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RESETTING THE BASELINE OF OWNERSHIP: TAKINGS AND INVESTOR EXPECTATIONS AFTER THE BAILOUTS

NESTOR M. DAVIDSON*

During the economic crisis that began in 2008, the federal government nationalized several of the nation's most significant private companies as part of a broad effort to forestall a global depression. Shareholders in those companies later filed suit, alleging that the federal government in so doing—and in subsequent actions while in control of the firms—took their property without compensation in violation of the Fifth Amendment. To date, those claims have not succeeded. If these cases continue on their current trajectory, with courts rejecting arguments that the rescue of systematically important firms on the brink of collapse requires compensation for shareholders, that outcome will have a profound consequence. Any investor contemplating investment in such companies must now, in the calculus of the Takings Clause, understand the change in the reasonableness of their investment-backed expectations, and, potentially even more broadly, the "background principles" of property law that define such ownership, may now reflect those outcomes. In other words, the fact that federal bailouts in the recent crisis impaired (or even wiped out) shareholder value, and that those policy steps are surviving Fifth Amendment takings challenges, means we are resetting the baseline of expectation for shareholders. As a result, future regulators contemplating the need for swift intervention in the inevitable crises to come should worry far less about takings liability.

INTRODUCTION

At the height (or, perhaps, the nadir?) of the economic crisis that began in 2008, the federal government nationalized several of the nation's largest

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* Professor and Associate Dean for Academic Affairs, Fordham University School of Law. This Essay benefited from feedback at the Eighteenth Annual Conference on Litigating Takings Challenges to Land Use and Environmental Regulations at the University of Maryland Francis King Carey School of Law and, in particular, from discussion with Chris Serkin, and from comments on an early draft by John Echeverria. Pekham Pal provided excellent research assistance.

companies in a bid to stave off a serious economic meltdown.[1] The most notable examples included Fannie Mae, Freddie Mac, the American International Group ("AIG"), and General Motors ("GM").[2] In each instance, the federal government provided significant financial resources to rescue companies that were both failing and vitally important to the national—indeed, global—economy. With federal help, the companies all survived, and appear now to be thriving.[3]

Proving that no good (or at least necessary) deed goes unpunished, investors in Fannie Mae, Freddie Mac, and AIG later filed suit, alleging, among other claims, that actions by the federal government to rescue these companies "took" their property—their ownership stake and other corporate rights—in violation of the Takings Clause.[4] The heart of their claims is that the federal assertion of control, and subsequent governmental actions while managing these firms, impaired or destroyed the value of investor equity and other corporate property.[5]

Although the litigation is still ongoing, courts have largely rejected these claims based on a variety of theories.[6] If the litigation continues on its current trajectory, it will not settle the intensely contextual question of whether nationalization of failing companies in times of economic crisis "takes" the property of shareholders. But it will send a clear signal to investors contemplating ownership of companies integral to the larger economy that nationalization is a valid policy option even when it significantly impairs the value of ownership stakes in those companies. This very visible crucible can shape what, in regulatory takings parlance, is known as owners' "reasonable investment-backed expectations," and might

1. For a detailed discussion of the crisis and an overview of policy responses, see Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607, 1628–32 (2010). There are many popular accounts of the crisis and aftermath as well. *See, e.g.*, TIMOTHY F. GEITHNER, STRESS TEST: REFLECTIONS ON FINANCIAL CRISIS (2014); ROBERT J. SHILLER, THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT 32 (2008); ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS—AND THEMSELVES (2009).

2. *See infra* Part II.A.

3. *See infra* text accompanying note 103.

4. *See infra* Part II.C. Although no investor takings claims followed the GM bailout, auto dealers whose franchises were terminated in the GM structured bankruptcy (and a similar process involving Chrysler) are currently litigating claims that the terminations constituted a taking. *See* A & D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1147 (2014).

5. *See infra* Part II.C. The AIG suit involves assertions of liability directly to shareholders as well as derivative takings claims on behalf of the company. This Essay focuses on direct shareholder claims, although the larger set of claims is relevant.

6. *See infra* Part II.B.

eventually even rise to the level of a "background principle" of property law that inheres in this particular type of entity ownership.[7]

If so, judicial rejection of challenges to nationalization in the face of vigorous opposition could have significant—and under-appreciated—consequences. As the saying goes, it is difficult to make predictions, especially about the future,[8] but it is fairly certain that another economic crisis of some sort is inevitable, given the regularity with which they have occurred since the Founding.[9] Bailouts that involve federal control have proven to be a valuable tool to steady particularly important sectors of the economy in moments of panic and to calm global financial markets.[10] The ongoing takings litigation may thus yield a new baseline of ownership in companies at the center of such crises in much the same way that investors have internalized the existence of bankruptcy. If so, then going forward, officials facing future panics can have greater confidence to take the steps necessary to stop financial wildfires without fear of liability.[11]

This Essay proceeds in three Parts. Part I briefly lays the groundwork for understanding why a possible judicial rejection of takings challenges to nationalization in times of crisis may factor into the expectations of investors or even the background principles of property in the kinds of companies at issue. Part II then reviews several of the primary flashpoints that emerged from the economic crisis of the last decade, explaining what led to nationalization in each instance and how the resulting takings litigation has developed. Finally, Part III squares the circle, explaining how these cases may change the baseline of ownership and why that shift would be normatively justifiable.

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7. For the doctrinal frameworks in which the reasonableness of an owner's expectations in light of regulatory constraints and background principles of property law apply to takings challenges, see *infra* Part I.

8. This sentiment has been ascribed to everyone from Yogi Berra to Mark Twain to Neils Bohr. *It's Difficult to Make Predictions, Especially About the Future*, QUOTE INVESTIGATOR (Oct. 20, 2013), http://quoteinvestigator.com/2013/10/20/no-predict/.

9. *See generally* CHARLES P. KINDLEBERGER, MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES (2000); CARMEN M. REINHART & KENNETH ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY (2011).

10. Indeed, this may be even more important in future crises, given the creation of new standing resolution authority enacted in the wake of the crisis. *See* Thomas W. Merrill & Margaret L. Merrill, *Dodd-Frank Orderly Liquidation Authority: Too Big for the Constitution?*, 163 U. PA. L. REV. 165, 187–89 (2014) (analyzing Title II of the Dodd-Frank Act's regime for the orderly liquidation of systemically significant nonbank financial entities).

11. I have elsewhere argued that the doctrine of emergency that has traditionally shielded the government from takings liability when responding to situations like wildfire and contagion might provide a novel avenue to validate nationalization under certain circumstances. *See generally* Nestor M. Davidson, *Nationalization and Necessity: Takings and a Doctrine of Economic Emergency*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 187, 187–89 (2014). This Essay, by contrast, focuses on the question of whether nationalization involves regulatory takings in the first instance.

I. REGULATION AND INVESTOR EXPECTATION OVER TIME

To understand how current takings litigation arising from the rescue of several of the country's largest companies may shape future crises, it is necessary to begin with a framework for how existing restraints and limitations on ownership shape the Takings Clause doctrinal inquiry.[12] It is intuitive that if the legal system places a legitimate restriction on the use of property (or similar constraint) and someone buys property with that restriction in place, it would be odd for the owner then to claim that the regulation has taken his or her property.[13] For example, if a state concludes that a reasonable height limitation is necessary to protect common interests in sunlight, and people come to conform to that limitation over time, it clearly becomes part of how ownership is defined. In this sense, then, the boundaries of property law are iterative over time and the existing regulatory landscape at the time that property changes hands matters in defining those boundaries.

On a more technical level, there are two primary ways in which this intuition is reflected in the doctrine. The first is under the general default framework for evaluating regulatory takings claims that the Supreme Court articulated in *Penn Central Transportation Co. v. New York City*.[14] The case famously laid out three factors of particular relevance to the ad hoc evaluation of whether a restriction on property constitutes a taking, one of which is an owner's "reasonable investment-backed expectations."[15] When someone purchases property, although the existence of a regulatory

12. It bears noting that the frameworks described in this Part apply in the context of "regulatory" takings and not the direct exercise of eminent domain. As will be discussed below, see *infra* Part II, nationalization in the last crisis did not involve any steps to appropriate shareholder interests directly, but rather involved actions by the federal government and the companies at issue that placed the federal government in control, creating collateral consequences for shareholders.

13. This is not to try to sneak the difficult question of the legitimacy of any given restriction into a discussion of simple intuitions. There is obvious circularity in the proposition that a legitimate restriction in place when an owner takes title should inform whether that restriction can rise to the level of regulatory taking (if it is legitimate, how can it be a taking?), but remember that there are many grounds on which a restriction might be challenged other than that it "goes too far," in Justice Holmes' terms. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

14. 438 U.S. 104 (1978).

15. *See id.* at 124 ("In engaging in these essentially ad hoc, factual inquiries [for regulatory takings], the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action." (citation omitted)). The qualifying term "distinct" quickly shifted in the jurisprudence to "reasonable," and that is how the Court now often describes the *Penn Central* test. *See, e.g.*, Horne v. Dep't of Agric., 135 S. Ct. 2419, 2427 (2015); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 342 (2002).

restriction is not dispositive, it certainly shapes how an owner should understand the value and nature of his or her investment.[16]

A close, but institutionally more complex variant is the concept of "background principles" of property law as a limitation on potential takings liability. As the Supreme Court set out in *Lucas v. South Carolina Coastal Council*,[17] the idea is that certain limitations on property rights become so ingrained in the basic nature of the ownership of a given resource that such limitations, in the Court's words, "inhere in the title itself."[18] Under such a theory, a governmental action that replicates those inherent limitations, even to the point of destroying the value of property entirely, is not amenable to a takings claim. This concept is easy to understand in the context of harms that are at the traditional core of the *sic utere* principle that owners cannot use their property to harm others.[19] Someone poisoning his neighbor's land with toxic runoff would not expect to be compensated when told to stop. The idea gets more difficult to grasp, however, when the relevant limitations involve novel conceptions of harm, such as threats to ecosystems (or, in the present context, purely economic harms).[20]

The Supreme Court has been almost entirely silent on the process by which evolving legal norms can come to "inhere in the title" under *Lucas*. In *Palazzolo v. Rhode Island*, the Court hinted that legislative change over time could become embodied as a background principle.[21] The Court, however, had little to say about how and in what way that process of legislative change becoming embodied in property law's inherent structure might occur. As the Court has rightly noted, it cannot be enough simply to enact some restriction and then have an owner take title with that restriction in place.[22] Nonetheless, it is clear that, over time, a set of regulatory

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16. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (noting that "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of [an owner's] expectations"); *see also, e.g.*, Rith Energy, Inc. v. United States, 247 F.3d 1355, 1364 (Fed. Cir.), *reh'g denied*, 270 F.3d 1347 (Fed. Cir. 2001), *cert. denied*, 536 U.S. 958 (2002) (noting the relevance of existing regulatory constraints on the reasonableness of owner expectations).

17. 505 U.S. 1003 (1992).

18. *Id.* at 1029.

19. The common-law maxim *sic utere tuo ut alienum non laedas*, which translates as "so use your own as not to injure others," reflects the long-standing limitations in property law on uses of property that cause harm. *See* Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. CAL. L. REV. 1101, 1138 (1986).

20. *See* Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347, 421–24 (1998).

21. *See Palazzolo*, 533 U.S. at 629–30 (noting that "a legislative enactment can be deemed a background principle of state law").

22. This would be Justice Kennedy's infamous Hobbsian stick in the Lockean bundle. *See id.* at 627.

constraints, even if challenged initially, can so deeply settle into the law of property that no owner would be reasonable in challenging the restraints.[23]

II. THE CRUCIBLE OF THE LAST CRISIS

With that brief doctrinal background, we can now turn to how takings became a flashpoint in the recent economic crisis and how the courts have addressed the litigation that followed.

A. Nationalization as a Regulatory Response to Economic Crisis

Nationalization played an important and prominent—if tailored—role in responding to what has been called the "Great Recession." This Part examines the most significant examples of this practice, namely the government takeovers of Fannie Mae, Freddie Mac, and the AIG.[24]

Fannie Mae and Freddie Mac both have their origins in Congress's response to the Great Depression. In 1938, Congress established the Federal National Mortgage Association, later known as Fannie Mae; Congress privatized Fannie Mae in 1968, and established a companion company, the Federal Home Loan Mortgage Corporation, or Freddie Mac, in 1970.[25] Fannie Mae and Freddie Mac purchase residential mortgages or provide credit enhancement to facilitate the securitization of residential mortgage-backed securities, in turn generating liquidity for home lenders.[26]

At the height of the housing bubble of the early and mid-2000s, Fannie Mae and Freddie Mac owned or guaranteed more than forty percent of all

23. Examples of once-contested limitations on property that now arguably "inhere in the title" are not hard to find—they include zoning, constraints on air rights, and antidiscrimination principles. *See* Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1660–61 (2008).

24. Another significant instance of nationalization in the last crisis was the bailout of General Motors, but there were others as well. *See* Marcel Kahan & Edward B. Rock, *When the Government Is the Controlling Shareholder*, 89 TEX. L. REV. 1293, 1299–1300 (2011) (discussing the fact that the federal government became the controlling shareholder in companies such as GMAC and owned as much as thirty-four percent of outstanding Citigroup common stock); *see also* Damian Paletta et al., *IndyMac Reopens, Halts Foreclosures on Its Loans*, WALL ST. J. (July 15, 2008), http://www.wsj.com/articles/SB121607890530252639 (describing the federal takeover of IndyMac); Deborah Solomon et al., *U.S. to Buy Stakes in Nation's Largest Banks—Recipients Include Citi, Bank of America, Goldman; Government Pressures All To Accept Money as Part of Broadened Rescue Effort*, WALL ST. J. (Oct. 14, 2008), http://www.wsj.com/articles/SB122390023840728367 (discussing federal bank investments) .

25. *See* Richard K. Green & Susan M. Wachter, *The American Mortgage in Historical and International Context*, 19 J. ECON. PERSP. 93, 95–98 (2005).

26. *Id.* at 98. Although Fannie Mae and Freddie Mac were "government-sponsored," which is to say originally chartered by statute, they had long been private entities before the takeover. Fannie Mae began trading on the New York Stock Exchange in 1968 and Freddie Mac began in 1984. Both companies suspended trading in 2010.

U.S. residential mortgages,[27] a pivotal position facilitated by an implicit Treasury Department guarantee of their obligations.[28] Therefore, any Fannie Mae and Freddie Mac failure would have sent ripples that could have devastated the global economy.

As the economic crisis began to accelerate in the summer of 2008, concerns about Fannie Mae and Freddie Mac's viability were mounting.[29] In the Housing and Economic Recovery Act of 2008 ("HERA"),[30] Congress restructured the oversight of Fannie Mae and Freddie Mac and expanded the authority of its reconstituted regulator, the Federal Housing Finance Agency ("FHFA"), to place the companies in conservatorship.[31] On September 7, 2008, less than two months after HERA's passage, FHFA placed both companies in conservatorship and replaced their top leadership.[32] Common and preferred shareholders allege that, in the process, they lost essentially all of the value of their stock.[33]

AIG, a diversified financial services company that traced back nearly a century to origins in East Asian insurance markets,[34] had assets of slightly more than $1 trillion by the crest of the economic crisis in 2008.[35] Among the more important of AIG's many lines of business was the sale of credit

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27. *See* David Reiss, *The Federal Government's Implied Guarantee of Fannie Mae and Freddie Mac's Obligations: Uncle Sam Will Pick up the Tab*, 42 GA. L. REV. 1019, 1033 (2008).

28. *See* David Reiss, *Fannie Mae and Freddie Mac and the Future of Federal Housing Finance Policy: A Study of Regulatory Privilege*, 61 ALA. L. REV. 907, 909–10 (2010) (discussing the market advantages that flowed from the then-implied federal guarantee of Fannie Mae and Freddie Mac's obligations).

29. *Id.* at 916–17.

30. Pub. L. No. 110-289, 122 Stat. 2654 (2008).

31. *See* 12 U.S.C. § 4617 (2012). In addition to revamping Fannie Mae and Freddie Mac's oversight, HERA authorized several mechanisms through which the Treasury Department could provide the companies with capital as well as additional credit.

32. *See* Cynthia M. Hajost, *From Oversight to Conservatorship: What Does the Housing and Economic Recovery Act of 2008 Hold For GSEs Fannie Mae and Freddie Mac?*, 18 J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 3, 7–8 (2008) (discussing the statutory authority invoked for the conservatorships).

33. *See* THE FINANCIAL CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 431 (2011), http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic _final_report_full.pdf. At the time of the takeover, Fannie Mae had nearly 600 million preferred shares outstanding, with a redemption value of roughly $21 billion and over a billion shares of common stock, valued at more than $7 billion. *See* Complaint at 14, 51, Wash. Fed. v. United States, No. 13-385C (Fed. Cl. June 10, 2013) [hereinafter *Washington Federal* Complaint]. Similarly, Freddie Mac at the time had nearly 465 million shares of preferred stock outstanding, with an alleged redemption value of about $14 billion, and about 650 million shares of common stock valued at roughly $3.3 billion. *Id.* at 14–15.

34. For a general history of AIG and a view from the person who shaped the company's growth in the run-up to the economic crisis, see MAURICE R. GREENBERG & LAWRENCE A. CUNNINGHAM, THE AIG STORY (2013).

35. William K. Sjostrom, Jr., *The AIG Bailout*, 66 WASH. & LEE L. REV. 943, 946 (2009).

default swaps.[36] AIG sold these insurance contracts to investors who had bought collateralized debt obligations, a type of asset-backed security often based on pools of mortgages. This placed AIG, like Fannie Mae and Freddie Mac, firmly at the intersection between housing finance and global capital markets.

Over the summer of 2008, as the housing-market collapse cascaded through the secondary mortgage market, AIG faced severe liquidity pressures related to its outstanding portfolio of credit default swaps and, by mid-September 2008, the company could not procure private financing to meet its continuing obligations.[37] Because the federal government feared that AIG's potential default would have had a significant global systemic impact, the Federal Reserve agreed to provide AIG with a line of credit of up to $85 billion.[38] In return, AIG granted the federal government preferred stock convertible into a 79.9% stake in AIG, effectively putting the government in charge of the company.[39]

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36. Credit default swaps guarantee to counterparties that "the party writing the CDS is obligated to pay the counterparty the par value of the debt instrument in the event the instrument defaults." Starr Int'l Co. v. United States, 106 Fed. Cl. 50, 55, *recons. denied*, 107 Fed. Cl. 374 (2012).

37. On September 15, 2008, the same day that the storied Wall Street mainstay Lehman Brothers filed for bankruptcy, sending shockwaves through the market, Moody's, S & P, and Fitch downgraded AIG's long-term credit rating, raising the distinct possibility of bankruptcy, given the company's collateral position at the time. *See Washington Federal* Complaint, *supra* note 33, at 56.

38. *See* Starr Int'l Co. v. United States, 121 Fed Cl. 428, 430–31 (2015). The Federal Reserve invoked Section 13(3) of the Federal Reserve Act, 12 U.S.C. § 343 (2012), to validate its actions.

39. The General Motors situation provides another example of nationalization as a regulatory response. When the economic crisis began to crest in 2008, General Motors was the world's largest automaker, producing over nine million cars and trucks a year in thirty-four different countries. *See A Giant Falls: The Bankruptcy of General Motors*, ECONOMIST (June 4, 2009), http://www.economist.com/node/13782942. As the global economic slowdown progressed, gas prices reached $4 per gallon in the summer of 2008 and auto sales slumped significantly. *See* STEVEN RATTNER, OVERHAUL: AN INSIDER'S ACCOUNT OF THE OBAMA ADMINISTRATION'S EMERGENCY RESCUE OF THE AUTO INDUSTRY (2010) (providing a general, albeit slightly biased, history of the auto industry rescue from the former head of the Presidential Task Force on the Auto Industry); *see also* Malcolm Gladwell, *Overdrive: Who Really Rescued GM?*, NEW YORKER (Nov. 1, 2010), http://www.newyorker.com/magazine/2010/11/01/overdrive-2 (book review) (noting some skepticism about Rattner's account).

In December 2008, GM announced that it was running out of cash reserves and hinted that bankruptcy was a genuine possibility. General Motors soon received a $50 billion bailout. Brent J. Horton, *The TARP Bailout of GM: A Legal, Historical, and Literary Critique*, 14 TEX. REV. L. & POL. 217, 275 (2010). In the spring of 2009, President Obama's newly formed Presidential Task Force on the Auto Industry negotiated a much more substantial bailout of GM as an asset sale under Section 363 of the Bankruptcy Code that left the federal government with a sixty percent stake in the company. *See generally* Stephen J. Lubben, *No Big Deal: The GM and Chrysler Cases in Context*, 83 AM. BANKR. L.J. 531 (2009); Neil King Jr. & Sharon Terlep, *GM Collapses into Government's Arms*, WALL ST. J. (June 2, 2009), http://www.wsj.com/articles/SB124385428627671889.

B. Three Common Elements

These federal rescues share several similarities. One common element is that each involved a company that might be considered "too big to fail," but whose failure was likely to have had broader economic or social consequences. The concept is notoriously hard to cabin but reflects the reality that actions of certain firms can raise particularly significant, indeed even systemic, risks. Whatever the outer boundaries of the concept, it is hard to argue that the entities nationalized during the Great Recession were not deeply tied to broad macroeconomic networks that made their failure potentially much more consequential than most other businesses.

Another common element is the infusion of public funds.[40] In the policy discourse and the popular literature, these instances of nationalization are generally described as "bailouts,"[41] but they each involved shareholders and managers ceding control to the government and concomitant significant reordering of the property rights of each company's economic stakeholders (shareholders, creditors, employees, retirees).[42] Each of the "bailed out" companies was failing at the time and each instance of nationalization involved significant investment of federal resources through a variety of mechanisms.[43]

A final common element is that investors who perceived themselves as harmed by the federal intervention have vigorously disputed the propriety of the bailouts, leading to several high-profile takings suits to which we now turn.

The GM nationalization has generated takings litigation, although the claims are being raised not by shareholders, but rather by auto dealers. The dealers allege that the federal government forced GM to terminate their dealerships in order to obtain funding, allegedly taking "franchise contracts, ongoing automobile businesses, and automobile dealer rights under state law." Colonial Chevrolet Co. v. United States, 103 Fed. Cl. 570, 571 (2012). The Court of Federal Claims has allowed these claims to survive a motion to dismiss, but noted the unusual nature of a takings claim predicated on the government's role in assisting with a structured bankruptcy. *Id.* at 574–75.

40. The line of credit to AIG eventually grew to over $182 billion. John J. Chung et al., *Developments in Banking and Financial Law: 2010: The AIG Bailout and AIG's Prospects for Repaying Government Loans*, 29 REV. BANKING & FIN. L. 363, 365 (2010).

41. *See, e.g.*, Adam Levitin, *In Defense of Bailouts*, 99 GEO. L.J. 435 (2011).

42. *See* Jeffrey Manns, *Building Better Bailouts: The Case for a Long-Term Investment Approach*, 63 FLA. L. REV. 1349, 1359 (2011) (arguing that although "the federal government has used nationalizations of corporations and federalizations of liabilities as policy tools to combat crises," the federal "government merely engages in semantic gamesmanship when it characterizes this activity as a 'bailout'").

43. These public investments included, most prominently, direct subsidies, lines of credit and other financing, assumptions of liability, debt guarantees, and similar loan backstops. *See id.* at 1358–65. *See generally* Levitin, *supra* note 41.

C. Takings Challenges in Motion

Although the litigation by investors in Fannie Mae, Freddie Mac and AIG is still ongoing—a very important caveat—federal regulators have prevailed so far.[44] Turning first to Fannie Mae and Freddie Mac, a group of individual and institutional shareholders filed a class-action suit in June 2013 in the United States Court of Federal Claims, alleging that the conservatorships constituted either a taking of their property without just compensation or an illegal exaction, or both.[45] The heart of the complaint, which sought $41 billion in compensation, in addition to arguing that the conservatorship was illegally imposed,[46] charged that the conservatorships were designed to channel funds from Fannie Mae and Freddie Mac to other companies (providing the government with a vehicle to purchase troubled mortgage debt), and ultimately back to the Treasury.[47] Specifically, the shareholders asserted that they were harmed by FHFA's order to the companies to cease paying dividends other than to the Treasury, the subsequent delisting of the companies' common and preferred shares from the New York Stock Exchange in June 2010, and agreements to sweep net profits from these government sponsored enterprises ("GSEs") to the Treasury when they returned to economic stability.[48]

44. Under any theory of takings liability, it is important to untangle questions of legal authority to act from the question of whether an otherwise valid exercise of authority requires just compensation. The Fannie Mae and Freddie Mac suits, as well as the AIG litigation, assert statutory arguments challenging the federal government's basic authority to act in each instance. One could conceivably frame this threshold claim in takings terms as a question of whether each instance of nationalization meets the "public use" test, but that would mistake claims about the breadth of statutory delegations of power with the doctrine that governs the range of legitimate purposes available for eminent domain. The former tests the power to act, while the latter turns on the constitutional validity of an otherwise authorized action.

45. *See Washinton Federal* Complaint, *supra* note 33, at 50. The complaint raises due process and statutory claims. A number of similar cases have been filed raising similar claims. *See, e.g.*, *In re* Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigs., 70 F. Supp. 3d 208 (D.D.C. 2014). Some of the cases that were part of this class action include Fairholme Funds, Inc., v. FHFA (No. 13-1053); Perry Capital, LLC v. Lew, (No. 13-1025); Liao v. Lew, (No. 13-1094); Cacciapelle v. Fed. Nat'l Mortgage Ass'n, (No. 13-1149); Am. European Ins. Co. v. Fed. Nat'l Mortgage Ass'n, (No. 13-1169); Dennis v. FHFA, (No. 13-1208); Cane v. FHFA, (No. 13-1184).

46. The plaintiffs are arguing that the conservatorships were not, in fact, justified under the criteria set forth in HERA, 12 U.S.C. § 4617 (2012), on the theory that the conservatorships were intended to preserve the economy, not save Fannie Mae and Freddie Mac, per se. The plaintiffs also asserted that Board consent under § 4617 was coerced.

47. *See Washinton Federal* Complaint, *supra* note 33, at 56.

48. *See id.* The federal government has raised a number of threshold jurisdictional, statute of limitations, and standing arguments in seeking to dismiss the Fannie Mae and Freddie Mac litigation. *See* Defendant's Motion to Dismiss at 11–21, Wash. Fed. v. United States, No. 13-385C (Fed. Cl. Nov. 7, 2013) [hereinafter *Washington Federal* Motion to Dismiss]. These arguments, of course, may well eventually resolve the case short of a ruling on the merits of the takings claims.

In another class-action suit brought by the United States District Court for the District of Columbia, *In re Fannie Mae/Freddie Mac Preferred Stock Purchase Agreement Class Action Litigation*,[49] investors sued the Treasury and FHFA, claiming their stock in Freddie Mac and Fannie Mae had become undervalued as a result of the two GSEs being placed under conservatorship. After the GSEs were placed into conservatorship on September 7, 2008, the Treasury entered into Senior Preferred Stock Purchase Agreements ("PSPAs") with both Freddie Mac and Fannie Mae.[50] In exchange for funding, the Treasury received senior preferred stock in each GSE.[51] The Treasury and GSEs amended the PSPAs several times, often increasing the GSEs dividend obligation to the Treasury. The second amendment to the PSPA raised the cap on how much the government could lend to the GSEs; by August 8, 2012, the Treasury held $189.5 billion in senior liquidation preference stock between both GSEs, which meant that the GSEs' annual dividend obligations to the Treasury were about $19 billion.[52]

On August 17, 2012, however, the Treasury and the GSEs agreed to the third amendment to the PSPA, which replaced the previous dividend formula with one that essentially forced each GSE "to pay a quarterly dividend to Treasury equal to the *entire net worth* of each Enterprise, minus a small reserve that [shrunk] to zero over time."[53] This is known as a "net worth sweep."[54] The plaintiffs challenged the third amendment to the PSPA, alleging, among other things,[55] an unconstitutional taking.[56]

The District Court for the District of Columbia, in a 2014 ruling, found that the third amendment was not an unconstitutional taking of dividend entitlement and liquidation rights without just compensation because the plaintiffs failed to identify a cognizable property interest protected under the Fifth Amendment.[57] Moreover, even if there were a cognizable

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49. 70 F. Supp. 3d 208 (D.D.C. 2014).

50. *Id.* at 216.

51. *Id.*

52. *Id.* at 216–17.

53. *Id.* at 217–18.

54. *Id.* at 218.

55. The plaintiffs also raised a breach of contract claim, a breach of the implied covenant of good faith and fair dealing claim, and a derivative claim of fiduciary duty under the Administrative Procedure Act ("APA") and HERA. *Id.* The court held that HERA's anti-injunction provision prevented the plaintiffs from obtaining any declaratory, injunctive, or other equitable relief against FHFA or Treasury, *id.* at 219–20, and from bringing any of their derivative claims against FHFA and Treasury, *id.* at 229. Included in these prohibitions were the APA claims against FHFA and Treasury, the breach of fiduciary duty against FHFA, and parts of the breach of implied covenant of good faith and fair dealing with declaratory relief. *Id.* Finding certain claims were not yet ripe, the court also denied plaintiffs monetary damages on the breach of contract and breach of the implied covenant of good faith and fair dealing claims. *Id.* at 236.

56. *Id.* at 218.

57. *Id.* at 239.

property interest, the plaintiffs had failed to plead a regulatory taking, as they could not show that "the Third Amendment rendered their prospects of receiving dividends any less discretionary than they were prior to the amendment."[58] Indeed, the court continued, there "can be no doubt that the plaintiff shareholders understood the risks intrinsic to investments in entities as closely regulated as the GSEs, and, as such, have not now been deprived of any *reasonable* investment-backed expectations."[59] Accordingly, they failed to state a claim against FHFA and the Treasury, and the case was dismissed.[60]

Moving to the AIG conflict, Starr International Company, Inc. ("Starr"), one of the company's largest shareholders (headed by Maurice "Hank" Greenberg, the former chairman) filed suit on November 21, 2011.[61] Starr argued that the Treasury Department took advantage of AIG's vulnerability in September 2008 when it became AIG's controlling lender and shareholder. Starr asserted, through shareholder derivative and direct claims, that the takeover constituted a "taking and illegal exaction of the property and property rights of AIG without due process or just compensation."[62] Starr's direct takings claims asserted that dilution of its shares undermined their economic value as well as Starr's voting power.[63]

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58. *Id.* at 244.

59. *Id.*

60. *Id.* at 239.

61. Starr Int'l Co. v. United States, 121 Fed. Cl. 428, 430–31 (2015). Starr filed complaints against the United States in the Court of Federal Claims and against the Federal Reserve Bank of New York in the U.S. District Court for the Southern District of New York on the same day, challenging actions taken by the Federal Reserve after the takeover as breaches of fiduciary duty. *See* Starr Int'l Co. v. Fed. Reserve Bank of N.Y., 906 F. Supp. 2d 202 (S.D.N.Y. 2012). In early November 2012, the U.S. District Court for the Southern District of New York granted the Federal Reserve's motion to dismiss. *Id.*

62. Starr Int'l Co. v. United States, 111 Fed. Cl. 459, 466 (2013). In many instances, an exaction theory would present distinct questions from a more general taking or inverse condemnation claim, but in this case, the Court of Federal Claims noted that the test for Starr's illegal exaction claim "is identical to the Takings test." *Id.* at 482 (quoting Casa de Cambio Comdiv S.A., de C.V. v. United States, 291 F.3d 1356, 1364 (Fed. Cir. 2002)). Starr also asserted an equal protection claim. On July 2, 2012, the Court of Federal Claims dismissed the due process and equal protection claims except to the extent that the due process claims contemplate monetary recovery. Starr Int'l Co. v. United States, 105 Fed. Cl. 50 (2012). Starr's asserted shareholder derivative claims were barred under the business judgment rule. *Starr*, 111 Fed. Cl. at 471.

63. The Court of Federal Claims considered the relevant date to evaluate the market value of the government's 79.9% ownership to be September 22, 2008, at which point the shares were apparently worth roughly $23 billion. *Id.* at 482.

The AIG litigation involves a separate claim of loss of shareholder voting rights (in addition to the claim of loss of shareholder value), which, although potentially moot, now seems implausible. The claim raises a corporate law variation on the denominator question familiar in many other takings contexts. *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross-Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674 (1988) (identifying the idea of conceptual severance in takings jurisprudence). For all of the reasons the Supreme Court has rejected conceptual severance in the context of physical property boundaries,

In *Starr v. United States*,[64] the court addressed two main issues: first, whether the Federal Reserve Bank of New York ("FRBNY") had the legal authority under Section 13(3) of the Federal Reserve Act[65] ("FRA") to receive AIG equity in return for its loan to AIG and, second, whether an actual taking under the Fifth Amendment occurred where the AIG Board of Directors voted to accept the government's proposed terms.[66]

The court found that an illegal exaction did occur, although it importantly noted that Starr had suffered no remediable injury.[67] Under the FRA, the FRBNY could "serve as a lender of last resort" in "unusual and exigent circumstances,"[68] but was not authorized to take as consideration for the loan any part of the borrower's equity.[69] Moreover, neither the FRA nor any other federal statute allowed the government to take over a private corporation as the FRBNY had[70]—replacing the CEO and taking over AIG's business operations was a far cry from simply lending $85 billion to AIG.[71] Nonetheless, the court found in Starr's favor on the exaction claim, meaning that Starr's Fifth Amendment taking claim necessarily failed.[72] The court reasoned that if the government's actions were unauthorized, no Fifth Amendment violation could exist.[73]

As for damages, the court aptly stated, "[i]f the Government had done nothing, the shareholders would have been left with 100 percent of nothing."[74] Absent government intervention, AIG would have filed for bankruptcy.[75] And in bankruptcy, the shareholders would likely have lost

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see Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978) (noting regulatory takings analysis must focus on the "parcel as a whole"), and for property's temporal dimension, see Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002) (noting an owner cannot sever a thirty-two-month segment from a fee estate as the relevant denominator in evaluating a regulatory takings claim). It makes sense to reject disaggregating the strands of rights inherent in shareholding. Corporate voting rights, as practically important as they are, should not be removed as a stick in this particular property rights bundle. The market value of the underlying shares, which would form the basis for any compensation, would presumably reflect any control premium. *Cf.* Aswath Damodaran, *The Value of Control: Implications For Control Premiums, Minority Discounts and Voting Share Differentials*, 8 N.Y.U. J. L. & BUS. 487 (2012). *See generally* Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

64. 121 Fed. Cl. 428.
65. 12 U.S.C. § 343 (2006).
66. *Starr*, 121 Fed. Cl. at 431.
67. *Id.* at 434.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 435.
73. *Id.*
74. *Id.* at 436.
75. *Id.*

the full value of their stock.[76] Ultimately, although Starr proved its exaction claim, Starr could not show that it suffered any economic loss, and thus could not recover any damages.[77]

The proposition that resolved the *Starr* case—that failure to show economic harm from a governmental action yields no compensation—is a well-recognized aspect of regulatory takings jurisprudence. It certainly informs one prong of the *Penn Central* regulatory takings test, which is the "economic impact of the regulation on the claimant."[78] The fact that a governmental action causes no economic harm does not immunize the government from all potential takings claims, but factors heavily into the threshold calculus. More fundamentally, the Supreme Court has made clear that, even if a taking might have occurred as an abstract matter, a party is not entitled to just compensation absent actual economic harm.[79] In short, the theory on which the challenge to the AIG takeover was resolved strongly suggests that federal intervention in the face of imminent bankruptcy and a significant, or even entire, loss of investor equity ultimately yields no compensable takings for those investors.[80]

III. THE BASELINE OF OWNERSHIP AND THE FIRE NEXT TIME

What does that all mean going forward? As noted, these cases are ongoing and nothing has been finally resolved. Nonetheless, the initial shock that many commentators felt when the cases first began to emerge is largely reflected in the early rounds of the resulting decisions.[81] If the cases go the other way eventually, the question of nationalization will be even more deeply contested than it is at the moment. But if the cases finally resolve in roughly the direction of the decisions to date—judicial rejection of challenges in the face of spirited, well-funded, and high-profile opposition—this should send a signal to future shareholders who find

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76. *Id.*

77. *Id.* The government filed a notice of appeal on August 12, 2015.

78. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

79. Brown v. Legal Found. of Wash., 538 U.S. 216 (2003) (recognizing a property right and that it had been taken, but finding that no compensation was due); *see also* Thomas E. Roberts, *Regulatory Takings in the Wake of* Tahoe-Sierra *and the IOLTA Decision*, 35 URB. LAW. 759 (2003) (noting that after the Court decided *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the lower court on remand found no loss to the owner).

80. Moreover, a non-trivial argument can be made that, for shareholders, any loss from the nationalization of one firm may be compensated implicitly in offsetting gains to the larger economy. That is because shareholders, as a general matter, should not choose to bear firm-specific risk given how easy diversification is to achieve and the fact that no premium should be paid for bearing overly concentrating investments. I thank Caroline Gentile for this observation.

81. *See* Steven Pearlstein, *We Bailed You Out, and Now You Want What!?!*, WASH. POST (June 7, 2015), https://www.washingtonpost.com/business/we-bailed-you-out-and-now-you-want-what/2015/06/05/95ba1be0-0a27-11e5-95fd-d580f1c5d44e_story.html (a typical example that reports on some of the outrage).

themselves in a similar position.[82] There are many details that might distinguish these cases, but in the aggregate, they have the potential to shift a norm of ownership, with significant consequences for future crises.

A. Resetting the Baseline

Understanding how cases such as *Perry* and *Starr* might shift the baseline of ownership in corporate entities that raise macroeconomic risks returns us to the iterative nature of owner expectation and regulatory takings.[83] The impact of regulation on such expectations depends on context and is quite resource-specific as well: the norms that apply to land, writ large, are different than the norms that apply to chattels and intellectual property.[84] To be sure, this is a somewhat obvious point; nonetheless, the nature of investor expectations about the extent of public intervention in the kinds of companies that were nationalized during the economic crisis has not been widely explored. The issue of the reasonableness of investor expectations must be evaluated not as a general matter, but in light of the relevant type of firm and the nature of economic ownership in large, publicly traded companies—at least those that grow to a size that has broader macroeconomic consequences.[85]

In the ordinary course of business, most shareholders should be on notice that regulation can change the economic landscape in which companies operate, even for companies that are not as heavily regulated as Fannie Mae and Freddie Mac (or as banks and similar financial institutions generally are).[86] If a company loses value—and shareholders suffer—

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82. There are takings issues that implicate not just shareholders, but other economic stakeholders in nationalization, as the auto dealer claims in the GM takeover illustrate. This discussion, however, is focused solely on shareholders.

83. *See supra* Part I.

84. Moreover, within these broad categories, norms can vary significantly as well. What an owner should reasonably expect of urban land may vary from what they should reasonably expect of wilderness. Moreover, even after *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015)—the California raisin case—it is clear that the Court will tolerate significant restrictions on the use of personal property and that personal property is also regularly seized and even destroyed with relatively little constitutional concern in the name of law enforcement and national security. *See, e.g.*, Kam-Almaz v. United States, 682 F.3d 1364, 1371–72 (Fed. Cir. 2012) (finding no taking where a customs officer seized a laptop at an airport, damaging the hard drive and destroying its data).

85. Questions under the *Penn Central* analysis regarding economic impact, as with the issue of total deprivation, require factual development that remains contested in those suits that have already been filed. Character of the government action, the final *Penn Central* factor, seems to weigh heavily in favor of the government here, as these were bailouts to rescue deeply troubled companies, but that too is a doctrinal intuition that is open to question.

86. *Cf.* Christopher T. Curtis, *The Takings Clause and Regulatory Takeovers of Banks and Thrifts*, 27 HARV. J. ON LEGIS. 367, 373–74 (1990) (discussing the role of expectation in heavily regulated financial industries). The federal government raised a version of this argument in the Fannie Mae and Freddie Mac suits. *See Washington Federal* Motion to Dismiss, *supra* note 48, at 30–31 (analogizing Fannie Mae and Freddie Mac to banks subject to resolution authority).

because some general regulation changes the playing field, it would be hard to argue that the government action was a taking. And for most shareholders, corporate bankruptcy is a baseline norm of ownership that is beyond constitutional cavil.[87] Likewise, the resolution authority that the government regularly wields to take over failing banks is very much understood to be a part of the risk that any investor in such an institution accepts.[88] Does the possibility of nationalization in the face of potential bankruptcy or similar business failure fall into the same category?

Before the crisis, it might have been questionable whether the logic of general regulatory change and bankruptcy extended to government takeovers.[89] And that is where the current litigation may end up mattering most. For the types of companies at issue—those that operate in a highly regulated industry and, more importantly, have grown to a position of systemic importance such that their potential failure poses a significant macroeconomic threat—judicial testing and rejection of takings claims would put future investors on notice that their ownership interests are subject to nationalization. This precedent would not apply to all companies in all circumstances, by any means. But for the kinds of companies likely to require bailouts that involve federal control, the precedent would be significant.

87. *Cf.* Edward R. Morrison, *Is the Bankruptcy Code an Adequate Mechanism for Resolving the Distress of Systemically Important Institutions?*, 82 TEMP. L. REV. 449, 449, 451 (2009). Conceivably, a shareholder could make a judicial takings argument challenging the outcome of such a process, but it would require rather Herculean assumptions about the limits of bankruptcy court authority to sustain such a claim. *Cf.* James Stevens Rogers, *The Impairment of Secured Creditors' Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause*, 96 HARV. L. REV. 973, 997–98 (1983) (arguing that the substantive limits on bankruptcy authority to impact creditors' rights derive from the bankruptcy power in Article I, Section 8, not the Fifth Amendment). One could make the argument that any allocation of resources in a nationalized failing company that does not parallel the result that would have been reached through bankruptcy represents a compensable loss for those who did not realize that supposed full value. But bankruptcy in general carries with it a great deal of indeterminacy, making assertions of specific value hard to credit. Secured creditors could try to argue that their specific collateral rights were impaired in the process, but again, that argument is hard to sustain in light of traditional bankruptcy practice.

88. Under ordinary resolution authority, the government regularly takes control of financial institutions. This authority is occasionally challenged on takings grounds, see, for example, Golden Pac. Bancorp v. United States, 15 F.3d 1066 (Fed. Cir. 1994); Am. Cont'l Corp. v. United States, Fed. Banking L. Rep. P (CCH) ¶ 88,406 (U.S. Cl. Ct. Mar. 22, 1991), but it is fairly well established that banks and those with ownership interests in those entities operate or invest against the background of resolution authority and are not entitled to compensation when bank practices require its exercise. *Golden Pac. Bancorp*, 15 F.3d at 1076.

89. It could be argued that the doctrinal principles at issue in *Perry* and *Starr* are settled law, in which case the plaintiff investors in those cases could be understood to be trying to make new law. This would mean that the resolution of these cases against them would merely reaffirm the existing norms of ownership. While this is a reasonable argument, the specific types of claims in the precise context of nationalization have been so rarely litigated, and remain so controversial, that it would be hard to say that the baseline was clearly in favor of the state.

We might even go one step further and ask whether such a judicial response to the executive actions at issue could eventually "inhere in the title." This raises the question whether steps by regulators can themselves legitimately be considered part of the equation of "background principles" of property law. Clearly the heartland that the Supreme Court had in mind in *Lucas* involved state-level common law jurisprudence, but, as noted, the Court later clarified that legislation can likewise give rise to a background principle (indeed, how could it not?).[90] Despite the fact that nationalization involves action by federal administrators acting pursuant to delegated authority, there is no logical reason why such action—especially once tested judicially—could not likewise shape baseline norms. Certainly, the Supreme Court has been clear that any governmental action can theoretically trigger takings liability, regardless of the governmental actor.[91] For the same reason, executive actions should be able to contribute to how we understand the baseline of ownership.[92]

B. Justifying the New Landscape

Where, then, does that leave us? If the current trajectory holds, it will play a material role in shaping the choice architecture facing public officials in times of crisis, clarifying the latitude of public officials to nationalize companies as a policy response.[93] And that confirmed latitude to act in the narrow, but critical, circumstances of grave threats of macroeconomic harm squares with fundamental fairness in the sense of legitimate equal burden sharing at the heart of the Takings Clause that the Supreme Court articulated in *Armstrong v. United States*.[94]

To begin, one classic rationale for the compensation mandate is to ensure that public actors internalize the cost of expropriating property, whether the expropriation is done directly through eminent domain or

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90. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 629–30 (2001).

91. *See* Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Protection, 560 U.S. 702, 713–14 (2010) ("The Takings Clause (unlike, for instance, the *Ex Post Facto Clauses*, see Art. I, § 9, cl. 3; § 10, cl. 1) is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor . . . .").

92. The Supreme Court regularly notes that the Fifth Amendment merely recognizes property that is already defined by state law, see, for example, *id.* at 707 ("state law defines property interests"), but in the context of shares in corporations, the baseline of ownership is defined both by state law, such as the laws of incorporation and shareholder rights, as well as federal law, such as securities regulation.

93. There is always the threshold question of delegated authority, which has been at issue in the recent litigation but is likely to be less so in future crises for two reasons. First, because of the newly enacted Dodd-Frank Act resolution authority, see Merrill & Merrill, *supra* note 10, at 170–71, but also because in the next crisis, Congress is likely to legislate for new bailouts and now has a template of what worked and did not work during the last crisis in terms of necessary authorization.

94. 364 U.S. 40, 49 (1960).

through regulatory actions that are the functional equivalent of a taking.[95] Compensation should, the argument goes, align incentives for the government to regulate (or condemn) property efficiently.

Setting aside legitimate questions about whether this is how public actors actually evaluate policy choices, about which a great deal has been written,[96] crises—economic or otherwise—raise the issue of asymmetrical risk. In a context of uncertainty and short decisional time frames, the consequences of the failure to act are significant enough that a traditional efficiency calculus might stand in the way of taking necessary steps.

There is a risk that, in the context of a fast-moving economic crisis, a blanket mandate to compensate all those harmed economically by the state assuming control of certain critical firms may be overly chilling at the very moment when action is most necessary. As the dissenters to the Financial Crisis Inquiry Committee put it,[97] perhaps somewhat ruefully:

> For a policymaker, the calculus is simple: if you bail out AIG and you're wrong, you will have wasted taxpayer money and provoked public outrage. If you don't bail out AIG and you're wrong, the global financial system collapses. It should be easy to see why policymakers favored action—there was a chance of being wrong either way, and the costs of being wrong without action were far greater than the costs of being wrong with action.[98]

Compounding that calculus with the additional—and potentially prohibitive—cost of compensating all those whose economic interests are harmed in such a bailout would make that decision much more difficult at a moment when snap judgment is required.

Funding is ultimately possible—of the hundreds of billions of dollars expended during the crisis, only a relatively modest portion was

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95. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 881–84 (2007); Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 620–23 (1984); Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 998–99, 1011 (1999).

96. *See, e.g.*, Ronit Levine-Schnur & Gideon Parchomovsky, *Is the Government Fiscally Blind? An Empirical Examination of the Effect of the Compensation Requirement on Eminent Domain Exercises*, U. PA. LEGAL SCHOLARSHIP REPOSITORY (2015), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2596&context=faculty_scholarship (citing empirical evidence that calls into question the fiscal illusion hypothesis); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 357 (2000) ("Government does not behave like a wealth-maximizer, and therefore does not attach any intrinsic disutility to financial outflows—just as it attaches no intrinsic utility to financial inflows. Rather, government internalizes only *political* incentives.").

97. Congress established the Financial Crisis Inquiry Commission in 2009 and the Commission, after a more than a year of investigation, issued a comprehensive report on the crisis in 2011.

98. FINANCIAL CRISIS INQUIRY COMM'N, *supra* note 33, at 433.

accompanied by actual nationalization. But the unknown scope of potential liability may overly deter decisions that have to be made under difficult circumstances with imperfect information about the consequences. A constitutional compensation mandate might transform "too big to fail" into "too expensive to rescue."[99]

Which brings us, finally, to the question of whether it is ultimately *fair* to ask shareholders and others with potentially compensable stakes in companies that threaten the larger economy to bear the cost of responding to the harm that the entity has created. As the Supreme Court has reiterated, the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[100] This is a normative frame that centers takings law on the legitimacy of the narrowness of burden sharing for any given state action that harms property interests.

At its core, takings law thus invites a set of normative judgments about the distribution of harms in the name of public good that admittedly must be shaped by one's priors, although the exercise is not entirely unanchored. My own instinct is that compensation should not be mandated in the relatively narrow contexts in which the federal government has tended to deploy nationalization, given the significant financial and other economic threats posed by the firms at issue and the dire consequences that could follow from inaction. This is not some abstract collective punishment, but rather a recognition that whatever formal limits there are to shareholder liability as a matter of corporate law, questions of fairness can—and should—take into account the potential for significant harm that might have been caused by the failure of the firm those shareholders own.[101] This

99. One might raise a valid concern here about the slippery slope, namely whether we have any reason to trust legislators and executive branch officials to weigh appropriately the nature of the relevant emergency and the consequences of action or inaction. Eric A. Posner and Adrian Vermeule have argued that crisis—literally the experience of fear by public officials—can sharpen decisionmaking and that critiques of state action in the context of emergency grounded in behavioral assumptions must take cognizance of the potential benefits of crisis management. *See* Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies,* 56 STAN. L. REV. 605, 626–34 (2003); *cf.* Adrian Vermeule, *Holmes on Emergencies*, 61 STAN. L. REV. 163, 164–65 (2008) (discussing the challenges of framing the determination of emergency). I think the answer to the slippery slope argument—and broader institutional concerns about comparative competence and incentives—is better grounded in norms of democratic accountability than behavioral assumptions in either direction about the capacity of decisionmakers. To the extent that political institutions can respond to this decisionmaking, officials will have non-financial incentives to act with restraint. And whatever pathologies one wants to associate with the federal government's response to the economic crisis, it was both widely followed and made the subject of subsequent intense political focus.

100. Armstrong v. United States, 364 U.S. 40, 49 (1960).

101. *Cf.* Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CALIF. L. REV. 55, 85–93 (1990) (arguing for a takings jurisprudence grounded in collective norms of desert and punishment).

might sound more like a nuisance rationale for nationalization than a question of burden sharing, but it is really a way of framing the balance between the individual and the community in the context—like a firebreak—in which an individual's insistence on compensation would stand in the way of preventing great damage to the community.

This is not to say that non-constitutionally mandated compensation should not be granted as a matter of discretion where individual property interests have been harmed in the name of national exigencies, in times of economic emergency no less than otherwise.[102] And one can imagine creative mechanisms that would provide such compensation given that nationalization can generate net benefits when companies are re-privatized—much akin to the way that the measure of just compensation does not provide for the assembly value of a set of parcels.[103] But if the question is who should bear the cost of responding to dire economic emergencies involving firms that significantly threaten the larger economy, from the perspective of distributive justice, I think the answer is that it is legitimate for investors in such firms to bear that cost.

IV. CONCLUSION

Implicit in the question in regulatory takings jurisprudence of the reasonableness of expectation and the related concept of restrictions that "inhere" in title is that the balance between individual entitlement and social obligation is dynamic and subject to evolution. What is reasonable for investors in a world of significant market failures with serious macroeconomic consequences must surely reflect regulatory responses that are otherwise valid. Of course, that dynamism cannot be unbounded and the federal government's authority to intervene must reflect conditions that justify that intervention. But when those conditions arise, a combination of legislation, executive action, and high-profile judicial ratification in the face of spirited opposition can "reset" the baseline of this particular kind of ownership. Such a reset should confirm the range of policy latitude that

102. Many states, for example, choose to compensate those whose property interests are damaged or destroyed in the name of emergency, even where such compensation is not constitutionally mandated. *See* Susan S. Kuo, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*, 54 B.C. L. REV. 127, 135–37 (2013) (surveying state statutory compensation practices in the context of responses to natural disaster).

103. *See* Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1468 (2008). For example, the federal government returned a net profit of nearly $23 billion on its ownership stake in AIG. Likewise, of the $116 billion that the federal government has invested in Fannie Mae to date, Fannie Mae had already returned more than that amount to the Treasury as of the first quarter of 2014, and is still continuing to pay. *See* Clea Benson, *Fannie Mae Payments to U.S. Will Exceed Bailout*, BLOOMBERG BUS. (Feb. 21, 2014), http://www.bloomberg.com/news/articles/2014-02-21/fannie-mae-to-pay-u-s-7-2-bln-after-quarterly-profit.

officials need in such crises, which is vitally important given how certain they are to recur.