexts, reflecting two orthogonal dimensions. One dimension is the goal of the taking, either offensive or defensive. Offensive goals might be to achieve particular results in litigation, to ensure that an action continues where, perhaps, a current litigant does not have the resources to pursue it or pursue it effectively, or perhaps to avoid a settlement that current litigants might consider. Defensive goals might be to protect a defendant against a plaintiff’s claims, whether through more effective defense, through settlement, or through non-use of the action until a statute of limitations expires.<sup>167</sup> The second dimension is who obtains ownership of the cause of action: the government itself or another private party. Under appropriate circumstances, private property may qualify as being “taken for public use” even where it is transferred to another private party.<sup>168</sup> Thus, the government need not be the party to end up with ownership of the cause of action.

Accordingly, the government might take a cause of action either in order to litigate it on its own, using more and better resources than might be available to the initial plaintiff, or so that another private party would litigate it. Presumably, that third party would have more or better resources or motivation to pursue the suit, perhaps simply a party better off financially, but perhaps a party or group able and motivated to engage in impact or advocacy litigation, such as the ACLU, NAACP, or similar organizations. Alternatively, the seizure might be defensive, so the government could protect itself or a third party from a lawsuit or potential lawsuit. Again, this might be either through increased efforts at negotiation or settlement, through defense with increased resources, through voluntary dismissal of a taken case, or through inaction until the expiry of a statute of limitations. Under current jurisprudence defining “taking” and “public use,” would any or all of these justifications pass constitutional muster?

#### A. “Taken”

First, there is of course a vast literature on what constitutes a “taking” of property.<sup>169</sup> Much of this writing, however, focuses on parsing the meaning of “taking” in the regulatory context; that is, identifying when a regulation goes far enough that it will be analogous to a physical

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167. Both settlement examples might be characterized as offensive or defensive, though this is unimportant for the present discussion.

168. *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005).

169. *Merrill*, *supra* note 9, at 891 & n.17 (collecting sources).

appropriation of property.<sup>170</sup> Similarly, a typical analysis of whether something has been “taken” might address whether regulation took place under the state’s harm-preventing police power. If so, the reasoning would be that no property right has been “taken” and thus no compensation is warranted.<sup>171</sup> Again, however, the present focus is on instances of actual appropriation and transfer of ownership, so that determinations of how far is “too far” can be set to the side.<sup>172</sup>

Thus, in the naked transfer of ownership context, there is more clarity than usual about whether property is being “taken.” At least one important context, though—particularly relevant to the seizure of a cause of action—does implicate whether property has in fact been “taken”: the use (if any) to which the government subsequently puts the property. Again, I have suggested that one thing the government might do with a seized cause of action is *nothing*—simply not pursue the case or, subject to the rules of procedure, voluntarily dismiss it. Thus, parsing the meaning of “taken” here elides easily into an analysis of the use made (or not made) by the government of the property in question.<sup>173</sup>

One commentator has argued along those lines, suggesting that the focus of takings jurisprudence overall should be whether the government puts the property seized to actual use.<sup>174</sup> Under this approach, if the government does not in fact *use* the property in question, then no taking has occurred for Takings Clause purposes. Professor Rubenfeld used this approach both to advocate reconceptualizing takings doctrine, and to explain discrepant findings in takings case law. For instance, he pointed

170. *Cf.* *Pa. Coal v. Mahon*, 260 U.S. 393, 415 (1922) (“The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

171. *E.g.*, *Keystone Bituminous Coal Ass’n v. Benedectis*, 480 U.S. 470, 491 n.20 (1987) (holding that because “no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not ‘taken’ anything when it asserts its power to enjoin the nuisance-like activity”).

172. Nor should overemphasis on actual physical seizure of an intangible, such as a cause of action, be of concern. As noted above, intangibles—including choses in action—have long been understood as within the ambit of the eminent domain power. *See supra* note 25 and accompanying text. This broad reading of property subject to being taken leads to a broad reading of the term “taken.” Jeremy R. Polk, Comment, *Compensation for the Fruit of the Fund’s Use: The Takings Clause and Tax Refunds*, 98 NW. U. L. REV. 657, 673 n.92 (2004); Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far,”* 49 AM. U. L. REV. 181, 189 (1999).

173. *Cf.* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1111 (1993) (“The dispositive question in compensation doctrine should never have been, ‘Has the state taken something from an individual that qualifies as a fundamental deprivation?’ It should have been, ‘Has the state taken something for public use?’”).

174. *See generally id.*



out that the blighted cedar trees in *Miller v. Schoene*<sup>175</sup> were *destroyed*, not *used*; therefore, even though the government clearly appropriated the property, and clearly eliminated any viable economic use, there was no taking.<sup>176</sup> More precisely, when the government in seizing property<sup>177</sup> takes advantage of the “use-rights” connected with particular property, then that property has been taken. If those “use-rights” are not exploited—if, for instance, the property is simply destroyed or not used—then no taking has occurred.<sup>178</sup> He argues that this is both normatively<sup>179</sup> and descriptively<sup>180</sup> the appropriate account of takings doctrine. Under this account, the non-use of a cause of action—e.g., the voluntary dismissal of a case, or the failure to pursue it until a statute of limitations expires—would seem problematic.

Persuasive as Professor Rubenfeld’s article is more generally, however, the problem of non-use in this context seems illusory, for at least four reasons. First, takings doctrine emphasizes that it is the injury to the owner that makes something a taking (and that should be the measure of just compensation).<sup>181</sup> Such focus on the owner’s property loss suggests that that injury is the better indicator of whether a taking occurred than what is subsequently done with the property seized. Indeed, in *United States v. General Motors, Corp.* the Supreme Court made this explicit, noting that it is “the deprivation of the former owner rather than the accretion of a right or interest to the sovereign [that] constitutes the taking.”<sup>182</sup> Second, it is clear that the obligation to compensate for a seizure arises at the time of the government action or “invasion” of the

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175. *Miller v. Schoene*, 276 U.S. 272 (1928).

176. Rubenfeld, *supra* note 173, at 1113. Another example is *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1952), where soldiers deliberately destroyed a claimant’s property to prevent it from falling into enemy control. No taking was found, but the Court was forced to distinguish precedent holding that military seizure of property for use *was* a compensable taking. The Court distinguished between use and destruction; the former was a taking, the latter—because of non-use—was not. *Id.* at 155.

177. Or regulating it; Rubenfeld’s discussion is in the context of regulatory takings. See Rubenfeld, *supra* note 173.

178. *Id.* at 1114–18.

179. *Id.* at 1162–63.

180. *Id.* at 1121 (“Takings by eminent domain almost invariably involve a state-planned use of the taken property in precisely the sense that we defined above; the property is not merely taken away, but used to lay a highway, build a dam, operate a post office, and so on.” (emphasis added)).

181. E.g., *United States v. Causby*, 328 U.S. 256, 261 (1946) (focusing on owner’s loss of use of land, rather than government’s use); *Boston Chamber of Comm. v. Boston*, 217 U.S. 189, 195 (1910) (“[T]he question is what has the owner lost, not what has the taker gained.”).

182. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

property.<sup>183</sup> But a cause of action might be used or not, or pursued or not, up until the end of the relevant statute of limitations period.<sup>184</sup> And under Professor Rubenfeld's approach, it would be indeterminate whether the cause of action will be used until that time. We would have to say, therefore, that no taking occurred when the plaintiff was divested of his property; rather, a taking would only occur when the government in fact made some affirmative use of a cause of action. Apart from fairness issues, this would seem inconsistent with existing doctrine as described above.<sup>185</sup> Moreover, at least under common law, there is no requirement that a condemnor use the property for the stated public use within any specific time period.<sup>186</sup> Third, there are a number of modern instances in which land has been condemned by government bodies with the express purpose of non-use.<sup>187</sup> Finally, in particular after *Kelo*, takings doctrine operates under quite a deferential standard in determining what sort of "use" is appropriate.<sup>188</sup> For all these reasons, I turn now to discussion of what

183. *E.g.*, *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting) (stating that the government's obligation arises "[a]s soon as private property has been taken"); *Danforth v. United States*, 308 U.S. 271, 284 (1939) (noting that just compensation claim accrues "at the time of taking"); *United States v. Dickinson*, 331 U.S. 745, 751 (1946) (obligation to pay for land seized arose when the land was taken); Scott A. Keller, Note, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirement for Regulatory Takings Claims*, 85 TEX. L. REV. 199, 216 & n.116 (2006) (noting that multiple cases hold that "a concrete injury arises when the appropriation occurs" and collecting cases).

184. That is, the period in which the substantive claim could be brought.

185. Some reconciliation, perhaps, might come from Rubenfeld's emphasis on "use-rights," rather than simply on "use." He might suggest, for instance, that one way in which the use-rights associated with a lawsuit may in fact be exploited would be to let the suit expire. If so, then perhaps the taking would occur at the expiry of the statute of limitations. This reasoning, however, seems inconsistent with the destruction examples Rubenfeld provides, in which destroying property—analogue here to allowing a lawsuit to expire—does *not* lead to a taking. See generally Rubenfeld, *supra* note 173.

186. Lynda J. Oswald, *Can a Condemnee Regain Its Property if the Condemnor Abandons the Public Use?*, 39 URB. LAW. 671, 673 (2007).

187. See generally Lynda J. Oswald, *Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law*, 35 B.C. ENVTL. AFF. L. REV. 45 (2008).

188. In non-use cases where a condemnation was overturned, or where a court acknowledged the possibility of overturning it, the basis seems not to be the specific fact of non-use, but rather the apparent subterfuge in a condemnor stating that a particular public use was the goal of the taking, though the actual purpose was to prevent an initial private use from occurring. *E.g.*, *Borough of Essex Falls v. Kessler Inst. for Rehab.*, 673 A.2d 856, 861 (N.J. Super. Ct. Law Div. 1995) ("[W]here a condemnation is commenced for an apparently valid, stated purpose but the real purpose is to prevent a proposed development which is considered undesirable, the condemnation may be set aside."); *In re Hewlett Bay Park*, 265 N.Y.S.2d 1006 (N.Y. Sup. Ct. 1966), *rev'd*, 276 N.Y.S.2d 312 (N.Y. App. Div. 1966). Reviewing such cases, at least one commentator views non-use as a legitimate purpose, so long as that non-use is clearly stated initially (i.e., so long as no subterfuge exists). Oswald, *supra* note 187.

constitutes “public use” and how that use connects with the taking of causes of action.

## B. “For Public Use”

The second part of an eminent domain analysis concerns whether private property is being taken for a “public use.” Of course, it is now settled that “public use” is not limited to its narrow, literal meaning, nor have any of a number of alternative interpretations been accepted.<sup>189</sup> The line of cases culminating in *Kelo* has made clear that when private property is taken in order to provide some benefit for the public—that is, for some justifiable “public purpose”—then the public use requirement will be met.<sup>190</sup> In determining whether a particular goal by the condemnor serves a public purpose, courts will pay substantial deference to the legislative decision-maker.<sup>191</sup> *Kelo* noted, however, and Justice Kennedy emphasized in his concurrence, that in the context of transfers of condemned land to other private parties, merely pretextual statements of public benefits will not satisfy the Public Use Clause, where the taking’s actual purpose would

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189. Justice Thomas in *Kelo v. City of New London*, 545 U.S. 469 (2005), and one state court subscribe to the “narrow” view of public use, requiring literal “use” by members the public. *Id.* at 508–11 (2005) (Thomas, J., dissenting); *Karesh v. City Council of City of Charleston*, 247 S.E.2d 342, 344 (S.C. 1978) (adhering to a “strict interpretation” of the term); see Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 67 (1986) (explaining narrow test and noting its virtually unanimous rejection). *Kelo* rejected an idea related to the narrow, literal test, the suggestion that whether there is a literal use by the public or just a general purpose to serve the public, it must indeed be the public’s, rather than any private party’s. Professor Rubinfeld’s emphasis on “use,” rather than “public,” also seems not to have persuaded courts. Two decades ago, Professor Merrill reviewed other possible readings. For instance, quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984), he notes that “public use” may be “coterminous with the scope of a sovereign’s police power.” Merrill, *supra*, at 70. If taken literally, he suggested, that overlap might actually vitiate takings doctrine; a more plausible reading, he suggested, is that “police power,” and thus presumably the “public use” limitation, simply reflected “the extent to which government may constitutionally regulate private activity.” *Id.* Another suggestion was put forth recently by David Dana, who suggested the notion that a seizure of property must advance public welfare, or specifically, reduce concentration in poverty, in order to satisfy the public use requirement. David A. Dana, *Reforming Eminent Domain: Unsupported Advocacy, Ambiguous Economics, and the Case for a New Public Use Test*, 32 VT. L. REV. 129 (2007).

190. *Kelo*, 545 U.S. at 480 (2005) (noting that the Court has “repeatedly and consistently rejected that narrow test”); *Midkiff*, 467 U.S. at 241 (stating that the Public Use Clause is satisfied if taking is “rationally related to a conceivable public purpose”).

191. *Kelo*, 545 U.S. at 480 (“Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”); *Berman v. Parker*, 348 U.S. 26, 33 (1954) (“Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them.”); *Midkiff*, 467 U.S. at 241–42 (reaffirming deferential approach taken in *Berman*); see also *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1015 (1984) (paying deference to Congressional decision-making).

be to confer a private benefit on a third party.<sup>192</sup> Of course, courts have noted this restriction in the context of straightforward (i.e., non-transfer) condemnation cases as well; in determining whether a taking is in fact in the public interest, bad faith conduct by government officials—including arbitrary, capricious, or discriminatory conduct—may be considered.<sup>193</sup>

Accordingly, as a doctrinal matter a government body will likely be afforded broad latitude if it chooses to seize an individual's cause of action for some public purpose, so long as there is a clear plan or explanation by the condemning body as to what that public purpose is and how it will be achieved.<sup>194</sup> A court will of course need to assess whether the seizure is indeed for "public use"; in doing so, two concerns will likely be whether the condemnation is simply pretextual (if ownership is transferred to a third party), and whether use will actually be made of the seized cause of action.

In two of the suggested possible scenarios, a government body is condemning a cause of action to use itself. This may be either to pursue particular litigation on its own (offensive), or to prevent a suit against itself

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192. *Kelo*, 545 U.S. at 478 ("Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."); *id.* at 490–91 (Kennedy, J., concurring); *see generally* 49 WB, LLC v. Vill. of Haverstraw, 839 N.Y.S.2d 127 (N.Y. App. Div. 2007) (holding that the record did not support Village's claims that proposed condemnation served public purpose); *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 172 (D.C. App. 2007) (remanding to trial court for determination of whether stated purpose was pretextual).

193. *E.g.*, *Shaikh v. City of Chi.*, 341 F.3d 627, 632–33 (7th Cir. 2003) ("The public use protections would resolve Shaikh's concerns that Chicago was not motivated to take his property for the stated intention of relocating the Kennedy-King campus but rather by unlawful, discriminatory animus."); *United States v. 58.16 Acres of Land*, 478 F.2d 1055, 1060 (7th Cir. 1973); (observing that allegations of bad faith, arbitrariness, and capriciousness in the exercise of the eminent-domain power all bear upon the public use determination); *U.S. Dep't of the Interior v. 16.03 Acres of Land*, 26 F.3d 349, 356 (2d Cir. 1994) ("[A] reviewing court may only set aside a takings decision as being arbitrary, capricious, or undertaken in bad faith in those instances where the court finds the Secretary's conduct so egregious that the taking at issue can serve no public use."); *United States v. 397.51 Acres of Land*, 692 F.2d 688, 692 (10th Cir. 1982) ("In the absence of bad faith, a condemnation for a public use is a matter for the legislative branch and not open to judicial determination."); *see generally* Oswald, *supra* note 187. *But see* *Mount Laurel Twp. v. Mipro Homes, L.L.C.*, 878 A.2d 38, 50 (N.J. Super. Ct. App. Div. 2005) ("[T]his case is governed by the general rule that '[c]ourts will generally not inquire into a public body's motive concerning the necessity of the taking or the amount of property to be appropriated for public use.'" (citation omitted)).

194. *E.g.*, *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 338 (Pa. 2007) ("[E]vidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking"). One difference is that plans of the sort in *Stone*, *Kelo*, and other cases typically involve pre-established plans related to land development. Though such plans may be abstract or non-specific, they are at least likely to already be in place before the relevant condemnation occurs. In the case of causes of action, such established plans would be rarer, given the lower probability of predicting lawsuits. The condemnor will still have to set out some persuasive legitimate explanation.

or another party (defensive). In the other two scenarios, the condemned cause of action is then transferred to another private party.

First, a government body may believe that it is better equipped or motivated to pursue a particular cause of action than the action's initial holder, and that a successful outcome to the particular litigation would be of public benefit. Pursuing litigation against tobacco companies, foreign institutions, or other parties with substantial resources are possible examples where the action's initial holder might have fewer resources and thus be precluded from effectively pursuing the litigation. The government body would need to show that the outcome of the litigation would generate public benefit, perhaps in the form of a substantial damages award or a substantive legal ruling in the action that, the government body argues, is favorable to the public welfare (new limits on tobacco advertising, perhaps, or some symbolic admission by an institution that vindicates the interests of a particular minority group). Similarly, the cause of action might be condemned and then transferred to a third party. Here, the same public purpose analysis is necessary, and, again, the government body might argue that the condemnation is being undertaken in order to pursue litigation more effectively. This might be accomplished by giving the lawsuit to a party with better resources than the initial plaintiff. The recipient party might also be better positioned or motivated to pursue some sort of impact or advocacy litigation.

On the other hand, a government body might also condemn a lawsuit that it views as having the possibility of a substantial award explicitly in order to pursue that award. Seen this way, the government body might be seen as taking advantage of those better resources simply to pursue a windfall judgment. It might do something similar by giving an action with the possibility of a large award to another private party.

Alternatively, the government body might act defensively and condemn an action being brought against it, one of its agents, or even another third party. For instance, John Doe might bring a § 1983 action against a police official or a suit against a municipality. Doe refuses a settlement, and the relevant municipality (or other government body) predicts liability and a large damage award. In order to ensure that liability does not attach, that government body condemns Doe's action. Here, obviously, although pursuing the case or a settlement is conceivable (perhaps with a substantially smaller award being requested), the likelier alternative is for the new government owner of the suit to voluntarily dismiss the action or wait until the statute of limitations has expired.<sup>195</sup>

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195. Odd as it may appear, it is probably not a fatal concern that the condemnation may place the government body in the position of suing itself. In *United States v. Interstate Commerce*

Similarly, the action might be condemned and transferred to a third party under the same reasoning. Does such “defensive” conduct satisfy the public use requirement?

Plausibly, depending perhaps on the amount of damages foreseen, or, again, on the predicted legal outcome of the action. A substantial damage award might entail a serious drain on the public fisc, and the government body might make a legitimate case that such a budgetary depletion would have repercussions for subsequently available public services.<sup>196</sup> Other areas have seen general approbation of the use of eminent domain to prevent such economic consequences—not the usual economic development case, but rather to prevent negative local economic consequences. As the leading treatise on eminent domain points out, for instance, eminent domain in the case of businesses, industries, or sports franchises that might close or relocate, may be a valid public use.<sup>197</sup> Combining this reasoning with the deference typically paid to government actors in this context suggests that such a condemnation, with the goal of protecting the public fisc, could satisfy the public use prong. Another possibility would be some substantive outcome that, the government body argues, should be prevented because of some negative effect on the public welfare.

When the seizure is for defensive purposes, however, the scenarios raise additional questions of pretext.<sup>198</sup> Implicit in *Kelo*, and explicit in Justice Kennedy’s concurrence, is the idea that despite the deference to be

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*Commission*, 337 U.S. 426 (1949), the Supreme Court was faced with an instance of the United States bringing an action in federal district court to set aside a particular order by the Interstate Commerce Commission (“ICC”) concerning conduct by certain railroads. By relevant statute, any action for such relief was to include the United States as a defendant; accordingly, the United States appeared as both plaintiff and defendant. Although the Court recognized the well-established principle that no person can sue himself, it held that this was not an impediment to the case in question. The Court noted that the case “involve[d] controversies of a type that are traditionally justiciable,” specifically, whether the ICC’s order was validly enacted and whether the railroads had improperly “exacted sums of money from the United States.” *Id.* at 430. The presence of this justiciable issue made it appropriate for the court to “look behind [the] names that symbolize the parties” and address the substantive issues involved. *Id.* Similarly, a condemned lawsuit would likely still raise justiciable, substantive liability issues, and for that reason might be appropriate to continue despite the potential appearance of the government body on both sides of the “v.”

196. See Beermann, *supra* note 20, at 321 n.179 (“Protecting the public purse from tort claims is obviously a public purpose.”).

197. 8A SACKMAN ET AL., *supra* note 43, § G22.02(1) (citing *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982)).

198. Such questions also arise in the offensive context, where the apparent purpose of the condemnation is simply to pursue litigation with the goal of a favorable monetary outcome. In that instance they might be framed as whether the condemnation decision was arbitrary, capricious, or discriminatory. See cases cited *supra* note 193.

afforded the decision-making body, courts should nevertheless assess whether the transfer from one private property owner to another by means of eminent domain is not for a public purpose, but rather simply to benefit that recipient. Courts are beginning to make such assessments, at times holding that the claimed purpose is simply pretextual.<sup>199</sup> Of course, the determination will be heavily fact-dependent. In the context of the condemnation of a cause of action, evaluation would likely entail examination of the specific explanation given by the government body, to evaluate whether the goal is “legitimate” and the means are “not irrational” to achieving it.<sup>200</sup> I speculate that this analysis will usually tip in the government’s favor and, to the extent the goal is evaluated, the court would likely defer to the government body’s reasonable assessment of the likely monetary or substantive outcome. Moreover, to the extent that the means must be evaluated, a court will be unlikely to second-guess particular litigation strategies that the government body claims will achieve its ends.

A second point that might arise involves the actual use or non-use of the legal claim. This has already been addressed in part above in discussing Professor Rubinfeld’s article.<sup>201</sup> However, in light of recent legislative reforms, the further question arises whether non-use by the condemner might afford the opportunity for the condemnee to recover its property, i.e., the legal claim or cause of action.<sup>202</sup>

Again, at common law, little constraint is placed on the time in which a condemner must initiate the public use for which property was condemned.<sup>203</sup> By statute, however, some states provide that if such use is not initiated in a certain number of years, the condemnee may repurchase the property, either at fair market value,<sup>204</sup> at the condemnation price,<sup>205</sup> or by matching the highest bid at public auction.<sup>206</sup> Since *Kelo*, such provisions have increased, both at the constitutional and legislative level, typically providing that if condemned property is not used, or is not used

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199. *E.g.*, 49 WB, LLC v. Vill. of Haverstraw, 839 N.Y.S.2d 127 (N.Y. App. Div. 2007) (holding that the record did not support Village’s claims that the proposed condemnation served a public purpose); Franco v. Nat’l Capital Revitalization Corp., 930 A.2d 160 (D.C. App. 2007) (remanding to trial court for determination of whether stated purpose was pretextual).

200. *Kelo v. City of New London*, 545 U.S. 469, 488 (2005) (citation omitted).

201. *See supra* notes 173–88.

202. *See Oswald, supra* note 186.

203. *See id.*

204. *E.g.*, TEX. PROP. CODE ANN. § 21.103 (2008); N.Y. EM. DOM. PROC. LAW § 406(A) (2008) (applies to unimproved land); N.H. REV. STAT. ANN. § 498-A:12(1) (2008) (applies to unimproved land).

205. *E.g.*, KY. REV. STAT. ANN. § 416.670(1) (2008).

206. *E.g.*, MONT. CODE ANN. § 70-30-321(1) (2008).

for the originally stated purpose, the condemnee may repurchase the property, either at the condemnation price or at fair market value.<sup>207</sup> Some of these reforms go specifically to the *Kelo* situation of transferring condemned property to another private party. For instance, some states now prohibit such transfer of condemned property outright, but some prohibit such transfer when the property is unused unless the condemnee is given the opportunity to repurchase.<sup>208</sup>

Such provisions potentially improve the position of condemnees whose legal claims may have been seized, especially where the purpose of the seizure was to allow the statute of limitations for a legal claim to expire or to transfer to a third party. At least two caveats exist, however. First, as implied above, it is not necessarily clear that failure to pursue a legal claim must in fact constitute “non-use.”<sup>209</sup> There may be plausible strategic reasons for not engaging in particular litigation activity, and a court may be unwilling to directly second-guess such strategy.<sup>210</sup> Of course, the more it becomes apparent that *no* activity is contemplated, the more likely a court may be to take a hard look at the government body’s conduct, but what activity a condemnor would need to engage in to avoid such scrutiny is likely an open question. Moreover, a condemnor (or transferee) might voluntarily dismiss the suit. Although the outcome is the same, should both tactics be characterized as “non-use?” Second, the time the condemnor has before the condemnee may repurchase might conceivably be longer than the relevant statute of limitation for the underlying substantive claim that was taken. If so, the condemnee is hardly helped by the buyback opportunity.

### III. “Just Compensation”

When private property is taken for public use, just compensation is constitutionally mandated.<sup>211</sup> Unsurprisingly, however, determining what compensation might qualify as “just” can lead to substantial difficulty.<sup>212</sup> When the underlying property being taken is a cause of action, that

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207. Oswald, *supra* note 186, at 677–80.

208. *E.g.*, ALA. CODE §§ 11-47-170(c), 11-80-1(c) (2008); GA. CODE ANN. § 22-1-2(c) (2008).

209. *See supra* notes 173–88.

210. *See supra* note 188 and accompanying text.

211. U.S. CONST. amend. V; *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985) (“The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.” (citing *Hodel v. Va. Surface Mining & Reclamation Ass’n.*, 452 U.S. 264, 297 n.40 (1980))).

212. *DANA & MERRILL*, *supra* note 1, at 169 (noting that the compensation issue is the most frequently litigated of the Takings Clause issues).



difficulty can only increase because of the associated problems of defining and valuing that cause of action.

Ordinarily, to avoid the difficulties likely to arise in the valuation of a taken asset, courts rely primarily on the “fair market value” (“FMV”) being taken as the measure of just compensation—that is, what a willing buyer would pay in cash to a willing seller at the time the property is seized.<sup>213</sup> With the goal of increasing the certainty of arriving at a clear value for the property,<sup>214</sup> intangible value such as sentimental attachment or demoralization costs, as well as consequential damages such as attorney fees, lost profits, moving costs, or lost business good will, are typically excluded from consideration,<sup>215</sup> though these may be awarded under certain statutory regimes.<sup>216</sup> Using FMV as the benchmark for just compensation is well-established,<sup>217</sup> as are certain associated principles: Compensation should reflect the value that the erstwhile owner has lost, not what the new government owner has obtained;<sup>218</sup> the owner should be placed “in as good a position pecuniarily as if his property had not been taken”;<sup>219</sup> and compensation should reflect the value of the property at the time of the taking, although reasonably possible or reasonably probable future uses of the property may be taken into account.<sup>220</sup> Market value is typically not used, however, when that value would be too difficult to ascertain, or when

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213. *E.g.*, *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 243–44 (2003) (Scalia, J., dissenting); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 81 (1913). Further, in the real property context, FMV might be evaluated through at least three different methods: comparable sales, income capitalization, or reproduction or replacement cost. Michael DeBow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579, 581–82 (1995); *see also* Kwall, *supra* note 31, at 718–21 (discussing alternative means courts have used to calculate just compensation).

214. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (“Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule.”).

215. *E.g.*, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) (noting that values stemming from “idiosyncratic attachment” not to be considered); *United States v. Petty Motor Co.*, 327 U.S. 372, 377–78 (1946).

216. *See, e.g.*, Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 255 (2007). There has also been recent movement, spurred largely by *Kelo*, to reform states’ compensation practices by awarding compensation for intangible losses. *Id.* at 257 & n.61.

217. *E.g.*, *Petty Motor Co.*, 327 U.S. at 377.

218. *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910) (“[T]he question is, what has the owner lost, not, what has the taker gained.”).

219. *Olson v. United States*, 292 U.S. 246, 255 (1934); *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979).

220. *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984); *Olson*, 292 U.S. at 256–57. *Cf.* Kupchak et al., *supra* note 156, at 23 (“[J]ust compensation in this context must include fair market value of the property in its fully entitled state.” (emphasis added)).

paying FMV would somehow result in a “manifest injustice” to the owner or to the public.<sup>221</sup>

What is the value of a lawsuit? What is its FMV? Despite the calls reviewed earlier for markets in legal claims, it is difficult to ascertain the fair market value of a cause of action, and, therefore, difficult to determine the appropriate measure of just compensation when a legal claim is taken for public use. This difficulty arises for at least four reasons. First, of course, is the absence of a robust market. Second, there is some scholarly dispute over whether to characterize a lawsuit as an asset or as a real option. Third, there may be dispute over what exactly is being taken: the cause of action, the lawsuit, the remedy or judgment associated with that action, or the right to sue itself. Fourth, non-economic or intangible considerations may be present, and some recent statutory reforms suggest that they should be considered.

#### A. Valuation in the Absence of a Market

An immediate sticking point is the absence of a robust market for legal claims, and in particular, tort-based claims. Although inalienability need not mean that the underlying asset is not “property,” it does render it difficult to value that asset, especially, of course, given the emphasis placed on FMV. As Merrill has pointed out, “the constitutional right protected by the Takings Clause is the right to just compensation. Just compensation, in turn, is ordinarily measured by market value. This means that the rights protected by the Takings Clause tend to be those that are bought and sold in the market.”<sup>222</sup>

As suggested above, however, it is not unusual for courts to use an alternative approach to FMV when necessary, either where assessing value is difficult or where there is no robust market for the good.<sup>223</sup> Following his comment above, Merrill notes that in such cases, a property right should nevertheless be compensated if the right is “otherwise susceptible to

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221. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 n.14 (1984) (citations omitted); Brown v. Legal Found. of Wash., 538 U.S. 216, 243–44 (2003) (Scalia, J., dissenting). Some courts apply FMV even when such determination *is* quite difficult to ascertain. *E.g.*, Estate of Smith v. Comm’r, 198 F.3d 515, 529 n.61 (5th Cir. 1999) (“We have held, however, that the willing buyer-willing seller method applies to all questions of valuation, even when, as a realistic matter, the subject property might not be sold or assigned at all.”).

222. Merrill, *supra* note 9, at 957 (footnotes omitted).

223. Kimball Laundry Co. v. United States, 338 U.S. 1, 6 (1949) (“[R]ecourse must be had to other means of ascertaining value, including even value to the owner as indicative of value to other potential owners enjoying the same rights.”); *see also* Chaplin v. Hicks, 2 K.B. 786, 792 (1911) (“Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages.”).

monetary valuation on some objective basis.”<sup>224</sup> Elsewhere he has made a similar argument, in the interesting context of the propriety of condemning a business’s right to advertise. In particular, he argues that a liability rule—i.e., susceptibility to a taking by the government with a court’s determination of damages—is appropriate when

(1) the rightsholder has a monopoly over something the government needs to acquire to fulfill its objectives; (2) compensation rather than police power is appropriate, either because the rightsholder is blameless or because the rightsholder has already been determined to have a constitutionally protected right; and (3) the right in question can be objectively valued in monetary terms.<sup>225</sup>

Here, as sketched in Section I, the holder of a cause of action has a constitutionally protected property interest in that cause of action, one that only he can use, and is certainly “blameless” in Merrill’s sense (prongs one and two). Again, however, in order for compensation to be appropriate, can that interest be valued, especially in the absence of a market?

The most straightforward way to value the lawsuit would be simply to look at the damages requested. This has the appeal of, to some extent, reflecting the value the rightsholder has placed on the action, and thus is some indication of what the owner has lost.<sup>226</sup> It also reflects a line of reasoning from the land development context, in which the appropriate compensation is seen as the value of the land in its developed state (i.e., once the property interest has reached its full fruition).<sup>227</sup> An analogous approach, avoiding the subjectivity of simply the plaintiff’s valuation, would be the full, objectively determined value of a successful suit.

Although these approaches have the value of consistency with the development context, they obviously ignore the contingent nature of a lawsuit. It is not certain that the plaintiff will succeed in his suit, and the value of the suit should take that element of chance into account. Thus, the traditional approach to defining the value of a lawsuit, used typically for settlement purposes, focuses on its “expected value,” which multiplies the

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224. Merrill, *supra* note 9, at 957 n.270.

225. Thomas W. Merrill, *The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising*, 93 NW. U. L. REV. 1143, 1199 (1999).

226. The approach is not unheard of, especially to the extent the property in question is unique. See, e.g., *King v. United States*, 292 F. Supp. 767, 777 (D. Colo. 1968).

227. Kupchak et al., *supra* note 156, at 23 (“[J]ust compensation in this context must include fair market value of the property in its fully entitled state.” (emphasis added)).

expected value of the judgment by the probability of a successful claim.<sup>228</sup> Legal fees may be included in the calculus, with transaction and other additional costs potentially being considered as well.<sup>229</sup>

In fact, courts in other contexts do take something like this approach when faced with the necessity of placing a value on lawsuits. In estate law, for instance, when someone dies with a lawsuit pending, courts must place a value on that suit, typically for tax purposes.<sup>230</sup> Less directly analogous, in attorney malpractice suits, a plaintiff must show that there was a viable underlying cause of action, and that his attorney's negligent treatment of that action proximately caused him damage.<sup>231</sup> In determining a plaintiff's actual losses for such an action, the value of that underlying action is assessed.<sup>232</sup>

But despite such seemingly straightforward valuation processes, at least two other problems arise in trying to determine how to value the lawsuit in question. The first is whether to apply that traditional model of pricing in the first place. If that approach is not taken, then the further concern arises whether to characterize the underlying suit as an *asset*, or as a *real option*. Each characterization leads to a different valuation method.<sup>233</sup> The second issue concerns what exactly is being taken when the government condemns either a cause of action or the associated lawsuit.<sup>234</sup>

## B. What is Being Valued?

### 1. Valuation as an Asset or as an Option?

Recent commentators have criticized the traditional "expected-value" model of valuing a lawsuit. Such criticism, however, has taken quite

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228. See Grundfest & Huang, *supra* note 164, at 1280; Rhee, *supra* note 164, at 200–01; Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 418 (1973).

229. Posner, *supra* note 228, at 418.

230. See, e.g., *Estate of Smith v. Comm'r*, 198 F.3d 515 (5th Cir. 1999). Cf. *Matter of Estate of Davis*, 524 N.W.2d 125, 128 (S.D. 1994) ("We agree that the value of a cause of action as of the date of death, not its future proceeds, is what should be assessed for inheritance tax purposes." (citation omitted)); *Estate of Davis v. Comm'r*, 65 T.C.M. (CCH) 2365 (1993) (calculating value of lawsuit).

231. *E.g.*, *Kituskie v. Corbman*, 714 A.2d 1027, 1030 (Pa. 1998).

232. See, e.g., 7A C.J.S. *Attorney & Client* § 335 (2007) ("[T]he injuries resulting from legal malpractice are not personal injuries but, instead, are pecuniary injuries to intangible property interests." quoting *Coregis Ins. Co. v. Schuster*, 127 F. Supp. 2d 683, 686–87 (E.D. Pa. 2001) (citations omitted)).

233. Compare Grundfest & Huang, *supra* note 164, with Rhee, *supra* note 164. See also Peter H. Huang, *Lawsuit Abandonment Options in Possibly Frivolous Litigation Games*, 23 REV. LITIG. 47, 56 (2004).

234. See *supra* notes 150–58 for more discussion of the distinction's import.

different perspectives, and leads to quite different valuation outcomes. Grundfest and Huang, for instance, emphasize that a lawsuit is a series of choices and decisions regarding an underlying asset; as such, it is essentially a real option<sup>235</sup> and can be valued according to option theory.<sup>236</sup> Under this approach, uncertainty or risk involved in the underlying asset in fact increases the value of the option,<sup>237</sup> in part because of the opportunity to retain flexibility in decision-making<sup>238</sup> and in part because of additional information that might become available while no action is taken.<sup>239</sup> Accordingly, if a legal claim is seen as a real option, the potential decisions a plaintiff might take at different stages of the litigation process might be modeled and valued; Grundfest and Huang describe some ways to do so.<sup>240</sup>

Rhee's asset pricing argument disagrees with their approach. In part, he makes a sharper distinction than do Grundfest and Huang between the procedural right to sue and the underlying substantive claim (this issue is taken up in more detail in the next subsection).<sup>241</sup> This distinction suggests that although the procedural right to bring suit may plausibly be thought of as a real option, that option only derives its value from the underlying substantive dispute. Indeed, he argues, being distinct from the asset from

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235. A real option is an option (i.e., the right to take some action in the future) that is tied to a particular underlying asset.

236. Grundfest & Huang, *supra* note 164; *see also* Huang, *supra* note 65, at 1955 (“[A] lawsuit actually involves a series of call options.”).

237. *E.g.*, Grundfest & Huang, *supra* note 164; Thomas A. Smith, *Real Options and Takeovers*, 52 EMORY L.J. 1815, 1819 (2003) (noting that other things being equal, the “more volatile the underlying asset, the more valuable the option”); Rhee, *supra* note 164, at 196; Daniel Corrigan, *Real Option Theory and its Uses in Legal Thought* 10 (Apr. 20, 2005) (unpublished manuscript, on file with author).

238. *E.g.*, Mark Klock, *Financial Options, Real Options, and Legal Options: Opting to Exploit Ourselves and What We Can Do About It*, 55 ALA. L. REV. 63, 71 (2003).

239. Corrigan, *supra* note 237, at 22.

240. In particular, they note that

[litigation] operates through a well-defined sequence of events. Litigation is, in this respect, better defined than many other investment projects. The likely range of outcomes at each stage of the litigation process is also relatively well defined and is usually bounded in terms of a best and worst possible outcome. Experienced counsel can generally provide reasoned estimates of the distribution of these outcomes at each stage of the process. Indeed, even if counsel lack the experience necessary to generate such estimates, the models can be constructed using the equal ignorance assumption and can be subjected to sensitivity analyses designed to test whether and how various assumptions regarding the model's parameterization influence the lawsuit's potential settlement value. Computationally, because lawsuits typically involve a finite number of key decision points, standard binomial lattice approaches to the valuation of real options will be particularly well suited to the calculation of litigation options settlement values.

Grundfest & Huang, *supra* note 164, at 1327. *See* Huang, *supra* note 65, at 1958 for a related article with more specific examples.

241. Rhee, *supra* note 164, at 196.

which it derives its value, an option cannot generate its own value. As such, “[A] lawsuit is fundamentally an asset that generates a future, uncertain cashflow. Asset pricing principles must govern its valuation.”<sup>242</sup> In other words, according to Rhee, although the decision tree concerning litigation choices does suggest thinking in terms of a real option, that does not eliminate the fact that the underlying lawsuit is the asset that is to be valued.

## 2. *What is Being Taken?*

Rhee is correct to distinguish between the right to sue and the underlying lawsuit, as I did earlier (and which distinction Grundfest and Huang do not reject). This distinction, however, raises a second valuation question: what exactly is being subjected to condemnation? That is, what we might see the condemnor to be seizing is not the lawsuit, but rather the *right to sue* itself. This would be so if the seizure occurred after an injury but before a suit is actually filed. Alternatively, even if the lawsuit has been filed, we might analogize to compensation for the value of an asset, rather than what the owner might do with that asset (i.e., analogous to the justification for receiving fair market value rather than full development potential). That analogy might justify viewing the property to be valued as the right to sue, rather than the lawsuit.

Indeed, the value of the right to sue is almost certainly different from that of the underlying suit.<sup>243</sup> For instance, before a suit is filed, and even more so after it is filed, it acquires some settlement value, even if the underlying action is frivolous.<sup>244</sup> But how should the right to sue be valued? If FMV is to be used—i.e., what a willing buyer would pay a willing seller—how is a buyer likely to place a value on that right, other than the conventional expected value or real option approaches discussed above? How can the price (and thus just compensation) be determined unless the right to sue is itself specifically valued or commodified?

One initial attempt at quantifying that value comes from scholars in the Netherlands, developing working groups and research on measuring the costs of “access to justice.”<sup>245</sup> Their projects seek to measure the “costs of

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242. *Id.* at 223–24.

243. *See id.* at 212 (“[T]he value of a lawsuit has two parts: . . . the value of the underlying right that is the basis of the claim of injury, and . . . the procedural right to opt for trial.”).

244. Huang, *supra* note 233.

245. *See* Maurits Barendrecht et al., How to Measure the Price and Quality of Access to Justice? (Nov. 2006) (unpublished manuscript, on file with author); MEASURING ACCESS TO JUSTICE IN A GLOBALISING WORLD: THE HAGUE MODEL OF ACCESS TO JUSTICE STATUS REPORT (2008), <http://www.tilburguniversity.nl/faculties/law/research/tisco/research/projects/access/documents/statusreport-07-10-23.pdf>.

justice” and barriers to accessing justice, incorporating the costs to all parties involved of pursuing legal claims. A useful aspect of their approach is the recognition that such “costs are not merely measured in terms of money, but also in terms of time and emotional costs (e.g., stress).”<sup>246</sup> The problem with their model, however, is that it collapses (understandably) back into an analysis of the costs of a lawsuit, rather than somehow quantifying the value of the right to sue—i.e., the right to “access justice.”<sup>247</sup>

An alternative to this approach, focusing explicitly on the value of the right to sue, might consider the First Amendment or other cases brought for the denial of access to court.<sup>248</sup> If monetary relief were awarded in such cases, it might give some rough idea of how to value the right to sue itself. Such access cases typically fall into one of three categories: forward-looking, retaliation, or backward-looking.<sup>249</sup> Forward-looking cases occur when certain impediments, such as filing fees, effectively deny an individual access to the courts. Retaliation cases occur when a government actor retaliated against an individual for filing a claim. Backward-looking cases tend to occur when government action impedes a claim or potential claim, which may involve government “cover-ups,” destruction of evidence, or police misconduct. Of these three types, forward-looking claims seem least analogous, as they occur when some official action temporarily denies some class of plaintiffs the opportunity to litigate; that is, where that opportunity “has not been lost for all time, . . . but only in the short term.”<sup>250</sup> The goal of the denial of access action is thus to remove the “frustrating condition” of the official action and recover the opportunity to litigate.<sup>251</sup>

Both retaliation and backward-looking claims, however, support the idea of a distinct value for the right to sue, as reflected in damage awards for the loss of access to courts. In *Silver v. Cormier*, for instance, a retaliation case, the court upheld an award of punitive damages in a § 1983 claim that the defendant, a state official, threatened to withhold legally

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246. Barendrecht et al., *supra* note 245, at 5.

247. *Id.* at 14 tbl.1 (describing multiple costs that might enter into pursuing a legal claim).

248. The relevant cases, of course, would be those in which a plaintiff is inappropriately prevented from pursuing a legal claim at all, not simply, for instance, where physical barriers might exist to literally accessing a courthouse. See *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997) (noting that access to courts protects more than physical access, but also effective and meaningful access).

249. Una A. Kim, Note, *Government Corruption and the Right of Access to Courts*, 103 MICH. L. REV. 554, 562 (2004).

250. *Christopher v. Harbury*, 536 U.S. 403, 413 (2002).

251. *Id.*

required payments if the plaintiff exercised his right to access the court.<sup>252</sup> Recourse under § 1983 seems the accepted approach in vindicating the right to access in these retaliation cases.<sup>253</sup> It is not clear, however, whether these § 1983 cases place a value on the damage caused by the retaliation, or rather measure damages by the value of the underlying case that was precluded from being brought. *Silver*, for instance, upheld the award of punitive damages even in the “absence of actual loss.”<sup>254</sup>

The backward-looking cases seem equally applicable, as they look to vindicate “not the judgment in a further lawsuit, but simply the judgment in the access claim itself, in providing relief obtainable in no other suit in the future.”<sup>255</sup> However, like the retaliation cases, they are also somewhat unclear, at least in terms of giving guidance for valuing the right to sue. Although almost all circuits to visit the issue agree that a cause of action exists for such a claim,<sup>256</sup> most claims have been dismissed on various grounds, such as the availability of an alternative forum,<sup>257</sup> plaintiff’s failure to state an appropriate claim,<sup>258</sup> or plaintiff’s attempt to litigate the underlying cause of action prior to his denial of access claim.<sup>259</sup> Thus, although courts recognize this sort of claim in the abstract, in practice they are of less help in placing some value on the right to sue.

Finally, however, returning to real option theory may provide direction for making these valuations. Recall the emphasis there—and, especially, in the critique of the theory—on the distinction between the procedural right to sue and the substantive underlying claim.<sup>260</sup> Both approaches seem to agree that option theory may be an appropriate means of valuing the procedural right; the disagreement focuses on whether it is a sensible way to value the underlying right. If that is so, then real option theory and its established valuation formulae may yield useful insights for determining the value of the *right to sue*, and thus for determining what

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252. *Silver v. Cormier*, 529 F.2d 161, 163 (10th Cir. 1976).

253. See *Harrison v. Springdale Water & Sewer Comm’n*, 780 F.2d 1422, 1426 (8th Cir. 1986); *Valot v. Se. Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1225 (6th Cir. 1997); *Ringsred v. City of Duluth*, 187 F. Supp. 2d 1141, 1157 (D. Minn. 2001). The determination of damages under § 1983 is typically for a jury. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709–10 (1999).

254. *Silver*, 529 F.2d at 163.

255. *Harbury*, 536 U.S. at 414.

256. Kim, *supra* note 249, at 576.

257. *E.g.*, *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998).

258. *E.g.*, *Harbury*, 536 U.S. at 421.

259. *E.g.*, *Swelk v. City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997).

260. See *supra* notes 240–42.



constitutes just compensation when that right is condemned through eminent domain.

### C. Non-Economic Factors

One final consideration is the non-economic factors, whether perceived or objective, that might affect the value of the lawsuit. Again, in the wake of the Supreme Court's *Kelo* decision, states are turning towards allowing compensation for intangible losses.<sup>261</sup> Although it may at first blush seem incongruous to consider, for instance, sentimental attachment to a lawsuit—unlike attachment to land or a house—it is not unlikely that a plaintiff may experience the “warm glow of ownership” associated with the “endowment effect,” placing a higher value on a lawsuit simply because he owns or controls it.<sup>262</sup> The endowment effect, however, is often seen as a bias or error in judgment, and such subjective valuation is unlikely to factor into a calculation of just compensation.<sup>263</sup> Perhaps more plausible intangible factors to consider would include the “demoralization costs” discussed by Frank Michelman, which include the psychological harm caused by losses uncompensated by purely objective measures,<sup>264</sup> or the loss of the opportunity for a “day in court” or to express one’s “voice,” factors integral to notions of procedural justice.<sup>265</sup> Finally, commentators have noted the close relationship between lawsuits and personal dignity and integrity, in particular in the context of Margaret Radin’s property as personhood theory.<sup>266</sup> Although Professor Abramowicz points out some conceptual problems with the notion of defining one’s identity in terms of a

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261. See Wyman, *supra* note 216, at 257 & n.61.

262. See Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1, 3 (2007) (using the “warm glow” term and discussing endowment effect). For discussions of the endowment effect see *id.*; Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990); Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003).

263. Whether this is an appropriate characterization, and whether as a normative matter it should be taken into account, is another question.

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

265. E.g., Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 19 (2000) (noting that the most frequently cited objective of lay litigants in adjudicatory proceedings was to “tell my side of the story” (citation omitted) (quotation marks omitted)); Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 63 (1985) (noting that even when settling a lawsuit would be more favorable than a trial outcome, plaintiffs may want to feel that they have had their “day in court”).

266. Abramowicz, *supra* note 78, at 706–11; see Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987). Professor Abramowicz’s discussion focuses on whether Radin’s personhood theory should render legal claims inalienable, ultimately concluding that it should not. Abramowicz, *supra*, at 711.

lawsuit, it is certainly plausible that a plaintiff's goal in filing suit, especially a tort action, is to restore personal dignity and integrity. Placing a value on such intangibles is of course difficult, but to the extent statutory reform allows consideration of such intangibles,<sup>267</sup> they may be factors to consider in the just compensation context.

Indeed, there are hints in takings jurisprudence that this may even be mandated in such circumstances. In *Kimball Laundry Co. v. United States*,<sup>268</sup> the U.S. Supreme Court held that where the government had entirely appropriated a business to use itself, albeit temporarily, just compensation had to include the value of less tangible factors. At least one commentator has drawn attention to the value of the loss of autonomy attendant on the condemnation of property,<sup>269</sup> and it is plausible that such loss would be as great or greater in the context of the loss of a lawsuit.

#### D. Summary

When an individual's cause of action is taken by the government for public use, just compensation is mandated. The easiest means to calculate such compensation is likely the conventional approach to valuing lawsuits, involving an assessment of the potential award, discounted by the likelihood of success and incorporating other costs such as attorneys' fees. A case, however, can be made for treating a cause of action as a real option and valuing it according to well-established means of treating such options.

Other factors might be taken into account as well. Again, the most straightforward way to view such a seizure is that the lawsuit itself is being taken, and either the asset or option approach is appropriate. But an alternative account views the target of the seizure as the *right to sue* itself; if so, an alternative means of valuation, perhaps through real option pricing, is necessary. Finally, recent reforms might warrant the consideration of intangible, non-economic, consequential, and other non-FMV costs.

### Summary and Conclusion

The government may exercise its power of eminent domain to condemn the legal claims of private citizens, either for its own use or, with some qualifications, for transfer to another private party. Consistent with

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267. See *supra* note 261 and accompanying text.

268. *Kimball Laundry Co. v. United States*, 338 U.S. 15, 15-16 (1949).

269. Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957; Lee Anne Fennell, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101 (2006).

straightforward application of eminent domain law, the condemnation must be for public use and just compensation must be given to the condemnee.

Whether government bodies *should* undertake such conduct is, of course, an entirely different question.<sup>270</sup> As in other areas, government actors should take into account the costs and benefits of their actions.<sup>271</sup> Economic costs and benefits clearly must be considered, assessing whether the cost of just compensation and potential litigation costs are outweighed by the potential financial gains of the lawsuit.<sup>272</sup> Just as clearly, another critical cost to consider will be public reaction. Given the public outcry over *Kelo* and similar eminent domain cases, such reaction might be quite strong where a government body is perceived to be removing something of personal value from a private citizen, a vindicatory right to which that citizen might be strongly attached. Further, a perception that government bodies might step in defensively to prevent a suit against itself or another defendant, especially if based on repeated conduct by the government, may reduce trust in the government; it may also deter private citizens from initiating litigation for fear of “losing” their right to sue or their actual claim.<sup>273</sup> Similarly, public perceptions would likely also be negative when a lawsuit is condemned but then not “used”—i.e., if the statute of limitations were allowed to expire.

However, the public may react more favorably where the government condemns a legal claim in order to pursue it for reasons perceived to be in the public interest—again, the tobacco litigation or foreign institution examples above might reflect such a perception. Alternatively, given the public perception that plaintiffs are overly litigious, a sense that government is stepping in to protect society against frivolous lawsuits might emerge. Clearly, empirical research as to public perceptions of such government conduct, both the propriety of such seizures and of what is subsequently done with the lawsuit, will be quite useful.

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270. No less distinct, and no less important, is whether courts would in practice permit such condemnations.

271. *E.g.*, Blumenthal, *supra* note 262.

272. Of course, just compensation, as calculated by FMV, real option pricing, or asset theory pricing, may be higher or lower than the actual expected damages. Such differences could lead to strategic cost/benefit calculations for the efficiency of pursuing condemnation.

273. Conversely, it may encourage individuals to initiate litigation against government bodies in the hopes of having the claim taken. Which of these occurs would be an empirical question; the latter possibility might be addressed by data addressing whether settlement patterns by government bodies influence the rate at which subsequent litigation is brought.

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